OPINIONS
of the
ATTORNEY GENERAL

and

REPORT
to the
GOVERNOR OF VIRGINIA

VOLUME I

From July 1, 1982 to June 30, 1983

Commonwealth of Virginia
Office of the Attorney General
Richmond
1983
ERRATA

Volume I

On page xxi of Volume I, Burnett Miller, III was erroneously listed as an Assistant Attorney General. His correct title is Senior Assistant Attorney General.

Jane A. Perkins of Richmond was inadvertently omitted from the list of Legal Assistants on page xxii of Volume I.
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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, 1983

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

My dear Governor Robb:

Fiscal Year 1982-1983 was one of challenge for the Office of the Attorney General with many accomplishments in the areas of litigation and delivery of legal advice to State government. Enclosed with this Annual Report is the following summary of significant legal matters handled by this Office, many of which affect the budget of State government and the health, safety and welfare of the citizens of the Commonwealth. The Report also contains the Official Opinions of the Attorney General which I issued in response to requests from appropriate State and local government officials and which are designed to contribute to the orderly and uniform administration of government and law. During this period, the Office responded to 469 requests for formal opinions.

I have also included as a separate attachment a complete listing of cases pending or completed during that time.

Fiscal Year 1982-1983 has been a year of advances for the Office of the Attorney General on a broad front, ranging from legislative to administrative to adjudicative.

During this period, I have opened the first Southwest Office of the Attorney General to give the people and institutions of government of Southwest Virginia greater access to state legal services.

We have continued with our efforts to develop office-wide computerized systems to make more efficient and effective the delivery of legal services to the agencies and institutions of government of the Commonwealth.

The Office has also implemented a coordinated debt collection effort which, in conjunction with the Executive Branch of government, has been quite successful in recovering for the Commonwealth moneys lawfully owed to it.

Within each of the four divisions of the Office of the Attorney General, there have been significant accomplishments as well as important cases which warrant your attention.

CRIMINAL LAW ENFORCEMENT DIVISION

The Office continues its active role in matters concerning the public's safety. The passage by the 1983 General Assembly of the Robb-Baliles anti-crime package provided law enforcement officials with important tools for fighting crime. The new laws provide for coordination of efforts among law enforcement agencies through the use of multi-jurisdictional grand juries and cross-designation of State and federal prosecutors in appropriate cases; increased
sanctions on child pornography and prescription drug abuse; and greater use of felony-related information obtained during lawful wiretaps. The legislature also provided a penalty for the use of certain armor-piercing ammunition in the course of a crime and took the first steps toward a constitutional amendment which will permit the Commonwealth a limited right of appeal in criminal cases.

Medicaid Fraud

The Medicaid Fraud Control Unit, established in July, 1982, to investigate provider fraud in the State Medical Assistance Program, was fully certified by the United States Department of Health and Human Services on October 1, 1982. The Unit’s investigative efforts have so far resulted in several felony arrests and convictions; other charges are awaiting trial. The Unit has also instituted civil actions which resulted in recovery of overpayments with interest and civil penalties. Of critical importance is the deterrent effect which the Unit’s aggressive presence guarantees.

Criminal Litigation

Criminal Division attorneys represented the Commonwealth before the United States Supreme Court in the legal proceedings connected with the capital punishment case of Frank Coppola in August, the first such case since 1962 in Virginia.

In addition, the Supreme Court granted review on certiorari in three Virginia cases where representation was provided by Criminal Division attorneys. In Simopoulos v. Virginia, the Court upheld the constitutionality of Virginia’s abortion statutes. Two other cases, which are at the briefing stage, concern the judicial immunity afforded a State magistrate and the application of the Fourth Amendment in a search of an inmate’s cell. Virginia also participated as amicus curiae in Illinois v. Gates in which the Court considered modification of the exclusionary rule.

In fulfilling the duty of the Attorney General to represent the Commonwealth in all post-conviction legal proceedings filed by felons, Criminal Division staff attorneys handled 885 petitions for habeas corpus, mandamus and prohibition; 734 suits filed under 42 U.S.C. § 1983; and 82 appeals in State and federal courts. In an effort to reduce the number of frivolous suits filed by inmates, the attorneys also worked closely with the federal courts in the Eastern and Western Districts of Virginia to implement the Dupree Plan in Virginia. The Plan, named for the North Carolina judge who conceived it, requires an inmate to pay a portion of his inmate account as a filing fee to carry his suit forward unless he can establish his indigency to the court's satisfaction.

Correctional Litigation

Proposals to refer appropriate cases for resolution under the Department of Corrections' grievance procedure have
also been well-received by the courts. The grievance procedure was established pursuant to the federal Civil Rights of Institutionalized Persons Act and permits administrative investigation and disposition of prisoner claims, such as property loss or unfounded disciplinary action, with an option to return to court if the matter cannot be satisfactorily resolved. These procedures appear to have resulted in a substantial decrease in the number of unfounded lawsuits by prisoners, which in turn allows the concentration of judicial resources and staff time on more serious claims.

This year we achieved favorable disposition of the three major prison conditions lawsuits filed on behalf of classes of inmates at the Powhatan Correctional Center, the Mecklenburg Correctional Center, and the Virginia State Penitentiary. The federal court has approved a consent decree in Powhatan, and settlement of the Mecklenburg suit is in final negotiation. The two-week trial in April of the Penitentiary suit resulted in a complete victory for the Commonwealth. Although the Penitentiary is the second-oldest prison in the Nation, the court found no constitutional violations in its physical condition or operational procedures.

HUMAN AND NATURAL RESOURCES DIVISION

The Division of Human and Natural Resources represents more than 180 agencies and institutions which report to the Governor's Secretaries of Human Resources, Education and Commerce and Resources. The Division is currently handling 1,146 active adjudicative and administrative cases. In addition, 810 cases were closed during the 1982-83 fiscal year. These cases involve a broad range of litigation—constitutional issues in federal and State courts, cases interpreting federal and State statutes and regulations, contractual disputes, personnel and civil rights claims, and other matters. In addition, the Division provides advice and counsel to State agencies to assist them in carrying out the duties imposed on them by law. This responsibility requires the development of a close working relationship with the agency head and senior staff persons in each agency, as well as the development of expertise in the matters with which that agency is concerned.

Human Resources

The Human Resources Section represents those agencies and institutions reporting to the Secretary of Human Resources. Attorneys in this Section assisted in the Simopoulos v. Virginia case, in which the United States Supreme Court upheld the Commonwealth's requirement that second-trimester abortions be performed in certain licensed health care facilities. This year, a significant amount of time has been spent, both as an advocate and advisor, to the Health Department on disputes involving the Virginia Medical
Care Facilities Certificate of Public Need Law. These cases involve both administrative and judicial appeals of denials by the Commissioner of Health of requests for the issuance of certificates of public need to construct various types of medical care facilities. In addition, the Department of Health's Medicaid program continues to require significant legal representation. Litigation involving the Commonwealth's responsibility to provide the "least restrictive placement" for residents of the Department of Mental Health and Mental Retardation's facilities was settled favorably for the Commonwealth by attorneys representing that agency. Those attorneys also assisted the Department of Mental Health and Mental Retardation in drafting the Department's new human rights regulations for patients and residents of mental health facilities.

The attorneys representing the Department of Health Regulatory Boards assisted in the preparation of House Bill 139, enacted by the 1983 session of the General Assembly as part of the Governor and Attorney General's anti-crime package. The legislation will facilitate the investigation and prosecution of the improper prescribing and dispensing of drugs for nonmedical purposes. This activity has become a major source of illegal drugs in the Commonwealth. These attorneys also worked with that agency's staff to develop a central scheduling mechanism within the Department for prosecuting cases before the seven health regulatory boards. This mechanism will improve the control which the boards and this Office have over the number of cases to be heard, improve the ability to prioritize the most important cases, and expedite the vastly increased number of cases coming before the seven health regulatory boards. Attorneys assigned to the Department of Health Regulatory Boards are also currently working to develop mechanisms to prevent the sale of imitation controlled substances, "look alike drugs," and "combination drugs" to Virginia's youth. Stores selling these substances to young people have appeared in several Virginia localities in the past year.

The attorneys representing the Division of Support Enforcement within the Department of Social Services provided legal counsel to the Department of Social Services' seven regional offices located throughout the Commonwealth and assisted the Department in the collection of over $12,000,000 for the Commonwealth in Fiscal Year 1982-1983, an increase of $1,000,000 from the previous fiscal year.

Education and Employment

The attorneys in the Education and Employment Section represent the Commonwealth's 38 public institutions of higher education, the Department of Education, and Virginia's unemployment compensation and employment training agencies, as well as other agencies and institutions. Attorneys in this section prepared an extensive survey and analysis of the role of private foundations in assisting Virginia's institutions of public higher education. This study provided guidelines to the institutions on working with the foundations. The Commonwealth had not previously conducted
such a study, and this effort will assist in protecting the autonomy of educational institutions and facilitate private support of public education as well as maintain public trust in the integrity of the financial operations of these institutions.

Attorneys in this section successfully participated in the case of *Griggs v. Commonwealth* before the Virginia Supreme Court which upheld the Commonwealth's compulsory education statute and supported the right of the General Assembly to establish terms and conditions under which the education of pupils at home can be permitted. Attorneys in this section continue to provide legal advice to the Secretary of Education in development of the 1983 Amendments to Virginia's 1978 Plan for desegregation of its institutions of public higher education.

This section assisted in the establishment of the Governor's Employment and Training Division to carry out the federal Job Training Partnership Act and operate employment training programs for the Commonwealth's citizens. Attorneys representing the Virginia Employment Commission argued numerous cases concerning claims for unemployment benefits. The increased volume of such cases reached last year continued apace during Fiscal Year 1982-83.

**Commerce and Natural Resources**

The attorneys in the Commerce and Natural Resources Section continue to be involved in a wide variety of issues relating to environmental, agricultural, business and labor-related matters. Attorneys have been deeply involved in a case arising from acidic wastewater run-off into the Piney River in Nelson County on property operated by the American Cyanamid Company and later by the U.S. Titanium Corporation. The portion of the property causing the acidic run-off has been successfully reclaimed by a court appointed receiver. This reclamation work prevented the recurrence of fish kills in the Piney River such as occurred in 1981. This litigation continues with the object of obtaining final reclamation of the property and a permanent solution to the copperas waste problem that has been responsible for six major fish kills in the Piney and Tye Rivers.

In addition, with the close participation of this Office, the Saltville Task Force has recommended and the State Water Control Board has issued a special order to Olin Corporation. Under the order, Olin has dredged a portion of the North Fork of the Holston River and has taken remedial measures that the Task Force anticipates will abate, or at least greatly reduce, the mercury pollution of the North Fork.

In a lawsuit styled *Commonwealth v. Watt*, attorneys in this section filed suit against the United States Secretary of the Interior to enjoin the leasing for oil production of 192 off-shore tracts within 50 miles of Virginia's coastline. After this litigation was filed, the Secretary agreed not to award any leases within the contested area until the case could be heard. No bids were received to lease the
challenged tracts, and this Office then voluntarily dismissed its lawsuit.

This section was involved in numerous cases concerning environmental health. Lawsuits filed in the circuit courts of the Commonwealth sought to enforce requirements for sewage disposal, drinking water safety, sanitary landfill operations, and hazardous waste disposal.

The section has successfully intervened in a lawsuit brought by several environmental groups which challenged approval of the Commonwealth's Permanent Regulatory Program under the federal Surface Mining Control and Reclamation Act of 1977. The federal court ruled in the Commonwealth's favor on all 19 substantive issues raised by the plaintiffs. Attorneys in this section also filed two lawsuits in federal court against the Secretary of the Interior challenging federal surface mining regulations and enforcement thereof dealing with "two-acre" mining operations. A preliminary injunction has been granted to prevent the federal government from closing those mines while the litigation is pending.

As previously noted, I opened the Southwest Regional Office with branches in Abingdon and Big Stone Gap in order to provide greater assistance to the Commonwealth's agencies and institutions in that part of the State, as well as to provide assistance to residents of Southwest Virginia in legal matters involving these agencies. The two attorneys and legal assistant assigned to the Southwest Regional Office work primarily on matters related to the Department of Social Services and the Division of Mined Land Reclamation. The Southwest Regional Office also handles a wide variety of other civil and criminal matters. Attorneys in the Office have been involved in unemployment compensation issues, workers compensation, personnel matters and other cases. The Southwest Regional Office will continue to play a growing role in providing services to the Commonwealth's citizens and agencies in the Southwest Region of Virginia.

FINANCE AND TRANSPORTATION DIVISION

The Finance and Transportation Division provides legal services to a wide range of State agencies and officials of government, including the Virginia Department of Highways and Transportation, the Department of General Services, the State Department of Taxation, and in the areas of personnel and equal opportunity.

General Administration and Transportation

The General Administration and Transportation Section, as counsel to the Department of General Services, participated in an extensive revision of the State's public contract procedures as a result of the Virginia Public Procurement Act which became effective January 1, 1983. This comprehensive procurement legislation has required increased legal services from the attorneys in that Section to ensure that State agencies and institutions are familiar with and
comply with the new law. Those attorneys have also provided advice and assistance to counsel for local governments, and have appeared before a number of groups of public officials and representatives from private industry who are interested in the Act.

In response to a general increase in the number of construction contract claims and resulting litigation, this Division has represented the Division of Engineering and Buildings in numerous contract claims disputes, including claims arising under the relatively new design-build and construction management contracts. We have shifted and increased the number of attorneys assigned to that agency in an effort to avoid unnecessary claims and litigation through preventive measures, including a review of the State's construction contract specifications.

We have also increased the level of legal services provided to the Virginia Supplemental Retirement System which the Finance and Transportation Division represents. We have further expanded legal services to the Industrial Commission of Virginia by assigning on a regional basis Assistant Attorneys General to defend claims against the Uninsured Employer's Fund and the Criminal Injuries Compensation Fund. This has enabled our Office to be more responsive to the Commission's needs in administering those funds.

This Division was an active participant in the Commonwealth's efforts to reduce the incidence of driving while intoxicated in Virginia. In particular, our Office coordinated efforts of the Department of State Police, Division of Consolidated Laboratory Services, and the Department of Transportation Safety to maintain use of the "Breathalyzer" breath alcohol testing equipment after it was temporarily removed from service because of an alleged technical defect. As a result of those efforts and this Office's assistance to prosecuting attorneys throughout the State, this important law enforcement tool has been restored to use in Virginia.

In the past year, our Office distributed to the citizens of Virginia $210,000 recovered in civil actions brought against used car dealers for odometer tampering violations. In addition, $25,000 was collected in civil penalties, investigative costs and attorneys' fees. Our office has also filed a civil action on behalf of fifty-six Virginia citizens against a North Carolina wholesaler of used automobiles. In Commonwealth of Virginia v. Keeter Motor Company, et al., the Finance and Transportation Division is seeking civil damages for each of those citizens, in addition to injunctive relief.

The Office has remained heavily involved in personnel, equal employment opportunity, affirmative action, and employee grievance matters. Assistant Attorneys General have been active in helping agencies resolve questions in these areas and assure compliance with various State and federal requirements. As in the past, the Office has participated in grievance and equal employment opportunity training programs for State officials and employees.
Finance and War Veterans' Claims

Tax litigation and administrative tax appeals continue to be a principal focus of representation. Both areas have increased significantly this year. Two significant adverse trial court decisions are being appealed. The first involved a refund of more than one-half million dollars to a taxpayer whose refund claim was ruled by the Department of Taxation to be barred by the statute of limitations. The second, though less significant financially, represents a serious challenge to Virginia's income tax credit provisions by allowing the credit to include amounts of tax paid to Maryland local governments. There are over 200 active administrative tax appeals, an increase this year of more than 33 percent.

Tight budgets have resulted in a significant increase in Compensation Board appeals. A decision awarding a substantial judgment against the Board in favor of a local constitutional officer resulted in a legislative change making judgments which exceed the Board's appropriation subject to future appropriations. Another significant federal judgment against the Board in a civil rights case awarding extraordinary attorney's fees is being tested on appeal.

There has been an unexpected increase in the number of requests from State and local officials concerning tax statute and related matters. The taxation attorneys are also a substantial resource to local government officials in providing on-the-spot advice and assistance in local tax matters through telephone contacts, informal letters and service as lecturers in continuing education programs sponsored by organizations of local government officials.

The number of cases involving matters of escheat and unclaimed property has increased thirteen-fold. Bond issues and legislation relating to innovative financing techniques for capital construction projects have also merited considerable attention.

This Office aided the Comptroller on two important issues. First, the Office won a favorable ruling from the Social Security Administration allowing a claim for a refund of Social Security Taxes on sick pay. Second, assistance was given to the Comptroller in undertaking a major revision of the State's moving and relocation allowance regulations.

Highways and Transportation

The Highways and Transportation Section, with able assistance from the Litigation Section, negotiated a detailed consent decree in litigation brought by the U.S. Department of Justice against the Department of Highways and Transportation alleging widespread racial and sexual discrimination practices. While dropping the allegations, the consent decree provided for recruitment goals, not hiring quotas. The Department also agreed to institute new training programs to make all its employees eligible for promotion to higher jobs. One aspect of the decree provided for an employee career counseling program. The decree also provided a mechanism whereby certain personnel might present for
adjudication individual claims of past racial or sexual bias in promotion.

In addition, the staff provided 60-year title searches for 1,393 parcels of land to be acquired by the Department of Highways and Transportation, closed without litigation the acquisition of 1,246 parcels, oversaw the completion of acquisition by appointed counsel of 906 parcels, and the initiation and handling of the acquisition through condemnation proceedings by those attorneys of 2,303 parcels. The dollar value of the acquisitions initiated, but not yet completed, was $9,089,511.22.

During the fiscal year, the Office settled civil claims for highway construction bidrigging with eleven contractors prior to litigation. In addition, two civil suits were filed against contractors for collusive activities that terminated in favorable settlements for the Commonwealth, including civil penalties. The total settlements during this period have resulted in the obligation of nearly $3 million in payments to the Commonwealth as restitution for damages inflicted by bidrigging and civil penalties in connection therewith.

The Office also advised the Virginia Department of Highways and Transportation on the development of a policy controlling reinstatement of contractors to the bidders' list after their alleged involvement in bidrigging. As the bidrigging investigation continues, retrospective and prospective remedies are being implemented to resolve past wrongdoings and avoid future improprieties.

JUDICIAL AFFAIRS DIVISION

A central part of the reorganization plan for the Office of Attorney General was the creation of the Judicial Affairs Division. This Division is comprised of four sections: (1) Opinions and Regulations; (2) Civil Litigation; (3) Claims; and (4) Antitrust and Consumer Litigation. The Division has been operational for a full year, and I believe that this structure has allowed the Office to respond to our responsibility to represent the interests of our State clients and the public in an efficient and successful manner.

Antitrust and Consumer Litigation

In April, 1983, the former Antitrust Section, the Division of Consumer Counsel and the Consumer Protection Section of the Office were combined into a new Antitrust and Consumer Litigation Section. This step in the reorganization will centralize the enforcement responsibility of the Office pertaining to economic interests of business and consumers in the marketplace. It will allow better utilization of legal and other professional resources in investigations, litigation and other activities in which the Attorney General is the representative of the consuming public.
The Office continued its participation in rate cases and other matters before the State Corporation Commission. The Division, through the Section of Consumer Counsel, participated in rate cases and other matters before the Commission involving hundreds of millions of dollars of requested rate increases.

Virginia Electric and Power Company began a corporate reorganization, proposed the sale of a portion of one of its power plants to Old Dominion Electric Cooperative, and filed a major rate case during the year. Commission decisions and approvals are necessary with respect to each of these requests. The Section is participating in each of the cases to represent the interests of consumers.

Chesapeake and Potomac Telephone Company filed a major rate case during the year. The Section participated fully in the case and submitted expert testimony which urged the Commission to reduce the rate request substantially. The Company originally requested approximately $131,000,000 of rate relief which it subsequently reduced to $93,000,000. The Commission granted only approximately $67,000,000 of the request.

The Section also continued its representation of consumer interests in the proceedings to approve the AT&T reorganization. With several states and other parties, the Commonwealth appealed the U.S. District Court's decision to approve the reorganization to the United States Supreme Court. The appeal was an attempt to preserve state jurisdiction with respect to telephone rates. In the case Maryland v. United States, the District Court decision was affirmed and implementation of the reorganization has begun.

The AT&T and Vepco reorganizations have raised new and difficult issues concerning utility regulation which may occupy the Section's efforts for several years. Its other utility work is not expected to decrease. The utility activities of the Section are a large portion of its workload.

The Section continued its investigation and prosecution of cases under the Virginia Consumer Protection Act. For example, as I reported to you last year, we concluded a settlement in the case of the Commonwealth of Virginia v. Fedders Corporation in which an assurance of voluntary compliance was obtained covering defective heat pumps and air conditioners marketed in Virginia. During 1982-83, the settlement has been implemented and Fedders has made inspections, repairs, and in some cases, monetary restitution to the consumers. A total of more than 1,800 consumers have been qualified for the program and it has resulted in several hundred thousand dollars in cash restitution and refunds to consumers, as well as servicing of many air conditioning and heat pump units at the Company's expense.

In another case, Commonwealth v. Carolina Furniture Galleries, the Section obtained refunds for consumers who had paid deposits on, but had never received delivery of, furniture ordered from the Company. A total of almost $42,000 in customer restitution was obtained.

The Antitrust Unit within the Antitrust and Consumer Litigation Section has continued an active role in
investigating and prosecuting violations of the antitrust laws. Additionally, this section has participated in programs designed to educate private industry and governmental bodies to achieve a better understanding of the antitrust laws. Examples of the litigation in which antitrust attorneys have appeared in the past fiscal year include Commonwealth v. Mid-Atlantic Toyota Distributors, Inc., et al. This case involves an antitrust action against the regional Toyota distributor and Virginia, Maryland, Pennsylvania, Delaware and District of Columbia Toyota dealers for retail price maintenance. During the course of the year, the Commonwealth successfully resisted certain defendants' attempts to discover investigative materials prepared in anticipation of litigation. From December, 1982, to April, 1983, attorneys participated in intense bargaining which led to settlement with the distributor defendants and 16 Virginia dealers. A tentative settlement received preliminary approval from the court in June, and, upon final approval, will be implemented for individual consumers.

Two actions were filed in the Federal District Court for the Eastern District of Virginia relating to highway contractor bidrigging. Commonwealth ex rel. Mazur v. Williams Corporation of Virginia; Commonwealth ex rel. Mazur v. Henry S. Branscome, Inc. Both actions terminated in a consent decree which provided for restitution to the Commonwealth and continuing enforcement by the Commonwealth and the court.

Other litigation undertaken by the Antitrust Unit included a retail price maintenance case brought in State court against a distributor of art prints, as well as recovery of restitution in a number of federal multi-district litigation antitrust suits. More than ten active investigations are presently under way in the Unit.

The activity of the Antitrust Unit can be easily seen through the increase in use of civil investigative demands during the past year. In 1981-82, a total of 28 civil investigative demands were issued. Eighteen of those demands called for the production of documents and ten demands sought testimony. In 1982-83, a total of 118 civil investigative demands were issued, 93 of which sought documents and 25 sought testimony. During 1982-83, approximately 400,000 to 500,000 documents were received pursuant to civil investigative demands and processed by the Antitrust Unit. The increased utilization of civil investigative demands has been accompanied by a shift in policy concerning the issuance and enforcement of the demands. The Antitrust Unit has made it clear to recipients of civil investigative demands that every effort will be made to accommodate legitimate requests for modification of the demands or for extensions of time in which to respond. Nevertheless, each civil investigative demand must be answered completely and within the time constraints, or the staff will initiate proceedings in circuit court to compel compliance and penalize non-compliance. This approach has greatly enhanced the effectiveness of this investigative tool.

In addition to the educational presentations made by the staff explaining the application of state and federal
antitrust laws, this unit staffed the Attorney General's Committee to Study Local Government Antitrust Immunity. I appointed this committee in response to the 1982 decision of the United States Supreme Court, Community Communications, Inc. v. Boulder, which raised serious questions concerning the ability of local governments to receive state action immunity. A 17-page report was issued by this committee in March.

Opinions and Regulations

In creating the Opinions and Regulations Section, we hoped to increase the efficiency and ability of the Office to respond to the many inquiries concerning the interpretation and application of State law and local governmental activity. During the fiscal year, this Office issued 469 opinions. The average reply was made within 16 days of receipt of the request, although the number of requests has increased 37% over the number requested in 1981-82.

Attorneys in the Section were also active in participating in continuing legal education programs throughout the year. The Section participated in three statewide seminars for State officials and three seminars for local government officials, and gave presentations at numerous conferences sponsored by various legal government groups and agencies.

This Section is represented on the Governor's Regulatory Reform Advisory Board and attends all monthly meetings of that Board. In conjunction with that project and directives of the Governor, this Office reviews all newly proposed regulations.

This Section reviewed all legislation pertaining to elections, participated in litigation arising from election questions, and routinely answers all inquiries pertaining to the election laws.

This Section also advises the Commission on Local Government and, in this capacity, has assisted the Commission in all annexation cases. Additionally, this Section responds to inquiries of the Governor, the Secretary of the Commonwealth, and local constitutional officers.

Claims

The Claims Section became fully operational during the past fiscal year. In the last 12 months, the Section has spent time reviewing the internal collection procedures, to the extent they existed, of the various State agencies. We then developed, in consultation with those agencies and the Secretary of Administration and Finance, a set of general policies and procedures for the management of delinquent accounts and claims. At my request, the Secretary issued a directive effective August 1, 1982, requiring those policies and procedures to be followed in State government. This directive was modified April 1, 1983, to accommodate the requirements of the Procurement Act in the securing of private collection agency services.
Briefly, these procedures require the agencies to pursue internal collection efforts for the first 90 days from the due date of an account. Provisions have been made for specifying the forms and methods by which the debtor is to be informed, amounts collected, settled or referred for collections. In the second 90-day period, there are procedures by which the agency may decide to retain the account for additional collection effort or refer it to a private collection agency, or refer it to the Attorney General's Office if it appears that legal assistance will be required. Exceptions to these time limits are granted to meet an agency's need.

During this first year of operation, the Claims Section brought in 2,168 files from 34 State agencies representing approximately $8.4 million of delinquent accounts. About $7 million of that amount stemmed from unpaid student loans, hospital bills, highway property damage, and mental patient bills. The goal set for the Section for the fiscal year was the collection of $1 million. The Section, in fact, collected $1,283,099. The Section is staffed by three attorneys, one claims adjuster, and three clerical personnel. With the institution of a computer program in June, the Section's ability to monitor and process cases has been greatly enhanced. The experience of the Collection Section over the last 12 months has shown that the involvement of this Office in collections is cost-effective and has generated appreciation from State agencies and the public.

Civil Litigation

The Civil Litigation Section has been expanded in the past fiscal year. It is composed of attorneys with significant litigation experience who can be ready on short notice to represent the Commonwealth in specialized and highly complicated cases. This Section handles complex litigation previously handled by specially appointed outside counsel. This arrangement has resulted in a substantial cost savings to the Commonwealth.

In the past year, the Section has handled approximately 200 cases. Several of these cases warrant brief mention here. The Commonwealth has intervened in several cases involving suits to recover from petroleum producers overcharges in the sale of crude oil to the public. The cases of Hunt v. Department of Energy, et al; Prosper Energy Corporation v. Department of Energy, et al; in Re: The Department of Energy Stripper Well Exemption Litigation; and United States v. Exxon, are pending in the federal district courts in Texas, Kansas and New York, respectively. These cases involve the return, nationwide, of more than $3 billion in oil overcharge refunds. The Commonwealth of Virginia, along with other states, is seeking to have the moneys returned to the states for utilization in energy-related projects.

In addition, the Antitrust and Consumer Litigation Section has been engaged in efforts to collect funds from escrow accounts maintained by the United States Department of Energy resulting from settlement payments by oil companies...
for oil overcharges which occurred during the price and allocation control program in the period 1973 through 1981. The efforts pertain to funds paid directly by the Commonwealth. The section has collected approximately $200,000 under a consent order with the JOC Oil Company, and an additional amount of approximately $200,000 is expected under that settlement. An additional $93,000 is expected shortly from another case, and other smaller amounts have been claimed by the Commonwealth for reimbursement of amounts paid by the Commonwealth due to the inflated oil prices.

The Section is representing Virginia Commonwealth University in several major construction cases. Litigation is underway in which more than $10 million is being disputed, arising out of the construction of the new Medical College of Virginia Hospital wing. Other construction cases, also handled by this Section, involve disputes over the construction of the Performing Arts Center of Virginia Commonwealth University and the construction of the 14th Street Tower.

The Section also is responsible for the handling of litigation arising pursuant to the Tort Claims Act, which became effective July 1, 1982. During the past year, 329 claims were filed pursuant to the Act. Approximately 40 of these cases are presently in litigation.

INFORMATION AND PROGRAMS

The Office of Information and Programs has been active during the fiscal year in preparing and presenting a number of seminars dealing with a wide range of legal issues, including procurement practices, antitrust concerns, freedom of information and conflict of interests. During the year, the Office has also cooperated with a number of other agencies and organizations to provide legal training and briefings to State and local officials.

Along with the preparation and dissemination of a handbook on the Comprehensive Conflict of Interests Act, the Office has also provided seminars on the subject for several thousand State and local government officers and employees.

It is my firm belief that the Commonwealth and its agencies, as well as the agencies and institutions of local government, are best served by an active program of education and training to prevent legal problems from arising. Such a program, I believe, will be extremely cost-effective in preventing legal crises and their attendant legal expenses. The end result will be more effective, more cost efficient, government services.

Conclusion

I have attempted to provide a broad overview of the activities of the Office within the past Fiscal Year.
The guiding thrust of our efforts has been to provide the most efficient, effective legal services possible to the agencies and institutions of State government, while at the same time developing procedures and practices designed to anticipate and prevent legal problems from arising.

While no document can cover all the duties and activities 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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<tr>
<td>Linda M. Roberts</td>
<td>Richmond</td>
<td>Receptionist</td>
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<tr>
<td>Jack Richardson</td>
<td>Richmond</td>
<td>Clerk/Messenger</td>
</tr>
</tbody>
</table>
ATTORNEYS GENERAL OF VIRGINIA
FROM 1776 TO 1983

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.
ATTORNEYS GENERAL OF VIRGINIA
FROM 1776 TO 1983

†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.
CASES DECIDED IN THE SUPREME COURT OF VIRGINIA


Blodinger v. Brokers’ Title Inc. From Circuit Court, City of Charlottesville. Amicus brief filed in appeal from dismissal of a declaratory judgment action concerning alleged unauthorized practice of law. Reversed and remanded.


Briley v. Superintendent. From Circuit Court, City of Richmond, Division I. Appeal from denial of habeas corpus. Affirmed.

Brown, et al. v. Lukhard, et al. From Circuit Court, City of Richmond, Division I. Appeal of decision eliminating Aid to Dependent Children funding for persons between ages of sixteen and twenty-one not in school. Petition for appeal granted.

Browning-Ferris, Inc. v. Commonwealth. From Circuit Court, County of Loudoun. Finding that § 46.1-160 is applicable to the disposal service rendered by Browning-Ferris, Inc. Affirmed.


Burgess v. Commonwealth. From Circuit Court, County of Arlington. Right to separate trial. Reversed.


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


Commonwealth v. E. A. Clore Sons, Inc. From Circuit Court, County of Madison. Petition for mandamus to compel trial of action to a court without a jury. Petition denied.


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. Affirmed.

Commonwealth, etc. v. Jenkins. From Circuit Court, County of Smyth. Whether Commonwealth must provide free mental hospital services to solvent pre-trial detainer. Judgment for Commonwealth.


Department of Corrections and Commonwealth v. Crowley. From Circuit Court, County of Cumberland. Appeal from denial of motion to vacate suspension of sentence granted after the expiration of circuit court's jurisdiction. Writ of error granted.
Department of Corrections and Commonwealth v. Sherman. From Circuit Court, County of Cumberland. Appeal from denial of motion to vacate suspension of sentence granted after the expiration of circuit court's jurisdiction. Writ of error granted.

Department of Corrections and Commonwealth v. Taylor. From Circuit Court, County of Cumberland. Appeal from denial of motion to vacate suspension of sentence granted after the expiration of circuit court's jurisdiction. Writ of error granted.


Dotson v. Dalton, et al. From Circuit Court, City of Richmond, Division I. Appeal of grant of demurrer upholding State defendants' sovereign immunity. Petition for appeal denied.


Gordon v. The Presidential Electors of the State of Virginia. Suit against electors for failure to elect plaintiff as President because Rockefeller family orchestrates presidential elections. Dismissed.

Greenwalt v. Commonwealth. From Circuit Court, County of Spotsylvania. Double jeopardy. Reversed and dismissed.


In re Blackwell. Writ of mandamus against Judge of Circuit Court of Fairfax County. Dismissed.

In re Exum and Accredited Surety and Casualty Company, Inc. Application for writ of mandamus against Judge of Circuit Court of the City of Portsmouth. Dismissed.

In re Hall and Hall. From Circuit Court, County of Fairfax. Petition for writ of mandamus and writ of prohibition and temporary injunction and stay. Dismissed.

In re Malachi Powell, No. 89820. From Circuit Court, City of Norfolk. Petition for preemptory writ of mandamus. Dismissed.

In re Mobile Field Office Company. From Circuit Court, City of Richmond, Division I. Petition for writ of prohibition against judge. Dismissed.

In re Worrell, et al. Petition for mandamus and prohibition against Judge of Circuit Court of the City of Charlottesville. Dismissed.

Johnson v. Commonwealth. From Circuit Court, County of Russell. Impeachment of witness by use of prior felony. Reversed and remanded.


Knox v. Commonwealth. From Circuit Court, City of Chesapeake. Validity of burglary conviction of husband for forcible entry into separate residence of wife. Affirmed.


McCutcheon v. Commonwealth. From Circuit Court, City of Portsmouth. Appeal from conviction of obtaining drugs by use of false name. Affirmed.


Mink v. Commonwealth. From Circuit Court, County of Wythe. Appeal from conviction of operating a motor vehicle after having been adjudicated an habitual offender. Reversed and remanded by consent.


Mowbray v. Williams. From Circuit Court, County of Fairfax. Appeal from denial of petition for restoration of driving privileges. Petition refused.


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. Appeal withdrawn by Commissioner.


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


Stokes v. Hill and Bradbery. Appeal from adverse judgment on action to have § 46.1-421(b) declared unconstitutional. Petition refused.


Townes v. Circuit Court of the City of Virginia Beach. From Circuit Court, City of Virginia Beach. Petition for writ of mandamus or prohibition seeking to require court to enter annulment for petitioner. Dismissed.


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. Reversed favoring the Commonwealth.
Walker v. Commonwealth. From Circuit Court, City of Williamsburg and James City. Ineffective assistance of counsel claims are ordinarily not cognizable on direct appeal from conviction. Affirmed.

Walker v. Commonwealth. From Circuit Court, County of Washington. Appeal of drug conviction on grounds that defendant's right to speedy trial was violated. Reversed and final judgment.

Walker v. Warden. From Circuit Court, City of Williamsburg and County of James City. Dilatoriness of habeas corpus petitioner to prejudice of respondent precludes habeas relief. Affirmed.


Williams v. Circuit Court of the City of Norfolk. Mandamus for appointment of a committee for prisoner and other relief. Dismissed.


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

CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Augustine v. Commonwealth. From Circuit Court, City of Suffolk. Appeal from arson conviction.


Baliles v. Miller. Suit to construe a will. Appeal granted.

Brady v. Virginia Employment Commission and Human Resource Institute of Norfolk, Inc. From Circuit Court, City of Norfolk. Unemployment insurance benefits.
Bright v. LBJ Apartments. From Industrial Commission of Virginia. Appeal from denial of workmen's compensation benefits.


Buffalo v. Director of Central State Hospital. Petition for writ of habeas corpus.

Campbell v. Commonwealth. From Circuit Court, County of Rockingham. Appeal of maiming conviction.


Chewning v. Real Estate Commission. From Circuit Court, City of Richmond, Division II. Appeal from Circuit Court reversal of administrative hearing and sanction favoring Commission. Petition for appeal filed.

Clark v. Commonwealth. From Circuit Court, County of Fairfax. Appeal from granting of habeas corpus. Effectiveness of counsel during sentencing phase of capital murder trial; procedure for resentencing following granting of habeas corpus relief.

Cloud v. Eastover Mining Company and Virginia Employment Commission. From Circuit Court, County of Wise. Unemployment insurance benefits.

Coleman v. Commonwealth. From Circuit Court, County of Buchanan. Appeal of death penalty. Advisement of rights; admissibility of photos; sufficiency of the evidence; consent to body search; change of venue; propriety of instruction.

Collins v. Commonwealth. From Circuit Court, City of Richmond, Division II. Criminal appeal of conviction under § 18.2-361 prohibiting the procuring of others to engage in unlawful sexual intercourse.

Commissioner v. Carter. From Circuit Court, County of Patrick. Condemnation case involving general damages, negligence of contractor and date of taking. Petition for appeal filed.

Commonwealth v. American Brands, Inc. From Circuit Court, City of Richmond, Division I. Correction of erroneous tax assessment. Petition filed.

Commonwealth v. B. J. McAdams, Inc. From Circuit Court, City of Richmond, Division II. Whether an interstate trucking company is required to file and pay Virginia income taxes. Appeal granted.
Fariss v. Commonwealth, Department of Highways and Transportation. From Circuit Court, County of Campbell. Whether personnel issue is grievable.

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

Fulcher v. Commonwealth. From Circuit Court, County of Botetourt. Admissibility of juvenile record of Commonwealth witness.


Gills v. Commonwealth. From Circuit Court, County of Isle of Wight. Appeal from conviction for giving false report to law enforcement officer with intent to mislead.


Grunder v. The College of William and Mary, et al. From Circuit Court, City of Richmond, Division I. Chancery suit by ex-librarian alleging State classified personnel rules ignored. Appeal from dismissal and decision that employee had faculty status and could not use classified employee grievance rules.

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

Harris v. Woodard, Walker and the Rector and Visitors of Mary Washington College. From Circuit Court, City of Fredericksburg. Appeal from summary judgment in suit by ex-teacher alleging breach of contract.

Hinchey v. Ogden, et al. From Circuit Court, City of Virginia Beach. Appeal from dismissal of defendant Ogden in action to recover $1,500,000 for personal injury.

Honeycutt v. Real Estate Commission. From Circuit Court, County of Arlington. Petition for writ of error from administrative revocation of respondent's license.

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.

Lawhorn, et al. v. King. From Circuit Court, City of Richmond, Division I. Whether collateral estoppel was properly ruled present to bar this action.

Mahan v. National Conservative Political Action Committee. From Circuit Court, City of Richmond, Division I. Appeal from declaratory judgment. Unconstitutionality of § 24.1-23(8) as applied to plaintiff.


McCreery, et al. v. King, et al. From Circuit Court, County of New Kent. Appeal by landowner in eminent domain matter that Commonwealth can condemn additional land to replace utility easement; date of valuation.

Michaels v. Virginia Employment Commission and Sourtheaster Marketing, Inc. From Circuit Court, County of Giles. Unemployment insurance benefits.

Myers v. Virginia State Bar, ex rel. Second District Committee. From Circuit Court, City of Norfolk. Appeal by an attorney of license suspension for excessive charges.

Real Estate Commission v. Bias. From Circuit Court, County of Albemarle. Bias was found guilty in administrative hearing of violating the Commission's regulations. Appealed to Circuit Court, County of Albemarle, which found an error in Commission's action and set aside its decision. Appealed to the Supreme Court of Virginia.

Riddick v. Commonwealth. From Circuit Court, City of Portsmouth. Propriety of murder conviction for unintentional killing of innocent bystander during gunfight.

Slominski v. Commonwealth. From Circuit Court, City of Williamsburg and County of James City. Appeal from denial of disability benefits.

State Highway and Transportation Commissioner v. Cardinal Realty Company Inc. From Circuit Court, County of Chesterfield. Whether condemnation commissioners shall not have been allowed to serve for cause.

State Highway and Transportation Commissioner v. Dennison. From Circuit Court, County of Scott. Condemnation case. Qualification of expert testimony on land value.

State Highway Commissioner v. Donelson. From Circuit Court, County of Russell. Condemnation. Factual basis for expert testimony and award of damages for business loss.

State Highway and Transportation Commissioner v. Hoke. From Circuit Court, County of Sussex. Condemnation appeal.

Swersky v. Barrow, et al. Petition for mandamus and prohibition against judge from Circuit Court, City of Virginia Beach.

Third District Committee v. Matthews. From Virginia State Bar Disciplinary Board's decision to suspend petitioner's law license.

Tony's Kitchen, Inc. t/a Dee Dee's v. Alcoholic Beverage Control Commission. From Circuit Court, City of Richmond, Division I. Appeal from circuit court's affirmance of order revoking beer license.

Trivett v. Commonwealth. From Circuit Court, County of Spotsylvania. Appeal of conviction for disturbing the peace. Motion to withdraw appeal made by appellant.


Turner v. Commonwealth. From Circuit Court, City of Lynchburg. Appeal from instruction that defendant could be convicted of "operating an illegal gambling enterprise"; refusal to grant instruction on lesser included offense.


Virginia Polytechnic Institute and State University v. Cates. From Circuit Court, City of Richmond, Division I. Available relief under Virginia Freedom of Information Act.


Whitehurst v. Virginia State Bar ex rel. Third District Committee. From Circuit Court, City of Richmond, Division I. Appeal from a three-judge circuit court's suspension of petitioner's law license.

Wright v. Frank. From Circuit Court, County of Fauquier. Amicus case involving payment awarded pursuant to Contractor Transaction Recovery Act.

Wyman v. Commonwealth. From Circuit Court, City of Chesapeake. Petition for appeal. Habitual offender.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


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

Coppola v. Superintendent. Motion to vacate stay of execution granted.


Goodwin v. Davis. Inmate petition for certiorari seeking review of dismissal of claims for alleged inadequate medical attention. Certiorari denied.


Illinois v. Gates. Amicus curiae brief filed on behalf of appellants, supporting good faith exception to exclusionary rule. Court declined to consider issue since it was not presented to or decided by Illinois courts. Reversed on other grounds.


Mitchell and Baliles v. Lawrence, Individually and as Next Friend for Frank Coppola. Application of Commonwealth to vacate stay of execution granted. Stay vacated.


Scruggs v. Commonwealth. From Virginia Supreme Court. Petition for certiorari denied in case alleging violation of double jeopardy clause.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Oyster v. Oyster. Petition for appeal from Virginia Supreme Court on constitutional challenge to Virginia's no-fault divorce statute. This office may file a memorandum amicus curiae if appeal is granted.

Palmer v. Hudson. Applicability of Fourth Amendment to searches of a prisoner's cell.
Peterson v. Commonwealth. Petition for certiorari to review judgment of the Virginia Supreme Court in death penalty case.

The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
ACKNOWLEDGMENTS. PROCEDURE TO OBTAIN NOTARIZED SIGNATURE OF IRANIAN RESIDENT FOR RECORDATION PURPOSES.

May 16, 1983

The Honorable Richard L. Saslaw
Member, Senate of Virginia

This is in reply to your recent letter requesting an Opinion regarding the procedure necessary to obtain a notarized signature of a citizen of Iran who resides in Iran. The letter accompanying your request indicates that the signature must be notarized for the purposes of a real estate transaction.

For the purpose of the recordation of a document in a circuit court of Virginia, § 55-114 of the Code of Virginia provides that such document may be admitted to record:

"as to any person whose name is signed thereto upon the certificate under the official seal of any ambassador, minister plenipotentiary, minister resident, charge d'affaires, consul-general, consul, vice-consul or commercial agent appointed by the government of the United States to any foreign country, or of the proper officer of any court of record of such country or of the mayor or other chief magistrate of any city, town or corporation therein, that such writing was acknowledged by such person or approved as to him by two witnesses before any person having such appointment or before such court, mayor or chief magistrate."

If the purpose of obtaining the notarized signature is to enable such document to be placed to record in a circuit court in Virginia, any of the officials named in § 55-114 may certify that the writing was acknowledged by the person or approved as to him by two witnesses.

Additionally, § 55-118.11 provides:

"Notarial acts may be performed outside this State for use in this State with the same effect as if performed by a notary public of this State by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws and regulations of this State:

***

(3) An officer of the foreign service of the United States, a consular agent, or any other person authorized by regulation of the United States Department of State to perform notarial acts in the place in which the act is performed;

***

(5) Any other person authorized to perform notarial acts in the place in which the act is performed."

Accordingly, in addition to those persons mentioned in § 55-114, an officer of the foreign service of the United
States, a consular agent or any other person authorized by regulation of the United States Department of State to perform notarial acts in Iran and any other person authorized to perform notarial acts in Iran may properly notarize the Iranian citizen's signature for the purpose of recording the document in a circuit court of Virginia. If the notarial act is done by a person authorized to perform notarial acts by the laws or regulations of a foreign country, § 55-118.2(b) provides that there is sufficient proof of the authority of that person to act if:

"(2) The official seal of the person performing the notarial act is affixed to the document; or
(3) The title and indication of authority to perform notarial acts of the person appears either in a digest of foreign law or in a list customarily used as a source of such information."

Otherwise, the signature, rank, or title and serial number, if any, of the person are sufficient proof of the authority of the holder of that rank or title to perform the act. Section 55-118.2(a).

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1Section 55-118.1 is part of the Uniform Recognition of Acknowledgments Act, §§ 55-118.1 through 55-118.9.

ADMINISTRATIVE PROCEDURE. EX PARTE CONTACT MEANS PRESENTATION OF DATA OR ARGUMENTS ON MERITS OF CASE.

April 6, 1983

The Honorable James B. Kenley, Commissioner Department of Health

You have asked for my opinion concerning the application of the provisions of § 32.1-102.6(C) of the Code of Virginia.1 That provision of law prohibits ex parte contacts with certain State Health Department personnel while action is pending upon an application for a certificate of public need. I shall answer your questions in the order you asked them.

First, you ask for a definition of ex parte contact. Because the statute does not define the term and because I am unaware of any decision of the Supreme Court of Virginia that defines it, the term must be given its ordinary meaning, given the context in which it is used. See Commonwealth v. Orange-Madison Coop. Farm Service, 220 Va. 655, 658, 261 S.E.2d 532, 533-534 (1980). Black's Law Dictionary 517 (5th ed. 1979) defines "ex parte" as "done for, in behalf of, or on the application of, one party only." Similarly, Black's defines "ex parte hearing" as one in which the "tribunal hears only one side of the controversy." These definitions indicate that an ex parte contact is one in which an advocate
for but one of two or more parties presents his views upon the controversy to the decision maker. Thus, § 32.1-102.6(C) prohibits such contacts.

Another facet of this question, however, is whether the prohibition applies to written correspondence. I am advised that you routinely receive a large amount of correspondence concerning applications. In my opinion, § 32.1-102.6(C) does not prohibit letters or other written communications in which the merits of a particular application are discussed. Such contacts become a part of the public record, once received, pursuant to the Virginia Freedom of Information Act, and, therefore, the inherent dangers of ex parte contacts made orally are not present. Moreover, the later language in § 32.1-102.6(C) about the time and place of a proposed contact implies that the General Assembly had in mind only meetings, not correspondence.

Your second inquiry concerns the extent to which § 32.1-102.6(C) applies to contacts between your staff and a hearing officer appointed by you. I find nothing in § 32.1-102.6(C) that prohibits such contact. Furthermore, the authorities recognize that such contacts are both essential and inevitable for the proper development of an "institutional" decision. 3 Kenneth Culp Davis, Administrative Law Treatise (2d ed. 1980) § 18.7 at 302-306.

Your next question concerns the extent to which you and your designated hearing officer can communicate with one another. Again, nothing in § 32.1-102.6(C) prohibits such contacts; neither have such contacts been disapproved in federal agencies. See United States v. Morgan, 313 U.S. 409, 422 (1941). Consequently, I conclude that you and your hearing officer are not prohibited from talking to one another.

The fourth question you pose is whether § 32.1-102.6(C) applies to contacts between your staff or a hearing officer and persons who are not Health Department personnel and who have a position on the merits of a pending application for a certificate of public need. The statute prohibits only contacts with staff members who have authority to make a decision about the issuance or revocation of a certificate. As only you or one of your hearing officers makes a decision, only ex parte contacts with you and with them are prohibited. Thus, persons advocating a particular view may contact staff members, who are not designated hearing officers, but they may not properly contact you or your hearing officers on an ex parte basis. I would caution, however, against any procedure which may result in a staff member acting or being placed in a position to act as a conduit for information between the advocate and the hearing officer.

In your fifth question you ask what would constitute sufficient advance notice of a contact that would be otherwise prohibited as an improper ex parte contact but for the notice. In my judgment, that answer would depend upon
the facts of a given case. Some situations may require only a simple telephone call a few minutes before a meeting and others might require several days notice. The test would be reasonableness. I would advise you to consider the importance of the issue, the location of the parties, the exigencies of the situation, and all other relevant factors in determining an adequate notice.

Lastly, you ask whether all persons who are advised of an ex parte meeting and who wish to be present at a proposed meeting must be allowed to attend. In my opinion, they must be allowed to attend. A requirement for advance notice would be meaningless if interested parties could not attend, and the General Assembly is not presumed to enact meaningless legislation. See Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949).

1Section 32.1-102.6(C) provides: "After commencement of a public hearing and before a decision is made there shall be no ex parte contacts concerning the subject certificate or its application between (i) any person acting on behalf of the applicant or holder of a certificate or any person opposed to the issuance or in favor of revocation of a certificate of public need, and (ii) any person in the Department who has authority to make a determination respecting the issuance or revocation of a certificate of public need, unless the Department has provided advance notice to all parties referred to in (i) of the time and place of such proposed contact."

March 11, 1983

The Honorable James B. Kenley, Commissioner
Department of Health

This is in reply to your inquiry whether a representative of a health systems agency, who is not a licensed attorney, may, on behalf of the health systems agency, provide testimony, cross-examine witnesses, make objections, make argument, and submit proposed findings of facts in formal evidentiary hearings by the Department of Health in light of § 54-42 of the Code of Virginia. The health systems agency is a private entity which has submitted an application for a certificate of public need pursuant to § 32.1-102.6. The hearings are held before you, as State Health Commissioner, or your designee. The purpose of the hearings is to build a record upon which you will make a decision on the application.
Section 54-42 does not define "the practice of law," nor is that term generally defined elsewhere in the Code of Virginia. Section 54-48 vests in the Supreme Court of Virginia the general authority to define the practice of law. Thus, in order to answer your question, it is necessary to ascertain whether the actions described above in the first paragraph constitute the practice of law as defined by the Court. If those actions do not constitute the practice of law, then they may be undertaken by non-lawyers in the setting which you describe.

The Court has exercised its authority under § 54-48 and has adopted rules defining the practice of law. In pertinent part, Rule 6:1 provides that

"[O]ne is deemed to be practicing law, whenever ***

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal, - judicial, administrative, or executive, - otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."3 (Emphasis added.) 216 Va. 1062 (1976).

Thus, for purposes of this inquiry, representation of another may be the practice of law only if it occurs before a tribunal. Accordingly, it is necessary to turn to the definition of tribunal.

In 1979, the Virginia State Bar (the "Bar") proposed to the Court for its consideration Unauthorized Practice of Law Advisory Opinion No. 1 which expanded the definition of "tribunal" as used in Rule 6:1 quoted above. As proposed by the Bar, tribunal would have included "a department of the executive branch [of State Government] (such as the Department of Welfare), a state board (such as the Alcoholic Beverage Control Board and the State Board of Elections)...." The Bar also proposed adoption of an Unauthorized Practice Rule ("UPR") 1-101 which would have had the effect of sanctioning the appearance of a non-lawyer to represent a party before a State agency in an "informal" proceeding but not in a formal proceeding.4

Had the Court accepted the proposals as written, the answer to your inquiry would have been different. The Court, however, declined to follow the Bar's proposed definition of tribunal. Instead, the Court adopted a more restrictive definition which provides that the term tribunal "shall include, in addition to the courts and judicial officers of Virginia, the State Corporation Commission of Virginia and its various divisions, the Industrial Commission of Virginia, and the Alcoholic Beverage Control Board." Rule 6.1-1, 221
Va. 384 (1980). The Court also rejected the above referenced portion of proposed UPR 1-101 and, instead, adopted an unauthorized practice rule consistent with the definition of tribunal. See 221 Va. 386 (1980).

The language of Rule 6.1-1 defining tribunal and its history are clear. Tribunal is not to be given an expansive definition as suggested by the bar but a narrow one which includes only the State Corporation Commission, the Industrial Commission and the Alcoholic Beverage Control Board in addition to courts and judicial officers.

Because the Department of Health is not included in the definition and you are not a judicial officer, I must conclude that a non-lawyer may represent a party appearing in a proceeding before you conducted pursuant to § 32.1-102.6. In that proceeding, the non-lawyer may provide testimony, cross-examine witnesses, make objections, make argument and submit proposed findings of fact. Such action in a proceeding before you would not constitute the practice of law as defined by the Court.

I acknowledge that certain legislative enactments, by explicitly sanctioning representation by non-lawyers in very limited situations before State or local agencies, lend themselves to the suggestion that the General Assembly may believe, as a general proposition, that only duly licensed lawyers may represent others in formal agency proceedings. This implication may be strengthened by a comparison of § 9-6.14:11, which provides a person with the right to appear by counsel "or other qualified representative" in informal agency proceedings, with § 9-6.14:12(C) which in the context of formal proceedings, omits reference to representation by "other qualified representative." (Emphasis added.) Nevertheless, those inferences are not sufficient to overcome the clear language of the Supreme Court's Rules. As indicated above, the legislative history of the adoption of those Rules can only buttress my understanding of the Court's intent.

Accordingly, until such time as the Court redefines the practice of law to include representation of others in formal proceedings before those State agencies which are presently omitted from the definition, I must answer your inquiry in the affirmative.

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1Section 54-42 does prescribe who "may practice law in this State..." and it is a misdemeanor for anyone to practice law without being duly authorized or licensed. See § 54-44.

2The General Assembly has enacted into law several Bills which state that the general terms of § 54-42 regulating who may practice law shall not be construed as preventing certain designated non-attorneys from representing others in specified situations. See, e.g., §§ 2.1-114.5:1(D)(4),
22.1-214(C) and the last paragraph of 54-42. Otherwise, the matter has been left to the Supreme Court.

3Of course, other activities may also constitute the practice of law such as one who for compensation advises another who is not his regular employer on any matter involving the application of legal principles to facts; or one, other than as a regular employee acting for his employer, who undertakes, with or without compensation, to prepare for another a legal document. See 216 Va. 1062. These activities which constitute the practice of law are not analogous to the situation which you describe, however.

4The concept embodied in the proposed Rule would have paralleled the provisions of the Administrative Process Act. See §§ 9-6.14:11 and 9-6.14:12(C).

5See §§ 2.1-114.5:1(D)(4); 22.1-214(C); and the last paragraph of 54-42.

ADMINISTRATIVE PROCESS ACT. APPLICABLE TO PUBLIC ASSISTANCE PROGRAM.

June 24, 1983

The Honorable Joseph L. Fisher
Secretary of Human Resources

This is in reply to your inquiry regarding § 9-6.14:7 of the Code of Virginia, as amended by the 1983 session of the General Assembly, which will require agencies "formulating any regulation including those in public assistance programs" to comply with the informational requirements of § 9-6.14:7(B), unless those requirements are shortened or waived by the Secretary of Human Resources.¹

Section 9-6.14:7 presently provides informational requirements which must be complied with whenever regulations substantive in nature are contemplated. However, those informational requirements are not currently applicable to assistance programs such as the Virginia Medical Assistance Program. See Opinion to the Honorable James B. Kenley, M.D., Commissioner, Department of Health, dated July 29, 1982. The amendment in S.B. 280, Ch. 601, Acts of Assembly of 1983, will amend § 9-6.14:7(A), making the informational requirements of § 9-6.14:7(B) applicable to substantive regulations in public assistance programs. Section 9-6.14:7(D) indicates that "public assistance programs shall consist of those specified in § 63.1-87(e) of the Code." However, § 9-6.14:7(C), as enacted in Ch. 601, will allow the Secretary of Human Resources to shorten or waive the time requirements of § 9-6.14:7(B) in certain situations.

Your first question is which programs are covered by the definition of "public assistance" programs as defined by § 63.1-87(e). Your second question is what the appropriate criteria would be for the Secretary of Human Resources to exercise his discretion to waive the requirements of § 9-6.14:7(B).
Section 63.1-87(e) defines "assistance" and "public assistance" to "mean and include aid to dependent children, auxiliary grants to the aged, blind and disabled, medical assistance, food stamps, general relief, and social services." Several of the programs included in that definition are further defined in § 63.1-87. See § 63.1-87(c) (aid to dependent children); § 63.1-87(e)(T) (auxiliary grants); and § 63.1-87(h) (general relief). Clearly, those programs listed in § 63.1-87(e) which are defined elsewhere in § 63.1-87 are "public assistance" programs for purposes of § 9-6.14:7.

The term "medical assistance" is not specifically defined in the Code. However, § 32.1-74, et seq., describes the Medical Assistance Program ("Medicaid") which is implemented by the State Health Department pursuant to Title XIX of the United States Social Security Act. Furthermore, § 63.1-134, et seq., describes a Department of Social Services program for the hospitalization and treatment of indigent persons, commonly known as the State-Local Hospitalization ("SLH") program. I believe both of the programs must fall within the scope of "medical assistance" for purposes of § 63.1-87(e) and § 9-6.14:7.

Although "food stamps" is not defined in the Code, § 63.1-25.2 gives the State Board of Social Services the authorization to implement a food stamp program "in accordance with the federal Food Stamp Act...." Therefore, that food stamp program and the regulations enacted by the State Board of Social Services pursuant thereto should fall within the scope of the term "food stamps" for the purposes of § 63.1-87(e) and § 9-6.14:7.

The term "social services" is also not defined in the Code. However, I believe the term should be construed to include those service programs specifically provided for by Title 63.1, including, but not limited to, the foster care program (§ 63.1-55); the adult protection services program (§ 63.1-55.1); the child abuse and neglect program (§ 63.1-248.1); and the various federal social services programs referenced by §§ 63.1-97.1 and 63.1-98. It is my understanding that within the Virginia Department of Social Services is a Division of Service Programs. I recommend that the programs falling within that division's responsibility, including those listed above, be considered as "social services" programs for purposes of the "public assistance" definition in § 63.1-87(e) and for the purposes of § 9-6.14:7.

Your second question seeks the appropriate criteria for the Secretary of Human Resources to use in exercising his discretion, as provided by amended § 9-6.14:7, to waive the informational requirements of paragraph B therein. The amendment contemplates that the informational requirements will be shortened or waived only when time limitations imposed by state or federal law precludes compliance with the informational requirements. Thus, situations such as an
immediate implementation date for federal and/or state public assistance programs; new or different interpretations of statutes or regulations by the federal agencies responsible for the implementation of the relevant public assistance programs, which interpretations require immediate implementation; and court orders requiring immediate implementation would be examples of appropriate situations for waiving the requirements of § 9-6.14:7(B).

1 The provision is effective July 1, 1983.

ADMINISTRATIVE PROCESS ACT. VIRGINIA MEDICAL ASSISTANCE PROGRAM IS EXEMPTED FROM PROVISIONS OF ACT BY § 9-6.14:20(II).

July 29, 1982

The Honorable James B. Kenley, M.D., Commissioner
Department of Health

You have asked whether the requirements of the Virginia Administrative Process Act, §§ 9-6.14:1 to 9-6.14:21 of the Code of Virginia (the "Act") apply to the activities of the Virginia Medical Assistance Program (the "Program"). In my opinion, they do not.

Section 32.1-74 authorizes the State Board of Health, with the approval of the Governor, to develop the State plan for medical assistance and to amend it from time to time. In addition, the State Health Commissioner is authorized to administer the program, using the approved State plan. Nothing in § 32.1-74, however, specifies the specific processes that are to be used in promulgating the State plan or the processes that are to be used by the State Health Commissioner in making decisions about the rendition of benefits pursuant to the State plan. The promulgation of the State plan and the process by which decisions are to be made fall within the Act's definitions of "substantive regulations" and of "case decisions," and they, therefore, constitute "agency action" as that term is defined in the Act. Compare § 9-6.14:4(B) with § 9-6.14:4(D) and § 9-6.14:4(F) and § 9-6.14:4(H).

The question thus becomes whether the Act exempts from its coverage such "agency action." Section 9-6.14:20(ii) exempts any agency action relating to "(ii) grants of State or federal funds or property...." As indicated, "agency action" includes both the promulgation of regulations and the making of case decisions. The Virginia Medical Assistance Program is funded by grants of both State and Federal funds. See 42 U.S.C. §§ 1396-1396m (Supp. IV 1980). Consequently, it can be concluded that the Virginia Medical Assistance Program is exempted from the Act because both the promulgation of its regulations and the making of decisions
implementing its provisions constitute agency action relating to State or federal funds or property.

In a prior Opinion, this Office reached a contrary conclusion. See 1977-1978 Report of the Attorney General at 1. Since that Opinion was rendered, however, various courts have addressed this issue or analogous issues. In the recent case of Harris v. Lukhard, No. 80-162(L) (W.D. Va. June 28, 1982), the federal district court specifically held with respect to the promulgation of a State plan amendment that "agency action relating to the grant of Medicaid Funds is excluded from the APA by § 9-6.14:20(ii)." In reaching that holding, the court relied upon two Virginia circuit court cases which held that "case decisions" in similar welfare programs were exempted from the Act by § 9-6.14:20(ii). In addition, the Circuit Court of Madison County has recently ruled also that the Virginia Medical Assistance Program's "case decisions" are exempt from the Act's judicial review article by virtue of § 9-6.14:20(ii). See White v. Madison County Department of Social Services, No. 76-1710 (Circuit Court of Madison County).

Thus, although this Office reached a contrary conclusion in its prior Opinion, the decisional law of the Commonwealth's circuit courts and of the United States District Court holds otherwise. I concur with the Opinions of those courts. "Agency action" relating to the Virginia Medical Assistance Program, in my opinion, is exempt from the Act because the Act exempts "any agency action relating to "grants of State or federal funds...." See § 9-6.14:20(ii).

ANNEXATION. PERCENTAGE OF LANDOWNERS REQUIRED ON PETITION FOR ANNEXATION PURSUANT TO § 15.1-1034.

July 28, 1982

The Honorable C. L. Marcum
Commissioner of the Revenue for the City of Norton

You advise that some property owners adjacent to the City of Norton wish to have the area in which their property is located annexed by the city. There are a total of twelve property owners in the area. You ask whether three landowners owning eighty-nine percent of the land in the area qualify to file a petition for annexation of such territory pursuant to § 15.1-1034 of the Code of Virginia. That section provides that such a petition may be filed by "fifty-one per centum of the owners of real estate in number and land area...."

In City and County of Denver v. Holmes, 156 Colo. 586, 400 P.2d 901 (1965), the Colorado Supreme Court construed a similar statute to require that annexation be sought by more than fifty percent of persons who hold more than fifty percent of the lands sought to be annexed. Although the three landowners in the instant situation own eighty-nine
percent of the land area, as a group, they comprise only twenty-five percent of the landowners in the area sought to be annexed. Because § 15.1-1034 requires fifty-one percent of the number of landowners and land area, I am of the opinion that the three landowners under the circumstances you describe do not qualify to file a petition for annexation.\footnote{This section also provides that fifty-one percent of the qualified voters within such territory may file a petition.}

\footnote{This conclusion is based on the assumption that the three landowners do not comprise fifty-one percent of the qualified voters.}

APPROPRIATIONS. GOVERNOR'S AUTHORITY TO TRANSFER APPROPRIATIONS MAY BE LIMITED BY GENERAL ASSEMBLY.

March 23, 1983

The Honorable R. K. Procuinier, Director
Department of Corrections

You have asked whether language added in Item 545.1 of the Appropriations Act for the 1982-1984 biennium\footnote{This section also provides that fifty-one percent of the qualified voters within such territory may file a petition.} by amendments passed by the 1983 General Assembly\footnote{This conclusion is based on the assumption that the three landowners do not comprise fifty-one percent of the qualified voters.} supersedes the Governor's authority granted in § 4-1.03a of the Appropriations Act to transfer appropriations within agencies. If the Governor's powers to transfer are superseded, you also ask whether this results in an unconstitutional intrusion of the legislature into the executive powers of the Governor.

Both of your questions are directly related to the discharge of the duties of the Governor; hence § 2.1-118 of the Code of Virginia prevents me from rendering an official opinion unless the questions dealt with are directly related to the discharge of your duties. However, because the question deals with a matter that is of concern to your office, I will share with you several observations on the controlling principles in the question you have raised.

The language amending the Appropriations Act was inserted in Item 545.1 and reads as follows:

"It is the intent of the General Assembly that general fund amounts for the subprogram adult security (3570200) not be transferred to any other subprogram."

The insertion of this language in Item 545.1, the first item contained in § 1-115 DEPARTMENT OF CORRECTIONS appropriations places a restriction on all appropriations for each item containing a subprogram number 3570200. This specific limitation, like many other specific limitations in the Appropriations Act, limits the Governor's powers to make transfers of appropriations under the general authority...
granted to him by § 4-1.03a. It is a well-settled rule of legislative construction that specific provisions control general provisions.

Such restrictions do not represent an unconstitutional intrusion of the legislature into the executive powers of the Governor. Neither the Constitution of Virginia nor the Code of Virginia grants any power to the Governor to transfer appropriations. His only authority to make such transfers is that which is delegated to him by the General Assembly in § 4-1.03a.

"Where a condition is attached to an appropriation, the condition must be observed." Brault v. Holleman, 217 Va. 441, 447, 230 S.E.2d 238, 242 (1976). Conditions or restrictions placed upon appropriations are legislative matters. Commonwealth v. Dodson, 176 Va. 281, 296, 11 S.E.2d 120, 127 (1940). Moreover, the Supreme Court of Virginia has recognized the validity of specific prohibitions against using any part of an appropriation for a specific purpose. Dodson, 176 Va. at 304, 11 S.E.2d at 131. Similarly, a restriction prohibiting the use of funds appropriated for a specific purpose to any other purpose is likewise a valid exercise of legislative authority.3

There is but one basis upon which it could be asserted that the condition inserted in Item 545.1 is unconstitutional and that is if the restriction violated Art. IV, § 12 of the Constitution of Virginia (1971) which provides that "[n]o law shall embrace more than one object which shall be expressed in its title." If the restriction were not germane to the object of the act as expressed in its title, then it might be argued that the restriction is unconstitutional. However, an examination of the Supreme Court's analysis in Dodson of appropriations with similar restrictions persuades me that the restriction contained in Item 545.1 is well within the parameters of that decision. Dodson at 304-310, 11 S.E.2d at 131-133.

21983 H.B. 30 as amended by the Joint Conference Committee Report and passed by both the House and the Senate.
3"[The General Assembly] had the undoubted right to designate the purposes for which [the appropriations] should be used...Its wisdom in reaching its conclusion as to this is something which does not concern us, but plainly it can not be used except for designated purposes...." 176 Va. at 307, 11 S.E.2d at 132.

APPROPRIATIONS. LAW ENFORCEMENT REGIONAL TRAINING ACADEMIES. SHARES OF "TOTAL COSTS" NOT TO INCLUDE IN-KIND CONTRIBUTIONS BY LOCALITIES.
July 1, 1982

The Honorable Louis E. Barber
Sheriff of Montgomery County

This is in reply to your recent letter requesting an Opinion regarding the funding for Regional Training Academies in the Appropriation Act, Ch. 684, Acts of Assembly of 1982, approved on April 21, 1982. You asked:

"Is the requirement of The Criminal Justice Services Commission that the local share (40%) be in cash as indicated in their letter of June 2, 1982, valid when the language of Item 530 makes no reference to cash, only to total cost of operation or is in-kind participation which is a critical portion of total cost of operation an allowable share of the total cost of operation."

Item 530 of the Appropriation Act appropriates money for "Criminal Justice Training, Education and Standards" within the Department of Criminal Justice Services and contains the following language:

"Subject to the limits specified in this item, funding for Law Enforcement Training and Education provides assistance for 60% of the total costs of the Regional Training Academies; the remaining 40% shall be provided by the participating localities." (Emphasis added.)

The Supreme Court of Virginia has held that "[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity...." Watkins v. Hall, 161 Va. 924, 172 S.E. 445 (1934). Rules of statutory construction apply similarly to the Appropriation Act. In the absence of words of limitation, the meaning of the phrase "total costs" in Item 530 indicates the total cost of operating the academies.

The proposed budget that was submitted for the New River Academy at the time the General Assembly was considering the appropriation reflects the amount of money that will be expended during the 1982-1983 fiscal year to operate the academy. No reference was made to any services, facilities or costs which would be furnished by the localities as "in-kind" costs. By definition, no money is expended for in-kind services and facilities furnished by the localities. Consequently, the value of such in-kind services and facilities is properly excluded from the proposed budget that reflects the total cost to operate the academy.

I am, therefore, of the opinion that the 60%/40% shares of the total costs of the Regional Training Academies should be construed to mean shares of actual amounts of money to be
expended by the academy in the operation of the academy, and such shares would not include contributions of services or facilities that are not costs of operations expended by the academy.

"Kind" is defined as "goods or commodities as distinguished from money." Webster's New Collegiate Dictionary (1976).

Note: This problem might be avoided in the future by reflecting in the total budget all costs of services and facilities which may be required to operate the academy.

APPROPRIATIONS. TEXTBOOK RENTAL REVENUE.

September 16, 1982

The Honorable Charles K. Trible
Auditor of Public Accounts

You have asked whether a school board's expenditure of funds generated by the rental of textbooks, without an appropriation of those funds by the local board of supervisors to the school board, violates the provision of § 15.1-162 of the Code of Virginia which states:

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

Section 15.1-162 generally pertains to the publication of the budget for a county, city or town. The budget is prepared by the local governing body on the basis of estimates from the heads of departments, offices and agencies of the locality and is required to contain "a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing fiscal year...." Section 15.1-160. (Emphasis added.) On the basis of its approved budget, the local governing body fixes its tax rate for the budget year. Section 15.1-162. Approval of the budget, however, is not an appropriation. The formal act of appropriation by the governing body actually sets aside money for a specific use. See Almond v. Day, 197 Va. 419, 426, 89 S.E.2d 851, 855 (1955).

In making their estimates to the local governing body, the superintendent and school board must report all estimated revenues. Section 15.1-160. These revenues consist of funds available for school purposes, and include: "State funds appropriated for public school purposes and apportioned to
the school board, local funds appropriated to the school board by a local governing body or such funds as shall be raised by local levy as authorized by law, donations or the income arising therefrom, and any other funds that may be set apart for public school purposes." Section 22.1-88.

Textbook rental funds are generated in those school districts which have established textbook rental systems in accordance with regulations of the State Board of Education. See § 22.1-252; 1977-1978 Report of the Attorney General at 364. These rental proceeds are used, after either being deposited in a revolving textbook rental fund or the school division's operating account, to provide free textbooks for eligible students or purchase new textbooks. See § 22.1-251. Clearly, the proceeds of textbook rentals are "funds that may be set apart for public school purposes..." and, as such, are available to the school board. They must, therefore, be included in the budget estimate presented by the division superintendent to the school board and to the local board of supervisors for fiscal planning purposes.

There is no statutory provision or case decision exempting textbook rental proceeds from the local governing body's power of appropriation. This Office has in the past held that revenues generated by the operation of a school cafeteria are subject to appropriation by the local governing body. 1959-1960 Report of the Attorney General at 66, 71. There is no significant difference between the nature of textbook rental revenues and cafeteria revenues for the purposes of § 15.1-162.

It is my opinion, therefore, that a local school board may not spend textbook rental proceeds unless they have been appropriated to the school board by the local governing body. This appropriation may be made by inclusion in the total appropriation to the school board, or in the appropriations made for major classifications of educational needs. See § 22.1-94.

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1 You have cited in your request two prior Opinions of this Office which held that a school board may expend, without appropriation, funds it receives as compensatory damages for damage to its real property and funds it receives from the sale of its real property. See 1961-1962 Report of the Attorney General at 223; 1960-1961 Report of the Attorney General at 269. Recent enactments of §§ 15.1-262 and 22.1-129 indicate an intention on the part of the General Assembly that funds from the sale of a school board's real property be subject to appropriation by the local governing body. See Ch. 559, Acts of Assembly of 1980. Revisors' notes accompanying those changes state: "Since the funds from any such sale are subject to appropriation by the local governing body, provision is made for transferring the school board's surplus property to the governing body for disposition as it sees fit." (Emphasis added.) See House
Doc. 21, II House and Senate Documents (1980) at 5. The holdings of those prior Opinions, to the extent that they now may be read to deprive the local governing body of appropriation power over proceeds from the sale of a school division's real property, are no longer in accord with current legislative intent.

ARREST. LAW-ENFORCEMENT OFFICER ARMED WITH SUMMONS AUTHORIZED TO CONDUCT SEARCH IN SUSPECT'S PREMISES IN ORDER TO MAKE SERVICE.

August 20, 1982

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

You have referred to § 19.2-73, et seq., of the Code of Virginia and inquired (1) whether a law-enforcement officer, armed with a summons issued pursuant thereto, may search a suspect's premises for the suspect, if he has probable cause to believe that the suspect is inside, and if so, (2) what degree of force he may use in executing this search. You have indicated that this question relates only to execution of a summons issued by a magistrate or other judicial officer and you have further assumed the absence of exigent circumstances or consent.

Sections 19.2-73 and 19.2-74 specifically authorize both judicial and law-enforcement officers to issue a summons in lieu of a warrant for misdemeanor offenses therein prescribed. These statutory sections contemplate a suspect's giving his written promise to appear in cases where a summons has been issued. A suspect who refuses to give that promise may be taken to a magistrate. See § 19.2-74(A)(3).


With respect to service with a summons on individuals, § 19.2-76 provides that "a summons shall be executed by delivering a copy to the accused personally...." It would be inconsistent with the general provisions of criminal law to permit an individual to avoid service of a summons by merely refusing to open his door. Indeed, in Payton, supra, the court held that the arrest warrant required the suspect to "open his doors to the officers of the law...." Moreover, there is no basis in the Code for concluding that the duty to execute a summons is less than the duty to execute an arrest warrant. In my opinion, therefore, the officer's authority and duty carries with it the right to conduct a search of a
suspect's own premises for the suspect in cases where such is necessary in order to execute the summons. ¹

I find no authority to the effect that less force must be used by a law-enforcement officer in conducting a search in order to serve a misdemeanor summons than in the case where such a search is being conducted in order to make an arrest for a felony. In the case of a felony, a reasonable amount of force may be used, ² and, therefore, in my opinion, a law-enforcement officer may use a reasonable amount of force in conducting a search in order to make service of a misdemeanor summons issued by a judicial officer.

¹This authority would not extend to search of a third party's premises in the absence of a search warrant. Steagall v. United States, 451 U.S. 204 (1981).
²Parker v. McCoy, 272 Va. 808, 188 S.E.2d 222 (1972).

ARREST. REGISTERED PRIVATE SECURITY GUARD MAY ARREST AND ISSUE SUMMONS FOR MISDEMEANORS COMMITTED IN HIS PRESENCE ON PREMISES HE HAS CONTRACTED TO PROTECT.

August 3, 1982

The Honorable Paul A. Sciortino
Commonwealth's Attorney for the City of Virginia Beach

This is in response to your letter requesting an Opinion regarding the arrest powers of a registered guard of a private security services business under § 54-729.33 of the Code of Virginia.

Your first question is whether a registered private security guard can arrest for misdemeanors committed in his presence and on the premises he has contracted to protect. This Office has previously answered this question in the affirmative. See 1977-1978 Report of the Attorney General at 29. I adhere to that prior Opinion because I am in agreement with it and the statutory basis for the Opinion has not been changed.

Next, you inquire if a registered guard can issue a summons for such offenses. A prior Opinion of the Attorney General has answered this question affirmatively. See 1978-1979 Report of the Attorney General at 13. I find no subsequent amendment of the Virginia Code which alters that conclusion.

Finally, you ask whether a registered guard can arrest and issue a summons for offenses of drinking and urinating in public when those offenses occur in his presence and on the premises he has contracted to protect. Under § 4-78 the crime of drinking in public is a Class 4 misdemeanor. Urinating in public is a Class 4 misdemeanor under § 22-11.1
of the Code of the City of Virginia Beach. Thus, in accordance with the Opinions cited above, the answer is in the affirmative.¹

¹Section 19.2-74, except in specified circumstances not raised in your inquiry, directs the issuance of a summons for violation of an ordinance or for a misdemeanor.

ATTORNEY GENERAL. NO REQUIREMENT UNDER § 2.1-121 TO REPRESENT GOVERNMENT OFFICIAL NOT SUED IN OFFICIAL CAPACITY.

February 8, 1983

The Honorable George P. Beard, Jr.
Member, House of Delegates

This is in reply to your letter of January 20, 1983, in which you asked the following:

"1. Does Section 2.1-121 of the 1950 Code of Virginia, as amended, guarantee defense of civil litigation by the Attorney General's Office or by special counsel for persons who are members of a State department, institution, division, commission, board, bureau, agency or entity when they are sued in their individual capacity for actions taken as authorized agents for their State department, institution, division, commission, board, bureau, agency or entity?

2. Does the Board of Regents of the James Monroe Law Office Museum and Memorial Library constitute a 'board' under the provisions of Section 2.1-121 of the 1950 Code of Virginia, as amended?"

Section 2.1-121 provides in pertinent part:

"All legal service in civil matters for the Commonwealth, the Governor and every state department, institution, division, commission, board, bureau, agency, entity, official, judge of any circuit court or district court, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as hereinafter provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission."

This section provides the authority for the Attorney General's Office to represent a member of a State board when such person is sued in his official capacity for acts arising within the scope of his official duties. If the person is not sued in his official capacity no requirement of representation by the Attorney General's Office exists and
representation is at the discretion of the Attorney General based on the facts of the case.

Turning to your second question, the deed of gift accepted by the General Assembly in 1964 (Ch. 641, Acts of Assembly of 1964) transferred the James Monroe Law Office-Museum and Memorial Library to the Commonwealth of Virginia. The deed provided that the library shall be managed and supervised by a Board of Regents which is to be composed of eighteen members: Director and President of the College (Mary Washington College); the President and Secretary of the Foundation (the James Monroe Memorial Foundation); and at least fourteen others, appointed by the Governor. By Ch. 861, Acts of Assembly of 1972, the real and personal property so acquired was transferred to the control of the Rector and Visitors of Mary Washington College, although it continues to be the property of the Commonwealth.

In view of the foregoing, I am of the opinion that the James Monroe Law Office-Museum and Memorial Library Board of Regents is a "board" under the provisions of § 2.1-121.

ATTORNEYS. LICENSE SUSPENSION. RULE 13(D)(1), RULES OF SUPREME COURT.

January 25, 1983

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

This is in response to an inquiry regarding the application of Part 6:IV, ¶13(D)(1) (hereinafter "Rule 13") of the Rules of the Supreme Court of Virginia, 216 Va. 941, 1154 (1976). Specifically, you inquire whether the order of suspension of an attorney's license required by the rule on receipt of notification that the attorney has been convicted of a crime is dissolved if the attorney resorts to the three-judge court as authorized by Rule 13(C)(5). In my opinion, under these circumstances, the suspension order would not be dissolved pending action by the three-judge court.

Rule 13 sets out the procedure for disciplining, suspending and disbarring attorneys. The Supreme Court has defined "crime" for purposes of the rule to mean ten specific offenses (Rule 13(A)(9)). All other criminal offenses are termed "misconduct" (Rule 13(A)(11)). Section D of Rule 13 is entitled "Crime," and prescribes the procedures to be used when conviction of a crime forms the basis of the disciplinary action. On receipt of a certificate from a court clerk that an attorney has been convicted of a crime, "the [Disciplinary] Board shall forthwith enter an order suspending the license of the Attorney...." Rule 13(D)(1). The board must then send this order, a copy of the certification of conviction and a notice of the time and
place for hearing to the attorney. The applicable procedure for the hearing is that in Rule 13(C)(5).

When the attorney chooses to petition the Supreme Court for a hearing, rather than proceeding with the hearing before the board, his demand is that "further proceedings be conducted pursuant to Article 6 of Chapter 4 of Title 54 of the Code of Virginia...[and] further proceedings before the Board [are] terminated...." Rule 13(C)(5), 216 Va. 941, 1153 (1976). (Emphasis added.) The suspension order of the board is not a discretionary act. There is no language in Rule 13 which would cause prior actions of the board to be superseded on the filing of the demand. Accordingly, I am of the opinion that the prior summary suspension remains in effect.1

1This interpretation agrees with that in the 1972 Wash. & Lee L.Rev. Note on the proposed (now adopted) amendments to Rule 13. 29 Wash. & Lee L.Rev. at 452. It is also consistent with the ABA Special Committee Report cited in that law review. Id. n. 100.

AUCTION SALES. LICENSES. SALES OF REAL ESTATE AT PUBLIC AUCTION. ADVERTISING. BROKER'S LICENSE. AUCTIONEER WITHOUT BROKER'S LICENSE MAY NOT ADVERTISE. HE IS AUTHORIZED TO SELL REAL ESTATE BUT MAY ADVERTISE PARTICULAR REAL ESTATE FOR SALE AT AUCTION IF PROPERLY EMPLOYED.

August 25, 1982

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

This is in reply to your recent inquiry concerning auctioneers who advertise sales of the estates of others without listing a real estate broker in the advertisements. You ask to be informed of the limitations on sales of real estate by an auctioneer who has a crier's license but no broker's license.

The answer to your question is found in Ch. 18 of Title 54 of the Code of Virginia, the provisions of which regulate the licensing and activities of real estate brokers, real estate salesmen and rental location agents. Section 54-749 makes it unlawful for any person, partnership, association or corporation to act as a real estate broker or a real estate salesman without a license from the Virginia Real Estate Commission issued pursuant to § 54-740 and the Virginia Real Estate Commission regulations promulgated thereunder. Sections 54-730 and 54-731 define "real estate broker" and "real estate salesman" respectively. Section 54-732 provides that the doing of a single act, for compensation, of buying or selling real estate for another or offering for another to buy, sell, exchange or rent real estate except as
specifically excepted in the chapter, shall constitute one, a real estate broker or salesman, within the meaning of the chapter.

Section 54-734 enumerates the exemptions from Ch. 18, and, as it relates to advertising and sales by auctioneers and others, provides as follows:

"Nor shall the provisions of this chapter, or any other provisions of law, be construed to prohibit an auctioneer to sell at public auction real estate when employed for such purpose by the owner or owners of such real estate, by an attorney-at-law in the performance of his duties as such attorney-at-law, by a receiver, trustee in bankruptcy, administrator or executor, a special commissioner or any other person selling real estate under order of court, or by a trustee acting under the trust agreement, deed of trust or will, or the regular salaried employees thereof as provided in this section. However, an auctioneer shall not advertise that he is authorized to sell real estate. An auctioneer may advertise for sale at public auction any real estate when duly employed to do so as herein provided, and may advertise that he is authorized to auction real estate at public auction." (Emphasis added.)

The above quoted portion of § 54-734 clearly defines the actions an auctioneer may take in advertising and selling real estate at public auction and still remain exempt from regulation under Ch. 18 of Title 54. In the context of the factual situation which you presented, whether the auctioneer in question goes beyond the limitations inherent in the above quoted section of the Code depends upon how he is employed and upon the contents of his advertisements. Although an auctioneer without a broker's license may not advertise that he is authorized to sell real estate, he may advertise particular real estate for sale at public auction if he is properly employed as provided in § 54-734, and he may advertise that he is authorized to auction real estate at public auction, assuming of course, he is properly licensed as an auctioneer.

BANKING AND FINANCE. CHARGES ALLOWED TO BE MADE BY INDUSTRIAL LOAN ASSOCIATIONS AND CERTAIN OTHER LENDERS IN ADDITION TO INTEREST AND 2% SERVICE CHARGE PURSUANT TO §§ 6.1-330.15, 6.1-330.16(E) AND 6.1-330.16(F).

November 26, 1982

The Honorable William R. O'Brien  
Member, House of Delegates

This is in reply to your recent inquiry regarding appropriate interpretation of §§ 6.1-330.15, 6.1-330.16(E) and 6.1-330.16(F) of the Code of Virginia, relating to
interest and charges on loans. You have asked whether industrial loan associations and certain other lenders are limited in what they may charge to make a loan, to the interest rate stated therein plus a service charge of 2% of the principal amount of the loan, or whether other charges and fees, such as points, discount fees or origination fees may also be charged.

Sections 6.1-330.15 and 6.1-330.16 specify the charges on loans made by industrial loan associations and other lenders which may be enforced. Loans made by industrial loan associations may be enforced "as agreed in the obligation of indebtedness or at the interest rate stated therein...." Loans made by "other lenders," which loans are secured by a subordinate mortgage or deed of trust, may be enforced "at the interest rate" specified in § 6.1-330.16(A), 6.1-330.16(D), 6.1-330.16(E) or 6.1-330.16(F), depending upon the type loan. Additionally, each of the referenced sections allows for a 2% service charge to be imposed by the lender.

From the foregoing, I am of the opinion that industrial loan associations may impose such loan charge as agreed in the obligation of indebtedness and loans by other lenders which are secured by subordinate mortgages or deeds of trust may be enforced at the interest rate specified in subparagraphs (A), (D), (E) or (F) of § 6.1-330.16.

I next turn to the statutory charges permissible on real estate loans secured by subordinate mortgages or deeds of trust in addition to interest and service charges. Section 6.1-330.24(A) limits additional charges on a loan secured by a subordinate mortgage to: (1) actual cost of title examination, (2) title insurance, (3) mortgage guaranty insurance, (4) recording fees, (5) surveys, (6) attorney's fees, (7) appraisal fees, (8) late charges assessed pursuant to § 6.1-330.26 and (9) costs incident to collection upon borrower's default. Certain brokers' fees, finders' fees, etc., may be required to be paid by the borrower only if the total of such extra charges does not exceed the amount of service charge and interest permitted under § 6.1-330.16. Paragraph (D) of § 6.1-330.24 provides that the section shall not apply to any loan made by any lender enumerated in § 6.1-330.25. Therefore, the provisions of § 6.1-330.24 would not apply to industrial loan associations. I am unaware of any other section of the Code which would similarly restrict additional charges that could be imposed by industrial loan associations.

In summary, I am of the opinion that charges such as discount fees, points, and origination fees "as agreed in the obligation of indebtedness" may be imposed by industrial loan associations in addition to the 2% service charge and interest stated therein. Such additional fees may not, however, be imposed by lenders governed by § 6.1-330.16 because § 6.1-330.24 expressly limits the charges.
1I.e., those lenders not licensed by or under the supervision of the State Corporation Commission or the federal government or otherwise enumerated in §§ 6.1-330.25 and 6.1-330.48.

2Section 6.1-330.15 provides that loans made by such lenders: "may be lawfully enforced as agreed in the obligation of indebtedness or at the interest rate stated therein on the principal amount loaned or foreborne or contracted to be lent or foreborne. Notwithstanding the foregoing, a service charge not exceeding two percent of the amount of the loan may also be imposed." (Emphasis added.)

3See footnote 1.

4Paragraphs (A), (D), (E) and (F) of § 16.1-330.16 provide: "A. Any person, other than lenders licensed by and under the supervision of the State Corporation Commission or the federal government or otherwise enumerated in §§ 6.1-330.25 and 6.1-330.48, may charge in advance at a rate of interest of nine percent per annum upon the entire amount of the loan, and such loans may be repaid in weekly, monthly or other periodic installments, with the privilege of the lender to declare the entire unpaid balance due and payable in the event of default in the payment of any installment for a period of thirty days, if such loan is for a maturity of ten years and two months or less and is secured in whole or in part by a subordinate mortgage or deed of trust on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units. For the purposes of this chapter 7.2 (§ 6.2-330.6 et seq.) relating to money and interest, a subordinate mortgage or deed of trust is one subject to a prior mortgage or deed of trust in existence at the time of the making of the loan secured by such subordinate mortgage.

The lender may also impose a service charge not exceeding two percent of the amount of the loan provided that such service charge shall not be made more often than once each eighteen months except to the extent that new money is advanced within such eighteen-month period by a renewal or additional loan. New money shall be money lent in addition to the outstanding principal balance at the time such new advance is made. These provisions shall apply whether payable directly to the lender or to a third party in connection with such loan.

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D. Any loan secured by a subordinate mortgage or deed of trust on such residential real estate may be at an interest rate of eighteen percent per annum, plus the service charge not exceeding two percent set forth in subsection A of this section and subject to the eighteen-month limitation specified therein, except to the extent that new money is advanced.

E. Any loan secured by a subordinate mortgage or deed of trust on such residential real estate with an initial maturity in excess of ten years and two months may be lawfully enforced at the interest rate stated therein on the
principal amount of the loan forborne or contracted to be lent or forborne.

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F. Any loan secured by a subordinate mortgage or deed of trust on such residential real estate where the interest is charged at a simple interest rate on the unpaid balance stated therein may be lawfully enforced at the interest rate stated therein on the principal amount of the loan forborne or contracted to be lent or forborne." (Emphasis added.)

Section 6.1-330.24 provides in pertinent part: "A. Any lender making a loan secured by a subordinate mortgage may require the borrower to pay, in addition to the service charge and interest permitted by § 6.1-330.16, the actual cost of title examination, title insurance, mortgage guaranty insurance, recording fees, surveys, attorney's fees, and appraisal fees. No other charges of any kind shall be imposed on or be payable by the borrower either to the lender or any other party in connection with such loan; provided, however, late charges in the amount specified in § 6.1-330.26 may be made and, upon default, the borrower may be subject to court costs, attorney's fees, trustee's commission and other expenses of collection as otherwise permitted by law. 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.

D. This section shall not apply to any loan made by any lender enumerated in § 6.1-330.25." (Emphasis added.)

Section 6.1-330.25 provides: "Sections 6.1-330.16, 6.1-330.24 and 6.1-330.31 shall not apply to loans made by any lender licensed by, and under the supervision of the State Corporation Commission or the federal government, or to loans made by State and national banks, State and federal savings and loan associations and State and federal credit unions."


July 7, 1982

The Honorable Charles M. Stone, Judge
Henry County General District Court

This is in reply to your recent letter requesting an Opinion regarding the interest rate on judgments arising from a contract for the loan of money. Specifically, you ask:

1. "Does § 6.1-330.10 limit § 6.1-273 to 10% or may the contract rate be allowed on proper evidence?"
2. "Does § 6.1-276 further restrict the 10% to 6% six months after what would have been the date of maturity, but for the earlier default?"

3. "[I]f the Small Loan Company does not request that evidence be taken on the contract rate of interest...must the Court limit any award of interest to 10%?"

4. "Are other lenders [i.e., those not governed by the Virginia Consumer Finance Act] also limited to 10% interest on their judgments where the note does not state the contract rate of interest and there is no evidence of such rate other than the truth-in-lending disclosure required by statute?"

I will answer your questions seriatim.

1) Section 6.1-273 of the Code of Virginia provides:

"If judgment be obtained against any party on any loan made under the provisions of this chapter neither the judgment nor the loan shall carry, from the date of the judgment, any charges against any party to the loan other than court costs and interest on the amount of the judgment at the rate fixed by § 6.1-330.10."

Section 6.1-330.10 provides:

"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."

Because § 6.1-273 incorporates the provisions of § 6.1-330.10 in reference to fixing the judgment rate of interest, § 6.1-330.10 is controlling. Section 6.1-330.10 allows a judgment interest rate of the higher of the lawful rate of interest charged on the contract or the statutory rate of 10%. I conclude, therefore, that the higher of 10% interest or the contract rate of interest, if lawful, may be awarded pursuant to § 6.1-273 of the Consumer Finance Act, on proper evidence.

2) Section 6.1-276 provides:

"For the period beginning six months after the date of maturity, as originally scheduled or as deferred in the event of deferment, of any loan contract under the provisions of this chapter [i.e., the Consumer Finance Act], no further charges than interest at six per centum per annum shall be computed or collected from any party to the loan upon the unpaid balance of the loan."
Section 6.1-276 may be read together with § 6.1-330.10 with the following result. For the first six months after the maturity date of the loan, notwithstanding any default, the judgment rate of interest will be the rate lawfully charged on such contract or 10%, whichever is higher (§ 6.1-330.10). After that six-month period, the maximum rate is 6% (§ 6.1-276) until judgment is entered on the loan. From the time of judgment, the interest rate is again computed according to § 6.1-330.10. The 6% limitation imposed by § 6.1-276 applies only for the period beginning six months after maturity and ending upon entry of judgment.

3) Although it is well settled that interest may be awarded on a judgment, the court must determine the proper rate of interest to be awarded on a judgment arising from a contract for the loan of money pursuant to § 6.1-330.10. The burden of asking for and producing evidence on the rate of interest to be awarded on the judgment is on the party seeking judgment on the contract. Accordingly, if no request is made and no evidence is produced, the court may only properly award the 10% rate allowed by § 6.1-330.10.

Because the Annual Percentage Rate (the "APR") is a reflection of charges in addition to the rate of interest on the principal amount borrowed, it is not necessarily a true indication of the contract interest rate as contemplated by § 6.1-330.10. Therefore, if the APR is the only rate introduced, I am of the opinion that the 10% rate in § 6.1-330.10 would be the appropriate rate to award.

4) Sections 8.01-382 and 6.1-330.10 are statutes of general application. The conclusion reached in answer to your third question in reference to lenders governed by the Consumer Finance Act is equally applicable to lenders not governed by the Consumer Finance Act.

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1Sections 6.1-244 through 6.1-310.
2If judgment were obtained before the maturity date, the judgment rate for the period of time between judgment and the date of maturity would be determined according to § 6.1-330.10 and § 6.1-276 would not apply.
5The APR is the rate required by the federal Truth in Lending Act (15 U.S.C. § 1601, et seq.) to be disclosed in consumer credit transactions.
612 C.F.R. 226 (1981). The APR also reflects such charges as loan fee, points, credit report fee, appraisal fee, or insurance premiums.
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BANKING AND FINANCE. LENDER UNDER § 6.1-330.16(E) MUST MAKE REBATE OF UNEARNED INTEREST UNDER §§ 6.1-330.31 AND 6.1-330.32 WHERE INTEREST HAS BEEN ADDED TO FACE AMOUNT OF NOTE.

August 4, 1982

The Honorable Johnny S. Joannou
Member, House of Delegates

This is in reply to your letter of July 12, 1982, requesting an Opinion whether a lender under § 6.1-330.16(E) of the Code of Virginia is allowed to avoid giving a rebate of unearned interest to a borrower who anticipates payment of his debt pursuant to §§ 6.1-330.31 and 6.1-330.32 because the loan is made for more than ten years and two months.

Section 6.1-330.31 provides in pertinent part:

"Any borrower under any loan described in § 6.1-330.16 shall have the right to anticipate payment of his debt in whole or in part at any time and in cases where the interest has been added to the face amount of the note shall receive a rebate by way of credit for any unearned interest, which rebate shall be computed in accordance with the Rule of 78 as illustrated in § 6.1-330.32."

Section 6.1-330.16(E) provides in pertinent part:

"Any loan secured by a subordinate mortgage or deed of trust on such residential real estate with an initial maturity in excess of ten years and two months may be lawfully enforced at the interest rate stated therein on the principal amount of the loan forborne or contracted to be lent or forborne. Notwithstanding the foregoing, a service charge not exceeding two per centum of the amount of the loan may also be imposed."

A loan made pursuant to § 16.1-330.16(E) may lawfully carry any interest rate stated therein. If the interest rate is an add-on rate, you ask if it can be designated as a prepaid finance charge and therefore not be subject to the required rebate of unearned interest to the borrower should he pay off his loan early.

In each of the above sections, the term "interest" is used. In § 6.1-330.31, a rebate of "interest" that has been added to the face amount of the note is mandated; and in § 6.1-330.16(E), a certain type of loan may be lawfully enforced at the "interest rate" stated therein. "Interest" is defined as "the compensation allowed by law or fixed by the parties for the use or forebearance or detention of money." Black's Law Dictionary 729 (5th ed. 1979). "Finance charge" is defined as "[t]he consideration for [the] privilege of deferring payment of [the] purchase price." Black's Law Dictionary, supra, at 568. Calling an "add-on interest rate" a "finance charge" does not necessarily make
it so. If the amount is compensation for the use, forebearance or detention of money rather than consideration for the privilege of deferring payment of the purchase price, and if it is calculated and charged to the borrower in the manner provided in § 6.1-330.12, it is interest chargeable in advance and is, therefore, subject to the rebate provision of § 6.1-330.31.

Accordingly, I am of the opinion that pursuant to §§ 6.1-330.31 and 6.1-330.32 a lender under § 6.1-330.16(E) must make a rebate of unearned interest if the borrower prepays the loan in whole or in part where the interest has been added to the face amount of the note.

1"Add-on interest" is a commonly used term to describe interest "charged in advance." It means, when applied to installment loans, that the interest may be added to the principal amount of the note but may not be deducted from it. See § 6.1-330.12.

2Please note that certain lenders enumerated in § 6.1-330.25 are excluded from § 6.1-330.31.

**BANKRUPTCY. FILING PETITION IN BANKRUPTCY MEANS AUTOMATIC STAY OF EVICTIONS AND SHERIFF’S SALES.**

April 8, 1983

The Honorable M. Wayne Huggins
Sheriff of Fairfax County

In your recent letter and telephone discussions, you have inquired as to your responsibilities in conducting an eviction or a sale after being informed by a debtor or his attorney that the debtor has filed a petition in bankruptcy. In order to reply to your inquiry it is first necessary to examine the pertinent provisions of the Bankruptcy Code and related cases.

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides that the filing of a petition in bankruptcy imposes a broad stay of litigation, lien enforcement, and other actions to collect a debt of the debtor. Section 362(b) lists certain actions which are exempted from the automatic stay provisions of § 362 and, with respect to those actions, the issuance of any stay would have to be by order of the Bankruptcy Court. Violations of the stay, whether automatic or by court order, may be punished by contempt proceedings. In Re Tallyn, Bank.L.Rep., ¶ 65617 (E.D.Va. 1975).

Upon the filing of the bankruptcy petition, notice of the filing is sent to the creditors by the court. No provision is made for notifying courts in which a proceeding to collect debts is pending. It is appropriate for the debtor to file a motion for a stay in the court proceeding to
collect the debt to inform the court of the pendency of the bankruptcy. Scott, Bankruptcy § 2117.1 (Michie Co., 1982). Creditors seeking relief from the automatic stay must petition the Bankruptcy Court.


However, even though violations of the automatic stay may occur in circumstances which do not result in a contempt proceeding against you or the creditor, it is desirable that the stay be observed in circumstances where the fact of its existence is communicated to you. I am unaware, however, of any case which has addressed this issue in definitive fashion.

It is my opinion that, where the action is one for the collection of debt and you have reliable information that a petition has been filed, the stay should be observed. Pursuant to § 15.1-80 of the Code of Virginia, you can note the existence of the bankruptcy proceeding on your return and the creditor can protect his rights by seeking relief from the appropriate court. See Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933).

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

February 28, 1983

The Honorable Charles R. Watson
Commonwealth's Attorney for Chesterfield County

You have asked my opinion concerning the status of a softball club ("the club") which has been operating bingo games on a regular basis in Chesterfield County.

You first ask whether the club qualifies as an appropriate organization for such operation under § 18.2-340.1 of the Code of Virginia. You state in your letter that this particular organization's "purpose...[is] to finance and operate a girl's softball team in local and
national competition," and that you do not think it qualifies under § 18.2-340.1.

Based on the documents you have provided, the club apparently claims to come under the provision in § 18.2-340.1, defining organizations operated "exclusively for... community...purposes..." While there is some indication that the club does occasionally donate bingo proceeds to community service activities, it appears from the documents provided that the club does function essentially as a private organization for the benefit of its team members by paying the costs of providing equipment, paying entry fees and travel expenses. If this is the principal purpose of the organization, then I am constrained to conclude that it is not operated exclusively for community purposes as that term is used in § 18.2-340.1. The phrase "exclusively for...community...purposes..." denotes a broader civic endeavor or enterprise. Any other construction would permit any sports club or other type of association to finance its activities by claiming to be operated for "community" purposes.

You next ask whether the use of the club's bingo proceeds is in compliance with § 18.2-340.9(A). The statute provides that, excluding reasonable and proper operating costs and prizes, no part of the gross receipts may be used for any purpose other than those lawful religious, charitable, community or educational purposes for which the organization is specifically organized.2

From the information provided, it appears that the club uses a large portion of its net bingo proceeds to cover the cost of playing in tournaments and to purchase team equipment. If its purpose is to operate a girl's softball team, and, if the locality approving its application for a bingo permit properly found this to constitute a community purpose, I must then answer your question in the affirmative. However, as stated in response to your first question, the documents enclosed fail to support a conclusion that the club is operated exclusively for community purposes as contemplated in § 18.2-340.1.

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1Section 18.2-340.1 provides, in part: "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."

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 (i) those lawful religious,
charitable, community or educational purposes...."

BOARDS OF SUPERVISORS. APPROPRIATIONS. CHARITIES. UNDER
§ 15.1-24, COUNTY, CITY OR TOWN MAY APPROPRIATE FUNDS TO
CHARITABLE ORGANIZATIONS LOCATED IN THEIR GEOGRAPHICAL
BOUNDARIES PROVIDED ORGANIZATION IS NOT CONTROLLED BY CHURCH
OR SECTARIAN SOCIETY.

July 1, 1982

The Honorable A. Dow Owens
County Attorney for Pulaski County

You have inquired if the Board of Supervisors of Pulaski
County may legally appropriate public funds for operation
expenses of the Fine Arts Center for the New River Valley,
Inc., a corporation formed pursuant to Ch. 2, Title 13.1, of
the Code of Virginia.

The amended articles of incorporation of the
organization establishes it "exclusively for charitable,
religious, educational, and scientific purposes." You
further stated that the organization has received tax exempt
status from the Internal Revenue Service under § 501(C)(3) of
the I.R.S. Code. You also indicate that, in your opinion,
the corporation functions for charitable and non-profit
recreational purposes.

Section 15.1-24 authorizes a county, city or town to
appropriate funds to charitable organizations. According to
the facts as you have stated them, the organization in
question appears to be a corporation organized for charitable
and non-profitable related purposes within the contemplation

Sections 15.1-24 and 15.1-25 prohibit the appropriation
of funds to an organization that is controlled by any church
or sectarian society. As stated in the articles of
incorporation, the organization in question does have some
religious purposes. Assuming, however, that the religious
purpose of the society is merely incidental to its charitable
and other purposes, and in no way is the society related to,
controlled by, or the benefactor of any church or sectarian
organization, then the mere reference to it in the articles
would not preclude the organization from being funded under

Accordingly, based upon the foregoing description of the
corporation, I am of the opinion that the Board of
Supervisors of Pulaski County may appropriate funds to the Fine Arts Center of the New River Valley.

1Section 15.1-25 authorizes the government body to make donations to nonprofit recreational organizations.

2Section 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...." See, generally, Reports of the Attorney General 1976-1977 at 22; 1974-1975 at 52, 105.

3See, generally, City of Richmond v. United Givers Fund, 205 Va. 432, 137 S.E.2d 876 (1964).

November 24, 1982

The Honorable Edna D. Barber
Commonwealth's Attorney for the County of Northumberland

This is in reply to your letter pertaining to the validity of a lease wherein the Board of Supervisors of Northumberland County leased property to a local church, which property had been a county school declared surplus by the school board. The lease, for an unspecified term, extends from February 1, 1982, until terminated by either party.

You specifically ask

"(1) Does this lease amount to an appropriation of county property to a church in violation of Section 15.1-24 of the Code of Virginia?

(2) Does Section 15.1-24 forbid a county from allowing a church exclusive use of County property under any terms?"

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."
The lease in question is for the lease of county property to the church for the recited purpose of "providing to the lessee a facility to be used primarily for church activities." No consideration is recited and the lease term is not fixed. In my opinion, a county's assignment of an interest in its real property to another for an indefinite period and for no, or a nominal, consideration is tantamount to a gift and therefore would be governed either by § 15.1-24 or by § 15.1-25. Inasmuch as the county's authority under those statutes is limited by the proviso that the donee of the property not be controlled in whole or in part by a church or sectarian society, manifestly the county is not therein authorized to assign its property directly to a church for church use, as contemplated by the lease.

In answer to your second question, it is to be noted that § 15.1-24 by its terms authorizes appropriations to charitable institutions or associations. It neither authorizes nor prohibits appropriations to churches, nor does it speak at all to church or other private use of county property. Whether church use of public property is permissible is to be determined by application of constitutional principles to the facts of a given arrangement. Article IV, § 16, of the Constitution of Virginia (1971) prohibits the county from conferring peculiar privileges or advantages on any sect or denomination, and compliance therewith is judged on essentially the same criteria as are applied under the Establishment Clause of the First Amendment to the federal Constitution, that is, whether the arrangement has a secular purpose, whether its primary effect advances or inhibits religion, and the degree of governmental entanglement with religion which results. See 1979-1980 Report of the Attorney General at 107. These principles, as applied to particular statutes or arrangements, are discussed exhaustively in prior Opinions of this Office. See, e.g., Reports of the Attorney General 1977-1978 at 369; 1974-1975 at 353; 1973-1974 at 179.

In the context of your question, I am of the opinion that an arrangement in which a church is granted exclusive use of county property for church activities cannot be said to have a secular purpose and places the county in a position of providing aid to religion. Under such circumstances it is constitutionally infirm.4

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1I presume the title to the property is, in fact, vested in the county and not the school board.
2Compare § 15.1-259 (renting vacant rooms in county courthouse for office purposes, etc.); § 15.1-260 (leasing or other use of certain county buildings upon approval by circuit court); § 15.1-261 (leasing county land for swimming pool purposes); § 15.1-261.1 (leasing unused county land for any lawful purpose, after public hearing). Section 15.1-262 confers upon a county the power to sell or exchange and
convey its real property, upon public hearing. Prior
Opinions of this Office hold that this section empowers a
county to lease its real property. See, e.g., Reports of the
at 70.

3Article IV, § 16 reads as follows: "The General Assembly
shall not make any appropriation of public funds, personal
property, or real estate to any church or sectarian society,
or any association or institution of any kind whatever which
is entirely or partly, directly or indirectly, controlled by
any church or sectarian society. Nor shall the General
Assembly make any like appropriation to any charitable
institution which is not owned or controlled by the
Commonwealth; the General Assembly may, however, make
appropriations to nonsectarian institutions for the reform of
youthful criminals and may also authorize counties, cities,
or towns to make such appropriations to any charitable
institution or association."

4Compare 1974-1975 Report of the Attorney General at 95
(governmental agency permission for church to use its bus on
Sundays fails primary effect test and is an aid to religious
activities).

BOARDS OF SUPERVISORS. COMPENSATION. ACTION OF BOARD IN
RAISING MEMBER SALARIES TO STATUTORY MAXIMUM IS VALID.
SALARY INCREASE CANNOT APPLY TO INCUMBENT BOARD MEMBERS.

January 25, 1983

The Honorable C. Richard Cranwell
Member, House of Delegates

This is in reply to your recent letter requesting my
opinion whether a pay raise for board members adopted by the
Board of Supervisors of Roanoke County in June 1982, is valid
under current law. You submit for consideration a memorandum
of the county attorney to the county board, which discusses
the board's action in light of § 14.1-46.01 of the Code of
Virginia, and from which it appears that the board adopted a
budget in June containing appropriations for board salaries
in amounts of $4,800 for each member. It appears also that,
_prior to that action, board members salaries were set at less
than $4,800 each.

In an Opinion to the Honorable James E. Buchholtz,
County Attorney for Roanoke County, dated January 11, 1983, I
pointed out that § 14.1-46.01, as did its predecessors,
clearly gives the board of supervisors the discretion to set
the annual salary of each board member, subject only to the
limitations that (a) the compensation allowed must stay
within the established maximum and (b) no increase in the
salary of a member shall take effect during the incumbent's
term in office. Formerly, the General Assembly, by statute,
set the maximum limit within which member salaries could be
set in each county, whereas hereafter each county board will
determine that maximum for itself at certain intervals, in
the manner provided in the present first paragraph of § 14.1-46.01.

Until the board is able to determine a new maximum compensation limit in the manner and at the time authorized in the first paragraph of § 14.1-46.01, the maximum set by statute as of July 1, 1981, remains in effect. The limit for Roanoke County is listed as $4,800 annually. As noted above, the board may set a member's actual salary at any figure within the limit authorized at any time, subject to the limitations hereinafter discussed.

Although the board's action in June 1982 did fix the salaries at the maximum allowed by § 14.1-46.01, it should be noted that the authorized salary increase cannot take effect for any of the current board members during his or her present term in office.

The last paragraph of § 14.1-46.01 specifically provides that no increase shall take effect for an incumbent member during his term, except for those boards whose supervisors are "elected for staggered terms annually" (emphasis added) and except as to "corrections to the above listed compensation." See § 14.1-46.01, quoted in part in footnote 1, supra. Roanoke County elects it supervisors to staggered terms biennially pursuant to § 24.1-88(b) and, thus, does not come within the terms of the exception.

The words "nor to corrections to the above listed compensation" were added to the last paragraph of § 14.1-46.01 in the 1980 amendments and must be taken to refer to the maximum annual compensation figures listed for the counties in § 14.1-46.01 at that time, which remain in effect for each county until its board acts in accordance with the new first paragraph of the section. See discussion above. Because the amounts listed are part of the statute itself, "corrections" to them can only refer to actions taken by the General Assembly and not to any actions which might be taken by local boards of supervisors.

To summarize, the board had authority in 1982 to fix salaries of the board at $4,800, provided the increase is applied only to members who commence new terms thereafter.
become effective as of January 1 of the next year. These procedures shall not be applicable to a county to which Article 3 (§ 15.1-674 et seq.) of Chapter 14 of Title 15.1 applies.

Until the board is able to set a maximum compensation as provided above, the maximum compensations for the several counties shall be as authorized on July 1, 1981.

No increase in the salary of a member of the board of supervisors shall take effect during the incumbent supervisor's term in office; provided, however, this restriction shall not apply to boards of supervisors when the supervisors are elected for staggered terms annually nor to corrections to the above listed compensation.

3 See, e.g., Ch. 450, fn. 2, supra, which increased the statutorily listed maximum compensation amounts for a number of counties.
4 The proscription against an increase taking effect for the incumbent member during his term would apply also to any person who may be elected to fill an unexpired term.

BOARDS OF SUPERVISORS. COMPENSATION. CH. 623, ACTS OF ASSEMBLY OF 1981, DOES NOT OVERRIDE GENERAL AUTHORITY GIVEN LANCASTER COUNTY BOARD TO DETERMINE MAXIMUM ANNUAL COMPENSATION OF MEMBERS UNDER § 14.1-46.01, SUBSEQUENT TO JULY 1, 1981.

January 21, 1983

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

This is in reply to your letter of this date in which you state that the Board of Supervisors of Lancaster County desires to fix higher salaries for its members, pursuant to § 14.1-46.01 of the Code of Virginia, to take effect after the next general election to be held in November 1983. You request my opinion as follows:

"The 1981 Acts of Assembly, c.623, cl. 2 provides what appears to be a monetary limitation on Lancaster County in the amount of $4,400. I shall be grateful if you will give me your opinion as to whether or not the foregoing limitation[s] overrides the general authority contained in Section 14.1-46.01 mentioned above."

Chapter 623, Acts of Assembly of 1981, rewrote the first paragraph of § 14.1-46.01 by deleting a list which specified the maximum annual compensation to be allowed each county board member of each county in the Commonwealth and substituting therefor authority for the board to determine that maximum for itself in each instance at certain intervals after the effective date of the act.1 Clause 1 of Ch. 623 also provides that "[u]ntil the board is able to set a maximum compensation as provided above, the maximum
compensations for the several counties shall be as authorized on the effective date of this act." The effect of this provision is that the maximum compensation amounts listed in the first paragraph of § 14.1-46.01, although amended out of the statute, nevertheless remain in effect for each county until January 1 of the year following that in which the county board determines a new maximum compensation limit in the manner provided in the present first paragraph. See fn. 1, supra.

Clause 2 of Ch. 623 reads as follows:

"That for the purposes of this act, the maximum annual compensation to be allowed each member of the board of supervisors of the counties of Caroline and Lancaster on the effective date of this act shall be one thousand eight hundred dollars and four thousand four hundred dollars, respectively."

In my opinion the effect of clause 2, as it relates to Lancaster County, is to raise the maximum annual compensation figure listed for that county in the former first paragraph of § 14.1-46.01 from $2,400 to $4,400. It does not override the general authority given to the Board of Supervisors of Lancaster County in the new first paragraph of § 14.1-46.01 to determine the maximum annual compensation of its members hereafter. Rather, it provides that the maximum figure shall be $4,400 from the effective date of the act, July 1, 1981, until January 1 of the year following that in which the board determines a new maximum annual compensation limit in the manner provided in that new first paragraph.

1 The first paragraph of § 14.1-46.01 now reads as follows: "The annual compensation to be allowed each member of the board of supervisors of a county shall be determined by the board of supervisors of such county but such compensation shall be not more than a maximum determined in the following manner. Prior to July 1 of the year in which members of the board of supervisors are to be elected or, if the board is elected for staggered terms, of the year in which at least one-half of the members of the board are to be elected, the current board, by a recorded vote of a majority present, shall set a maximum annual compensation which will become effective as of January one of the next year. These procedures shall not be applicable to a county to which Article 3 (§ 15.1-674 et seq.) of Chapter 14 of Title 15.1 applies."

BOARDS OF SUPERVISORS. COMPENSATION. CURRENT COUNTY BOARD OF SUPERVISORS MAY ESTABLISH MAXIMUM ANNUAL COMPENSATION LIMIT AND SET STAGGERED SALARY INCREASES WITHIN MAXIMUM FOR FUTURE BOARD MEMBERS.
February 8, 1983

The Honorable James P. Downey
County Attorney for Fauquier County

This is in reply to your recent letter requesting my opinion on the following question:

"Could the Board of Supervisors of Fauquier County adopt an ordinance prior to July 1 of the current year, in which elections will be held for all Board members in November, setting salaries at $2,500, effective January 1, 1984, and at $4,500, effective January 1, 1986? The salaries of Board members presently are $1,200 per year." (Emphasis added.)

You refer to § 14.1-46.01 of the Code of Virginia which provides, in pertinent part, as follows:

"The annual compensation to be allowed each member of the board of supervisors of a county shall be determined by the board of supervisors of such county but such compensation shall be not more than a maximum determined in the following manner. Prior to July 1 of the year in which members of the board of supervisors are to be elected or, if the board is elected for staggered terms, of the year in which at least one-half of the members of the board are to be elected, the current board, by a recorded vote of a majority present, shall set a maximum annual compensation which will become effective as of January 1 of the next year.***

Until the board is able to set a maximum compensation as provided above, the maximum compensations for the several counties shall be as authorized on July 1, 1981.***

No increase in the salary of a member of the board of supervisors shall take effect during the incumbent supervisor's term in office; provided, however, this restriction shall not apply to boards of supervisors when the supervisors are elected for staggered terms annually nor to corrections to the above listed compensation." (Emphasis added.)

The setting of salaries for board members is to be distinguished from the board's determination of the maximum allowable compensation within which those salaries may be set. As did its predecessors, the statute clearly gives the board of supervisors the discretion to set the annual salary of each board member, subject to the limitations that (a) the compensation allowed must stay within the established maximum compensation limit, and (b) no increase in the salary of a member of the board shall take effect during the incumbent supervisor's term in office. Formerly, however, the General Assembly established the maximum within which a board member's salary could be set in each county, whereas the statute now provides that each county board will determine
its maximum for itself. See Opinion to the Honorable James E. Buchholtz, County Attorney for Roanoke County, dated January 11, 1983.

Because members of the Fauquier County Board of Supervisors are to be elected this year, prior to July 1 the current board may determine the maximum annual compensation limit applicable to subsequent board members to be, as you suggest, $4,500, effective from January 1, 1984, until a new maximum is determined four years hence. Contemporaneously with or after that maximum has been determined, the current board may set members' salary within the maximum with increases to become effective in the staggered fashion you suggest. Those increases would be applicable only to the members commencing new terms on or after January 1, 1984.

Accordingly, your question is answered in the affirmative.

1The "current board" means those members currently serving, not those members serving at the time the increases occur.

2Note, that, until the board determines a new maximum compensation as provided, the maximum authorized by statute on July 1, 1981, prevails, and, in this case, no salary increases would be possible, because Fauquier County presently is at its maximum.

BOARDS OF SUPERVISORS. COMPENSATION. MAY DETERMINE MAXIMUM COMPENSATION FOR MEMBERS EVERY FOUR YEARS AFTER JULY 1, 1981, IN YEARS WHEN MAJORITY OF BOARD IS REGULARLY SCHEDULED TO BE ELECTED. MAY SET MEMBER SALARIES AT ANY TIME WITHIN MAXIMUM LIMIT. NO SALARY INCREASE MAY TAKE EFFECT DURING INCUMBENT'S TERM IN OFFICE.

January 11, 1983

The Honorable James E. Buchholtz
County Attorney for Roanoke County

This is in reply to your request for my interpretation of § 14.1-46.01 of the Code of Virginia, which relates to the annual compensation to be allowed members of county boards of supervisors. You note that Roanoke County board members are elected for staggered terms, with three of five board seats to be filled in the election of November 1983. You ask the following questions:

1) What the earliest possible effective date would be of any raise which the board may determine to grant its members?

2) Whether the effective date, above, would differ if one of the persons elected is being elected to fill an unexpired term, thereby creating a situation in which a majority of the board will, in fact, be elected?
3) Whether the intent of the statute is that supervisors' salaries may be increased only every four years?

Section 14.1-46.01 provides, in pertinent part, as follows:

"The annual compensation to be allowed each member of the board of supervisors of a county shall be determined by the board of supervisors of such county but such compensation shall not be more than a maximum determined in the following manner. Prior to July 1 of the year in which members of the board of supervisors are to be elected or, if the board is elected for staggered terms, of the year in which at least one-half of the members of the board are to be elected, the current board, by a recorded vote of a majority present, shall set a maximum annual compensation which will become effective as of January 1 of the next year...Until the board is able to set a maximum compensation as provided above, the maximum compensations for the several counties shall be as authorized on July 1, 1981.

No increase in the salary of a member of the board of supervisors shall take effect during the incumbent supervisor's term in office; provided, however, this restriction shall not apply to boards of supervisors when the supervisors are elected for staggered terms annually nor to corrections to the above listed compensation." (Emphasis added.)

The statute clearly gives the board of supervisors the discretion to set the annual salary of each board member, within the limitations specified, and in that regard it does not differ materially in its language (emphasized above) from that of its predecessor statutes. Compare § 14.1-46.01 prior to the 1981 amendments and repealed § 14.1-46 ("The annual compensation to be allowed each member of the board of supervisors of each county shall be determined by the board....") The major difference in the present statute from its predecessors is the specified manner in which the maximum compensation limit is set. Formerly, the maximum to be allowed in each county was set by the General Assembly in the statute itself. Now, at specified intervals after July 1, 1981, each county board of supervisors will determine the maximum compensation limit within which it may set the salary for each of its members. The limitations on setting a member's salary are the same as before: the compensation allowed must stay within the established maximum, and no increase in the salary of a member of the board of supervisors shall take effect during the incumbent supervisor's term in office.

In answer to the first question, the earliest date upon which a salary raise could take effect for any board member is that day immediately following the end of his or her present term in office. Assuming three of the terms expire in 1983, the earliest date upon which a new maximum
compensation limit, as determined by the board of supervisors, could become effective would be January 1, 1984. Until that date, any salary increases adopted by the board must not place a member's compensation at a greater amount than the statutory maximum compensation authorized for the county on July 1, 1981.

Your second question is answered in the affirmative. A person elected to fill a vacancy stands in the shoes of the person whose term is unexpired. Section 14.1-46.01 states that the board shall set a maximum compensation "[p]rior to July 1 of the year in which members of the board of supervisors are to be elected or, if the board is elected for staggered terms, of the year in which at least one-half of the members of the board are to be elected..." (Emphasis added.) In my opinion, the "year" referred to means the regularly recurring year in which all or a majority of a county's supervisors are scheduled for election pursuant to § 24.1-88, which may be determined ahead of time in each instance. It is not meant to include a year in which, due to unforeseen circumstances, a special election must be held to fill a vacancy on the board, thereby fortuitously making that year one in which a majority of members are elected. Thus, in answer to the second question, the date given in question number one would differ if 1983 is not a year in which, by law, a majority of the supervisors ordinarily is to be elected, even though a majority in fact is elected because a special election also is held to fill a vacancy in office.

Question number three is answered in the affirmative. It is my opinion that, by the terms of § 14.1-46.01, read in conjunction with § 24.1-88, boards of supervisors are authorized to redetermine the maximum annual compensation allowable to each of its members, once every four years. Of course, no such increase can take effect during the incumbent member's term of office. See discussion of question number one, above.

You also ask me to confirm your conclusion that the board may set the chairman's salary "at any time and at any figure" and that the board has equally wide discretion in granting fringe benefits to board members. The relevant portions of § 14.1-46.01 state as follows:

"Any board of supervisors may fix a higher salary for the chairman, or the vice chairman, or both, than for the other members of the board without respect to the limits herein set forth.

***

In addition to the salary maximums, members of each governing body may receive the same fringe benefits which are given to county employees generally, and all prior grants of such benefits are validated."

The first statement quoted specifically grants authority to the board to set the chairman's and vice chairman's salaries at figures different from that set for other board
members, without limit as to the amounts. However, as with other board members, an increase in the chairman's salary cannot take effect during the incumbent supervisor's term in office. See § 14.1-46.01 and discussion of question one, above.

The second quoted statement, relating to granting of fringe benefits, states that such benefits are to be those "given to county employees generally." I am of the opinion that the board's discretion in granting its members fringe benefits is limited to the types, amounts and times of granting of the same to county employees.

1I assume you refer to biennial elections of supervisors to staggered four-year terms, as provided in § 24.1-88(b), and that, therefore, the proviso of the last paragraph of § 14.1-46.01, quoted herein, which would apply to those counties having optional forms of government under the provisions of §§ 15.1-669 through 15.1-695, does not apply here. See § 24.1-88(a).

2Section 24.1-88 provides that the term of office of a supervisor is four years. This definite period of time for which an official is elected is to be distinguished from "tenure" in office, which refers to the period of time that a particular official actually holds office and which may be more (or less) than one four-year term. See, e.g., 1976-1977 Report of the Attorney General at 159. Thus, a supervisor is to be considered "incumbent" for purposes here until the present term for which he was elected ends.

3A general election is an election held automatically on the first Tuesday of either May or November to fill offices regularly scheduled by law to be filled at those times; a special election is one specially called to fill a vacancy in office, and it may or may not be held on the same day as a general election. See § 24.1-1(5); 1981-1982 Report of the Attorney General at 84, 85. Words in a statute are to be given their ordinary meaning unless a contrary meaning is clearly intended. See, e.g., 1980-1981 Report of the Attorney General at 180; McCarron v. Commonwealth, 169 Va. 387, 394, 193 S.E. 509, 512 (1937). The word "the" is a definite article which refers to a particular object and it is not to be confused with the indefinite "a" or "any." See Black's Law Dictionary 1324 (5th ed. 1979); Webster's New World Dictionary 1473 (2d Coll. ed. 1974). By its use of the definite article in referring to "the year in which at least one-half of the members of the Board are to be elected" (emphasis added), that clause of § 14.1-46.01 must be taken to refer to those quadrennial years in which, pursuant to § 24.1-88(b), general elections are held to elect a majority of the supervisors in those counties whose supervisors are elected for staggered terms.

4The chairman and vice chairman are members of the board. See §§ 15.1-528.

The phrase "without respect to the limits herein set forth" refers to the monetary limits on maximum compensation
established pursuant to the first paragraph of § 14.1-46.01, and not to the general limitation contained in the last paragraph that no raise shall take effect during the incumbent supervisor's term in office, including the raise given the chairman. Compare the text of repealed § 14.1-46. This is consistent with Art. IV, § 5 of the Constitution of Virginia (1971), which provides that no salary increase shall take effect for a given member of the General Assembly until his term ends, and Art. IV, § 14(14) which provides that the General Assembly shall not enact any local, special or private law changing the compensation of public officers during the term for which the officers are elected or appointed. But, see, 1974-1975 Report of the Attorney General at 196.

BOARDS OF SUPERVISORS. TIE VOTE. BOARD MEMBER'S REFUSAL TO VOTE NOT TREATED AS NEGATIVE IN ORDER TO CREATE TIE.

August 11, 1982

The Honorable A. L. Philpott
Speaker, House of Delegates

This is in reply to your recent letter wherein you make several inquiries regarding Art. VII, § 7 of the Constitution of Virginia (1971), which requires a recorded affirmative vote of a majority of its elected members for a local governing body to pass an ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money.

Assuming a six-member board of supervisors and a tie breaker elected pursuant to § 15.1-535 of the Code of Virginia, you ask, first, whether the tie breaker may vote to break a three-to-three tie and create the majority affirmative vote required by Art. VII, § 7. In a prior Opinion, found in the 1974-1975 Report of the Attorney General at 35, this Office ruled that a tie breaker, either elected or appointed, who is considered a member of the board for the purpose of counting a quorum pursuant to § 15.1-540, is deemed to be an elected member of the governing body and may vote on matters requiring a majority vote under Art. VII, § 7. I concur in that ruling and, accordingly, answer your first inquiry in the affirmative.

You next ask whether the tie breaker would be entitled to vote in the event the six member board were to vote three "yes," two "no," with one member abstaining. Section 15.1-540 requires a tie vote of the recorded individual votes of the members of the board voting before the tie breaker procedure can be utilized. A tie exists "when the number of votes cast in favor of any measure, in a legislative or deliberative body, is equal to the number cast against it." Black's Law Dictionary 1329 (5th ed. 1979). One who abstains from voting refuses to cast any vote at all which can be
recorded as being for or against a measure. Although in a certain class of cases a refusal to vote is treated as an affirmative vote or a vote with the majority, I know of no instance in which it has been treated as a negative vote for the purpose of creating a tie under § 15.1-540. I am of the opinion that, under the circumstances you suggest, a tie will not have occurred and the tie breaker will not be entitled to vote.

Finally, you inquire whether the majority vote of the elected members prescribed in Art. VII, § 7, applies to the letting of a contract which would require a subsequent appropriation of more than five hundred dollars. Article VII, § 7, by its terms applies to ordinances and resolutions which appropriate money exceeding the sum of five hundred dollars, impose taxes, or authorize the borrowing of money. The answer to your question turns on whether or not the board's action in letting a contract in a given situation can be deemed an "appropriation" of a sum exceeding five hundred dollars.

An "appropriation" is an authority of a legislative body given to proper officers to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the government. See Black's Law Dictionary, supra, at 93. In the absence of a statute there is no set form of an appropriation resolution or ordinance, and the intent of the body, not the special language used, controls. See 15 McQuillen Municipal Corporations, §§ 39.66, 39.67 (3d ed.); accord Gordon v. Board of Supervisors of Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). This Office has held that Art. VII, § 7, requires, in effect, that any ordinance which will affect the financial condition of a county, city or town must be passed by a recorded affirmative vote of the majority of all members elected to the local governing body. See 1977-1978 Report of the Attorney General at 289, 290.

There may be board actions in approving contracts which are not appropriations in terms of affecting the financial condition of the county, as where they are preceded by a general or a special appropriation, or where the obligation is conditioned upon the happening of future events, including future appropriations. See, e.g., 1977-1978 Report of the Attorney General at 289, 291 and 1979-1980 Report of the Attorney General at 300. Although you indicate in your letter that the contract or contracts in question would require a subsequent appropriation of more than five hundred dollars, you do not indicate whether the contract obligations are to be made contingent upon the future appropriation. If the action of the board in letting a contract creates a fixed financial obligation against the county in a sum exceeding five hundred dollars, it must be considered an appropriation, and a recorded majority vote of the elected members is required to pass it. Whether or not the obligation is created at the time of the board's act in letting the
contract will depend upon the board's intent as expressed in its resolution or in the body of the contract, or both.

1The question of how to treat the vote of a local board when some of the members present abstain from voting has been considered by this Office a limited number of times. In construing predecessor statutes to § 15.1-540, prior Opinions subscribed to the general rule that, absent a statute or a Constitutional provision requiring a given measure to be passed by a certain vote, a refusal to vote is held to support the action of the majority actually voting. See, e.g., 1938-1939 Report of the Attorney General at 23 and 1950-1951 Report of the Attorney General at 29. See, also, 4 McQuillen Municipal Corporations, § 13.32 (3d ed.). It was pointed out that any other interpretation would allow a member, by refusing to vote, to prevent operation of the tie breaker provisions of the statute and thus to defeat the action of the majority voting, a result not contemplated by the legislature. See 1938-1939 Report of the Attorney General at 23. Where the law requires a given measure to be passed by a certain vote, such as that of a majority of the elected members, the vote specified must be obtained for passage. Smiley v. Commonwealth, 116 Va. 979, 83 S.E. 406 (1914). This Office has held that, in a situation of a tie vote with members abstaining, the refusals to vote are not to be considered as votes either way. See 1959-1960 Report of the Attorney General at 25.

BOARDS OF SUPERVISORS. TIE BREAKER. TERM OF OFFICE OF APPOINTED TIE BREAKER UNDER § 15.1-535 IS FOUR YEARS FROM TIME OF APPOINTMENT. NOT REQUIRED TO COINCIDE WITH TERM OF MEMBER OF BOARD OF SUPERVISORS.

June 2, 1983

The Honorable Russell O. Slayton, Jr.
County Attorney for Greensville County

This is in reply to your recent letter requesting my opinion on the following questions concerning tie breakers under § 15.1-535 of the Code of Virginia:

(1) Does Virginia law require that the term of office of a tie breaker appointed by the circuit court coincide with the term of a member of the governing body?

(2) What options are available to the board of supervisors regarding selection of a tie breaker?

(3) If the board of supervisors decides upon designation of a tie breaker by election, must this change be "precleared" by the U.S. Justice Department?
(4) If the board of supervisors continues to designate the tie breaker by appointment, whether by it or by the circuit court, can the term of office of the tie breaker be modified to coincide with the terms of office of the county supervisors?

An analysis of your inquiries must start with § 15.1-535 which provides in pertinent part as follows:

"The governing body of each county may designate a tie breaker, whose duty it shall be to cast the deciding vote in case of tie, as set forth in § 15.1-54). The designation of the tie breaker shall be, in the discretion of the governing body, by: (1) election by the voters of the county from the county at large; (2) appointment by the circuit court, or judge thereof in vacation, which shall be by order entered in the common-law order book; or (3) appointment by the governing body at its organizational meeting. In the event the governing body fails to decide on the method of designating a tie breaker or whether to have a tie breaker, a tie breaker shall be designated by the court as set forth above. Every tie breaker so appointed shall serve for a period of four years from the date of his appointment or election and every tie breaker so elected shall serve the same term as a member of the governing body." (Emphasis added.)

I will answer your questions seriatim:

1. The emphasized language of § 15.1-535 quoted above expressly states, without qualification, that an appointed tie breaker shall serve for four years from the date of his appointment. Nothing contained in the statute expressly or impliedly requires that his term of office coincide with the term of a member of the governing body. By way of contrast, such a requirement is expressly set out for an elected tie breaker in the very sentence which fixes the term of an appointed tie breaker at four years. Accordingly, I conclude that your first question should be answered in the negative.

2. The options available to the board of supervisors in selecting a tie breaker are those provided in § 15.1-535, which states that the governing body, in its discretion, may designate his selection by (1) election of the voters of the county; (2) appointment by circuit court; or (3) appointment by the board itself at its organizational meeting. It may also cause his selection by declining to act, in which case the circuit court would appoint him pursuant to § 15.1-535. The governing body may abolish the office altogether, but only by expressly deciding not to have a tie breaker. See 1975-1976 Report of the Attorney General at 30; 1974-1975 Report of the Attorney General at 61.1

administered by the Commonwealth of Virginia or any of its political subdivisions be first submitted to the United States Attorney General for his review and determination of the presence or lack of a discriminatory purpose or impact, as an alternative to obtaining a declaratory judgment to that effect from the United States District Court for the District of Columbia. The United States Supreme Court has declared that Congress intended the Voting Rights Act requirements to apply to virtually any alteration in laws affecting elections, however minor. See Allen v. State Bd. of Elections, 393 U.S. 544, 566-69 (1969). See, also, Dougherty County, Georgia, Bd. of Education v. White, 439 U.S. 32 (1978), (declaring that the Court consistently has given § 5 a very expansive construction); and 28 C.F.R. § 51.11 ("any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement"). In light of the foregoing, I am of the opinion that a decision by the county board of supervisors to designate selection of a tie breaker by election would be a change affecting voting which must be precleared by the United States Department of Justice.

4. In answer to your final question, § 15.1-535 expressly fixes the term of office of an appointed tie breaker at four years from the time of his appointment and does not confer any authority either upon the board of supervisors or the circuit court to modify that term. Compare 1975-1976 Report of the Attorney General, supra, at 31.

You suggest in your opinion that if the incumbent tie breaker were to resign his office effective January 1, 1984, when four year terms of the newly elected supervisors begin, a new tie breaker could be appointed to a four year term coinciding with that of each newly elected supervisor. I concur in your assessment. Section 15.1-535 makes provision for filling vacancies in the office of tie breaker which exist on or occur subsequently to July 1, 1974, and states that "[e]very appointment made pursuant to the provision of this section to fill a vacancy, whether occasioned by the expiration of a term or otherwise, shall be for a period of four years...." (Emphasis added.) Clearly, a vacancy may occur before a term expires as a result of a resignation or other circumstances, and the term of the appointed successor would be for four years from the time of his appointment, in accordance with the express words of the statute.

Note that the governing body must make its decision concerning the method of designating the tie breaker or to abolish the office at or before the expiration of the term of the incumbent tie breaker and may not terminate the term.
before four years have been served. See 1975-1976 Report of
the Attorney General, supra.

BONDS. MUNICIPAL COUPON BOND. NO PAYMENT REQUIRED FROM
LOCALITY WHERE APPLICABLE STATUTORY PERIOD HAS RUN.

March 7, 1983

The Honorable Lewis W. Parker, Jr.
Member, House of Delegates

You have asked for my opinion as to the validity of a
five hundred dollar coupon bond which, on its face, appears
to have been issued by the Town of Chase City. You have
enclosed a copy of this bond which indicates the Mayor of
Chase City signed the bond in 1902 bearing a maturity date of
1922. You state further that the bond was recently presented
to the town for payment by an individual who found it in an
old desk he had purchased.

The bond appears to be one of a series of eight coupon
bonds issued pursuant to an order of the Town Council of
Chase City, entered in conformity with an act of the General
Assembly, Ch. 15, Acts of Assembly of 1901, Extra Session at
13. It is settled that such municipal coupon bonds are
negotiable instruments subject to the applicable statute of
limitations. Davis v. Davis, 104 Va. 65, 51 S.E. 216 (1905);
Supervisors of Cumberland County v. Randolph, 89 Va. 614,
16 S.E. 722 (1893); 2 Dillon Commentaries on the Law of
Municipal Corporations § 879 (5th ed. 1911); 15 McQuillan
Municipal Corporations § 43.157 (Rev. ed. 1970). The statute
of limitations for the subject bond is the five-year period
for written contracts not under seal.1 The bond in question
was due and payable September 1, 1922. Assuming it was not
paid, the cause of action accrued on the day after maturity,
September 2, 1922.2 Accordingly, the time for bringing any
claim of nonpayment on this bond lapsed in 1927.

It is also a well established rule of common law that a
bond is presumed to have been paid after the lapse of twenty
years from its maturity. Tunstall v. Withers, 86 Va. 892, 11
S.E. 565 (1890); Norvell v. Little, 79 Va. 141 (1884). While
this rule can be rebutted by evidence to the contrary, I see
no indications that any facts exist in the situation
presented to rebut this rule. Accordingly, more than twenty
years having passed since the 1922 maturity date of the bond,
I conclude the rule would apply.

Based on the foregoing, I am of the opinion that the
Town of Chase City may properly refuse to make payment on the
subject bond.

1See §§ 2920 (Code of 1887), 5810 (Code of 1919) and 8-13
(Code of 1950), predecessors to § 8.01-246(2) of the Code of
Virginia. The closing of the bond states that the town seal is affixed to the bond. No seal is so affixed. However, even if the ten year limitation period for instruments under seal applicable to causes of action arising prior to October 1, 1977, were deemed to apply, the result would be no different because more than ten years have elapsed.

See Quackenbush v. Isley, 154 Va. 407, 153 S.E. 818 (1930). This case involved the applicability of the five year statute of limitations period to a corporate bond due on April 4, 1904. The Court stated that the cause of action accrued when the note was not paid at maturity. After the passage of five years, in 1909, the Court held the bar of the statute of limitations applied and no suit to recover on the bond could be maintained. See, also, § 8.3-122(1)(a).

CHARTERS. CONFLICT BETWEEN TOWN CHARTER AND § 24.1-90. CHARTER PREVAILS OVER CODE REGARDING DATE TOWN COUNCILMEN TAKE OFFICE.

July 27, 1982

The Honorable William A. Beeton, Jr.
Member, House of Delegates

In your letter of July 14, 1982, you asked two questions concerning the conflict between provisions of the Charter of the Town of Altavista and provisions of Title 24.1 of the Code of Virginia governing elections generally. Your third question concerns whether the town, in the event that it proposes a charter change to resolve the conflict, must obtain preclearance from the Attorney General of the United States under the Voting Rights Act before submitting the proposed charter change to the General Assembly.

Section 7 of the Charter of the Town of Altavista, which was enacted as Ch. 419, Acts of Assembly of 1936, provides that councilmanic elections will be held in June and that terms of office for those elected in June shall commence on the first day of September following their election. The charter provides that the terms of council members shall be four years. The conflict results from § 24.1-90 which provides that, "[n]otwithstanding any other provision of law..." any election of councilmen of a town whose charter provides for such elections at two or four year intervals shall occur on the first Tuesday in May. That section further provides that, "[u]nless otherwise provided by charter..." those elected will assume office on July 1.

In light of the above referenced provisions of the charter and the Code of Virginia, you ask, first, the date on which the town must conduct its councilmanic elections and, second, the date on which those elected must take office.

The language in § 24.1-90, "notwithstanding any other provision of law," indicates a clear desire and intent by the General Assembly to override any charter provisions providing
for councilmanic elections on dates other than the first Tuesday in May. The purpose of this provision is to provide for uniformity in elections and to avoid confusion which might result if towns and cities were permitted to conduct elections throughout the year for purposes of electing council members. Accordingly, with respect to your first question, I am of the opinion that the Town of Altavista must conduct its councilmanic elections on the first Tuesday in May as required by § 24.1-90.

Unlike that portion of § 24.1-90 which pertains to the date of holding councilmanic elections, however, the fourth sentence of § 24.1-90, which pertains to the date on which those elected must take office, contains the language "unless otherwise provided by charter." This indicates, with respect to the date on which the newly elected members must take office, that the General Assembly will permit flexibility and charter provisions will control. Therefore, in response to your second question, I am of the opinion that those elected to the town council must take office on September 1 as provided by charter and as authorized by § 24.1-90.

Turning to your last question, a recommendation or request by the town council that the General Assembly amend that portion of the charter pertaining to the date when a term begins is not a change which affects voting. Accordingly, in my opinion, such action of the town council does not have to be submitted to the Attorney General before it is submitted to the General Assembly. In the event, however, that the General Assembly subsequently enacts a bill making the requested amendment to the charter, the bill would constitute such a change and would have to be submitted to the Attorney General for preclearance under the Voting Rights Act. In the first situation, the council action is merely precatory and cannot, by itself, effect a change, while, in the second situation, the General Assembly action will result in a change.

CHARTERS. PUBLIC OFFICERS. FILLING OF VACANCIES. STATUTES. CITY CHARTER PROVISION REQUIRING REMAINING CITY COUNCIL MEMBERS TO FILL INTERIM VACANCY ON COUNCIL IS CONTROLLING, DESPITE COUNCIL'S FAILURE TO ACT WITHIN TIME SPECIFIED, AND § 24.1-76 DOES NOT APPLY.

October 28, 1982

The Honorable Elliot S. Schewel
Member, Senate of Virginia

This is in reply to your request for my opinion concerning the procedure for filling a prospective vacancy on Lynchburg City Council in the event the remaining six members of the council were to tie in their votes to fill such a vacancy as it occurs. Under these circumstances, you ask whether the responsibility to appoint a member to council
falls upon the judges of circuit court pursuant to § 24.1-76 of the Code of Virginia.

The first paragraph of § 24.1-76 provides, in part, as follows:

"When a vacancy occurs in any county, city, town or district office and no other provision is made for filling the same, it shall be filled by a majority of the circuit judges of the judicial circuit for such county or city in which it occurs. If a majority of such judges cannot agree, then the senior judge shall make the appointment subject to the approval of other such judge or judges." (Emphasis added.)

Section 5 of Lynchburg's charter provides, in part, as follows, in subsection (f):

"Vacancies occurring in the membership of the council shall be filled by the council within thirty days for a term to expire when the qualified voters of the city at large or the ward in which the vacancy occurred, as the case may be, have elected a successor at the next ensuing general election for councilmen and the person so chosen has duly qualified. If the vacancy occurs in a ward, the successor so chosen shall be a registered voter of that ward. All vacancies filled by the council shall be by majority vote of the remaining members."

Because the above quoted section provides for the filling of a vacancy on city council, the first paragraph of § 24.1-76 does not apply. Moreover, a charter provision touching upon the appointment to and holding of public office is one for the organization and government of a city, and it prevails over general law. See, e.g., 1979-1980 Report of the Attorney General at 70; 1975-1976 Report of the Attorney General at 52.

The question for consideration, implied by your inquiry, is whether council's continuing failure to fill a vacancy in its membership, due to tie votes of the remaining members, ousts it from jurisdiction over the matter at the end of the thirty day period specified in the charter. If that were the case, the first paragraph of § 24.1-76 might be construed to apply, and circuit court would fill the vacancy.

Although § 5 of Lynchburg's charter states that vacancies on council "shall" be filled by the remaining members within thirty days, the provision should be construed as being directory rather than mandatory. Where a statute directs that a public act must be done within a certain time, without any negative words restraining the doing of the act afterwards in the manner prescribed, it will not be regarded as a limitation of authority. See, e.g., Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956); Ladd v. Lamb, 195 Va. 1031, 81 S.E.2d 756 (1954). The relevant portion of § 5 of Lynchburg's charter does not contain words of limitation or
other language providing an alternative means to fill vacancies if council fails to act within thirty days. Accordingly, I am of the opinion that, pursuant to § 5 of the charter, which is controlling, city council retains discretion to fill the interim vacancy in its membership until the position is filled by the electorate at the next ensuing general election for the office involved.

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1The charter is contained in Ch. 343, Acts of Assembly of 1928. Section 5 was amended to its present wording by Ch. 3, Acts of Assembly of 1976.

2Compare, e.g., charter language discussed in the Opinion contained in the 1971-1972 Report of the Attorney General at 202 ("[I]f the council shall fail to act in sixty days of the occurrence of the vacancy, the appointment shall be made by the Circuit Court...").

3Note that the electors fill the vacancy for the unexpired term of the office at the next general election for councilmen regardless of whether the charter or the statute controls, and the question presented deals only with the interim appointment. Compare §§ 5 and 18 of the charter and § 24.1-76. See 1980-1981 Report of the Attorney General at 40; 1979-1980 Report of the Attorney General at 70, supra. Note also, that this Opinion does not express a view on the right of interested parties to compel action by the council through appropriate court proceedings.

CHARTERS. TOWN HAS ONLY THOSE POWERS CONFERRED ON IT BY GENERAL LAW OR SPECIAL ACT OF GENERAL ASSEMBLY. TOWN'S CHARTER CREATED OFFICE OF TREASURER. CHARTER WAS SILENT AS TO OPERATION, CONDUCT OR ORGANIZATION OF OFFICE. NO CONSTITUTIONAL OR OTHER STATE LAW ADDRESSED THESE MATTERS. THEREFORE, UNDER § 15.1-845 AS INCORPORATED IN § 7 OF TOWN CHARTER, TOWN COUNCIL MAY PRESCRIBE ORGANIZATION, OPERATION, AND CONDUCT OF TOWN TREASURER'S OFFICE AS WELL AS POWERS, DUTIES AND FUNCTIONS THEREOF.

October 20, 1982

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

You have asked for clarification of the legal relationship between the Council and Treasurer of the Town of Colonial Beach, Virginia. In this regard you attached to your inquiry a recent letter from George Mason, III, Town Attorney for Colonial Beach. Through this Letter, you have presented for my consideration the following questions:

1. Does the town council have the power to hire the employees of the treasurer's office and to reassign the same to other areas of town administration when it sees fit?
2. Does the town council have the authority to provide specific direction to the Treasurer of the Town of Colonial Beach in the following areas:

   a. Establishing a system of accounts for revenue and expense and method of data entry to be followed by the treasurer, given that the system does not conflict with the Uniform Reporting Manual issued by the Virginia Auditor of Public Accounts.

   b. Defining the number of checking and savings accounts to be used in controlling finances of the town.

   c. Defining a schedule of deposits to be made by date and amount for the repaying of town debts.

   d. Establishing a system of purchase orders to be used as substantiation for approval of purchase of and payment for any items procured for town benefit.

   e. Establishing the requirements to be met prior to signing of any checks drawn on town accounts, the order of signature, i.e., treasurer who must verify that the required documents exist and then mayor as cosignor, and also to prescribe the appropriate time for preparation of checks, i.e., only after bills have been approved for payment and funds exist to allow issue of the check.

   f. Defining the format and contents of the treasurer's monthly report to town council.

   g. Requiring the treasurer to compensate the town for use of staff and facilities in collecting county taxes, for which he alone is compensated by the county.

   h. Requiring the treasurer to prepare a weekly document specifying his hours worked and for what purpose in order to justify expenditures against federal, State and county grants.

   i. Removing from the responsibility of the treasurer any duty which the town council has reason to believe is not being performed in the best financial interest of the town except the responsibility to refuse signature of any check which the treasurer considers illegally prepared or not supported by sufficient funds for issue.


This Office has previously observed that "[t]he Uniform Charters Powers Act, which is codified as Chap. 18 of
Title 15.1 [of the Code of Virginia (the "Act")], provides an integrated set of powers that may be conferred upon the council of a...[town] by charter granted by the General Assembly." 1978-1979 Report of the Attorney General at 33, 34. These powers are vested in the Town of Colonial Beach through § 7 of its charter which provides:

"The powers set forth in §§ 15-77.2 through 15-77.70 [recodified as §§ 15.1-838 to 15.1-907, Ch. 623, Acts of Assembly of 1962] of the Code of Virginia...are hereby conferred on and vested in the town of Colonial Beach."¹

Among the powers granted in the Act are those set forth in § 15.1-845. This section provides:

"A municipal corporation may provide for the organization, conduct and operation of all departments, offices, boards, commissions and agencies of the municipal corporation, subject to such limitations as may be imposed by its charter or otherwise by law. A municipal corporation may establish, consolidate, abolish or change departments, offices, boards, commissions and agencies of the municipal corporation and prescribe the powers, duties and functions thereof, except where such departments, offices, boards, commissions and agencies or the powers, duties and functions thereof are specifically established or prescribed by its charter or otherwise by law."²

In addition, § 15.1-838 specifies that these powers are to be exercised by the town's council.

In the instant case, the office of town treasurer is established in § 3(b) of the charter of the Town of Colonial Beach.³ No constitutional or charter provision or State law sets forth the organization, conduct, operation, powers, duties, or functions of that office.⁴

Based on the foregoing, I am of the opinion that, pursuant to § 15.1-845, the council of the Town of Colonial Beach may prescribe the organization, conduct and operation, as well as the powers, duties and functions of the office of town treasurer. Accordingly, the answer to all of your inquiries is in the affirmative.⁵

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¹Section 7, Ch. 261, Acts of Assembly of 1960. Amendments to the charter of the Town of Colonial Beach are found in Ch. 488, Acts of Assembly of 1970.
In reference to your first question concerning the town council's power to hire employees of the treasurer's office, see also, §§ 15.1-19.4 and 15.1-797. This first general law section provides that officers of governments for counties, cities and towns may employ deputies and assistants but only when duly authorized by the governing body. Only constitutional officers are excepted from this provision. The latter general law section grants the council of every city or town the power to appoint employees as the council deems proper, provided that, by charter, such council has the power to appoint certain municipal officers.

Insofar as your second question deals with records, accounts or systems of accounting, see also, § 15.1-844. This section authorizes a town council to prescribe and require departments of local government to adopt and keep such records, accounts or systems of accounting "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." "Department" has been defined as "an administrative division or branch of a...municipal government." Webster's Third New International Dictionary. Section 15.1-844 would, therefore, apply to the office of town treasurer, an administrative division of the town government.

CHILD ABUSE. STATUTORY DUTY OF SCHOOL OFFICIAL TO REPORT SUSPECTED CASE OF CHILD ABUSE.

May 16, 1983

The Honorable Jon C. Poulson
Commonwealth's Attorney for Accomack County

This is in reply to your inquiry in which you asked if § 63.1-248.3 of the Code of Virginia, which imposes an affirmative duty upon certain specified individuals to report suspected cases of child abuse or neglect to local departments of welfare/social services, would be violated in a hypothetical situation in which a school principal, the superintendent of the school system, and an employee supervisor in the school system are informed or become aware of a suspected case of sexual abuse and fail to make such a report. You also asked what the statute of limitations would be for bringing an action against an individual for failure to make the mandated report.

Section 63.1-248.3(A) requires a teacher who has reason to suspect that a child is abused or neglected to report that information directly to a local welfare/social services department or to notify the person in charge of the institution or department, or his designee, who shall then make the report. Section 63.1-248.3(B) provides that failure to make the required report can result in a fine of up to five hundred dollars. Your hypothetical fact situation assumes that the teacher becomes aware of a case of suspected sexual abuse of a child by an employee of the school system.
and reports the matter to the school principal. It further assumes that the principal then informs the employee's supervisor and the superintendent for the school system of the allegation. None of these individuals reports the matter to the local department of social services. Your first inquiry, therefore, is whether the school principal would have complied with the mandatory reporting requirements of § 63.1-248.3 by only informing the superintendent and the supervisor. Your second inquiry is whether the school superintendent and employee supervisor have a duty to report the matter to the local department of social services after being informed of the allegation by the school principal.

Section 63.1-248.3(A) provides the option to a teacher of reporting cases of suspected abuse or neglect directly to a local department of welfare/social services or to the person in charge of the institution or department, or his designee. If the latter procedure is followed, the person in charge of the institution or department, or his designee, then is required by the statute to make the suspected abuse or neglect report to the local department so that the proper investigation can be made. The statute makes no provision which would allow the person in charge of the institution to alternatively inform other individuals within the school system of the alleged abuse or neglect. I have reviewed the Department of Education's Superintendent's Memo No. 8069, dated November 5, 1976, which suggests that a school principal or his designee be given the responsibility to report these matters to the local department of welfare/social services. Adoption of this procedure is not mandatory. Whether or not the system has been established within the school in question, I believe that the principal would be the person "in charge of the institution" for purposes of making the mandated report and, under the facts posed in your inquiry, I am of the opinion that he did not comply with the requirements of § 63.1-248.3(A).

The superintendent and the employee's supervisor would have learned of the alleged abuse from the principal who had been given the information by a teacher. In view of my conclusion that the principal is the person in charge of the institution, I am of the opinion that the superintendent and employee supervisor would not be obligated to make an abuse report to the local department of welfare/social services pursuant to § 63.1-248.3(A).

Your last inquiry was what the statute of limitations would be to bring an action for failure to make a mandated report pursuant to § 63.1-248.3(A). It is clear that the fine set forth in § 63.1-248.3(B) is recoverable through criminal prosecution. See §§ 19.2-340 and 19.2-341. Therefore, the one-year statute of limitations provided by § 19.2-8 would be applicable.
Section 63.1-248.3 states in relevant part: "A. Any teacher or other person employed in a public school who has reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred. If the information is received by a teacher such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith.

B. Any person required to file a report pursuant to subsection A of this section who is found guilty of failure so to do shall be fined not more than five hundred dollars for the first failure and for any subsequent failures not less than one hundred dollars nor more than one thousand dollars." (Emphasis added.)

The Honorable Clive L. DuVal, 2d
Member, Senate of Virginia

June 16, 1983

This is in reply to your letter requesting my opinion whether the City of Falls Church can condemn land owned by a private cemetery association and devoted to cemetery use, for the purpose of straightening and widening a dangerous curve in a street. You relate that the cemetery is actively used and that the land in question, which is adjacent to the street, contains cemetery lots assigned to three families. There are four graves in the lots which must be moved if the property is used for the street widening. The cemetery association trustees are willing to sell the city the land or an easement of right-of-way over the land, but they require the permission of the present lot owners to relocate the lots, as well as the permission of the heirs of the four persons whose remains are buried therein to have the remains relocated. The city has been unsuccessful in its attempts to locate the lot owners and to identify the heirs, thus necessitating the city's exercise of its power of eminent domain if the interests of those persons in the land required for the street are to be acquired. You ask whether the city can condemn the needed cemetery land in light of the limitation contained in § 25-46.6 of the Code of Virginia, and, assuming that it has the authority to condemn this land, what procedures must be followed.

Section 25-46.6 is part of the Virginia General Condemnation Act, codified in Ch. 1.1 of Title 25. Section 25-46.6(a) provides, in pertinent part, as follows:
"Nothing in this chapter shall be so construed as to authorize...the condemnation of any cemetery or burial ground, or any part thereof, established prior to the date of the charter of the petitioner proposing to condemn." (Emphasis added.)

You report that the cemetery in question, as best as can be determined, predates incorporation of the Town of Falls Church, the predecessor corporation to the city.

The language of § 25-46.6(a), quoted and emphasized above, expressly establishes that the Virginia General Condemnation Act may not be considered a source of legislative authority to condemn certain cemetery lands. However, it pointedly does not go so far as to preclude other statutory sources of such condemnation authority or to otherwise limit the valid exercise of the same by any entity which possesses the power pursuant to another legislative grant. In this regard, the language in question may be contrasted with that contained in § 25-46.6(b), which reads as follows:

"The lands of any university, incorporated college, or other seminary of learning, not owned and controlled by the Commonwealth, shall be subject to condemnation for the purposes of public highways, except that no part of such lands shall be condemned which are within five hundred feet of any building erected and used for school purposes at the time proceedings are instituted, nor through the land which surrounds the school buildings and is used at such time as a campus, park, or athletic ground or field in connection therewith." (Emphasis added.)

This subsection not only provides a source of authority to condemn the lands specified for public highway purposes but also places a limitation on the exercise of such authority and, as construed by the Supreme Court, upon other grants of authority. Had the legislature in enacting § 25-46.6(a) intended to unqualifiedly limit all present and future general conferrals of the eminent domain power and thereby prohibit condemnation of lands of existing cemeteries under all circumstances, it easily could have done so by employing the same or similar language as that used in subsection (b) of the same statute. I am of the opinion that the quoted language of § 25-46.6(a) must be taken as it is written, and, while it expressly limits the General Condemnation Act as a substantive source of condemnatory power over cemetery lands, it does not, by its terms, so limit any other statute.

Thus, the inquiry now must be whether the City of Falls Church possesses, by any other legislative grant, eminent domain authority sufficiently broad to include the power to condemn private cemetery lands such as that in question.

Section 18.01 of the Charter for the City of Falls Church reads as follows:
"The city shall have, for the purpose of carrying out any of its powers and duties, power to acquire by gift, bequest, purchase or lease, and to own and make use of, within and without the city, lands, buildings, other structures and personal property, including any interest, right, easement or estate therein, and in acquiring such property to exercise, within and without the city, the right of eminent domain as hereinafter provided in this chapter. This power shall be in addition to the powers granted to the school board in § 20.02." (Emphasis added.)

Section 18.02 of the charter sets forth the city's eminent domain authority in the following words:

"The city is hereby authorized to acquire by condemnation proceedings lands, buildings, structures and personal property or any interest, right, easement or estate therein, of any person or corporation, whenever in the opinion of the council a public necessity exists therefor, which shall be expressed in the resolution or ordinance directing such acquisition, and whenever the city cannot agree on terms of purchase or settlement with the owners of the subject of such acquisition because of the incapacity of such owner, or because of the inability to agree on the compensation to be paid or other terms of settlement or purchase, or because the owner or some one of the owners is a nonresident of the State or cannot with reasonable diligence be found in the state, or is unknown."

Statutes conferring the power of eminent domain are strictly construed, and the power can only be exercised for the purpose, to the extent, and in the manner provided by law. See, generally, 6B M.J. Eminent Domain § 7 (1976), and cases therein cited. But this rule of construction is not in conflict with the doctrine that where the legislature has plainly delegated the power of eminent domain to a subordinate agency, the legitimate scope of that power cannot be curtailed by construction. Norfolk & Western Railway Co. v. Lynchburg Cotton Mills Co., 106 Va. 376, 378, 56 S.E. 146 (1907).

Sections 18.01 and 18.02 of the charter contain no restrictions upon the type or quantity of land that may be acquired by condemnation proceedings; the power conferred upon the city is general, to take lands or "any interest, right, easement or estate therein, of any person or corporation...." (Emphasis added.) "If there are any restrictions upon the power thus conferred they must be found elsewhere." Alexander, supra, 126 Va. at 413. Lands of a cemetery association would certainly fit within the scope of the condemnation power granted in the charter as would any property right or interest in the individual grave lots. I am unaware of any other statute which restricts that scope to exclude those lands or interests. Accordingly, I conclude
that the city has the authority to condemn the cemetery property.

You ask what procedures must be followed by the city in exercising its condemnation power in this instance. Section 18.03 of its charter provides that "[t]he city may, in exercising the right of eminent domain conferred by the preceding section, make use of the procedure prescribed by the general law, as modified by said section or may elect to proceed as hereinafter provided." Section 18.03 goes on to provide a procedure for condemnation, which incorporates, in part, certain provisions of the General Condemnation Act "insofar as they are then applicable and are not inconsistent with the provisions of this and the preceding section...." General law also provides, in § 15.1-236, as follows:

"Subject to the provisions and limitations of this article, proceedings for the acquisition of property by counties, cities and towns in all cases in which they now have or may hereafter be given the right of eminent domain may be instituted and conducted in the name of such county, city or town and the procedure may be mutatis mutandis the same as is prescribed in article 7 of chapter 1 of Title 33.1 (§ 33.1-89 et seq.) for condemnation proceedings by the State Highway Commission in the construction, reconstruction, alteration, maintenance and repair of the public highways of the State, or § 33.1-229, or the same as is prescribed in chapter 1.1 (§ 25-46.1 et seq.) of Title 25 of the Code of Virginia."

In accordance with the above, the city has the separate alternatives of utilizing the procedures in (a) § 18.03 of its charter; (b) the Virginia General Condemnation Act, Ch. 1.1 of Title 25; or (c) the eminent domain provisions applicable to the State Highway Commissioner in Art. 7 of Ch. 1 of Title 33.1. Compare, e.g., City of Richmond v. Old Dominion Iron & Steel Corp., 212 Va. 611, 186 S.E.2d 30 (1972); City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950). None of the above alternatives speaks directly to the intricacies involved in relocating human remains from one place of interment to another. Compare, e.g., §§ 33.1-133 through 33.1-136, which provide just such a procedure for use in conjunction with condemnations by the State Highway Commissioner; and §§ 57-36 and 57-37, which make similar provision for removal of remains from abandoned and neglected cemeteries in conjunction with city or town condemnations under the eminent domain statutes. It is to be noted that these provisions do not confer the power of eminent domain over cemeteries to any entity but instead provide direction for a court presented with the need to relocate human remains in a condemnation case. In my opinion the city's power to condemn cemetery lands for a public purpose under its charter may not be defeated by lack of a specific statutory provision for relocating human remains within the alternative condemnation procedures available to it in exercising that power, and a court having jurisdiction
over the proceedings may be guided in its treatment of the matter by the direction provided in those statutes addressed to comparable situations.\(^8\)

In light of the foregoing, it is unnecessary to answer your second question, which proceeds from the assumption that condemnation is not available.

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\(^1\)The original charter for the Town of Falls Church was enacted in Ch. 316, Acts of Assembly of 1875.

\(^2\)See Marymount College v. Harris, 205 Va. 712, 139 S.E.2d 43 (1964) (State Highway Commissioner limited by § 25-46.6(b) and may not condemn college land within five hundred feet of building, notwithstanding separate Code provisions conferring condemnation power upon Commissioner and specifying that eminent domain procedure shall be in accordance with those provisions.) The effect of Marymount and § 25-46.6 on the Commissioner's power was nullified by enactment in 1964 of what is now § 33.1-95, which provides that "[e]xcept as to procedure, the State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title."

\(^3\)See, also, Ch. 426, Acts of Assembly of 1962, which enacted the Virginia General Condemnation Act as Ch. 1.1 of Title 25, and which provides in § 4 that "nothing contained in this chapter shall be construed to repeal, amend, impair or affect any provision of any charter of any city or town."

\(^4\)The present charter was enacted in Ch. 323, Acts of Assembly of 1950.

\(^5\)See, e.g., School Board of the City of Harrisonburg v. Alexander, 126 Va. 407, 472, 101 S.E. 349 (1919), which contains a much-quoted statement characterizing the eminent domain power as follows: "The right to take private property for a public use is a very high prerogative right, but there is no doubt about the power of the State to exercise it, or to delegate it to subordinate agencies to be exercised in proper proceedings for the public good...The taking of private property, however, is a matter of serious import and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed...The State may grant the power generally to condemn any property for a public use, or it may place such restrictions upon the power, the manner of its exercise or the character of the property that it may or may not be taken [sic] as it pleases, and when such restrictions are imposed they must be obeyed."

\(^6\)It is generally held that lands devoted to cemetery purposes are not beyond the reach of the power of eminent domain and that private cemeteries may be taken for a public use under general legislative authority. See 29A C.J.S. Eminent Domain § 85 (1965).

Title to a cemetery lot is not ordinarily absolute, nor is a deed necessary to establish it. The interest acquired is a qualified and usufructuary right, in the nature of a
permanent easement, to make interments in the lot exclusively of others as long as the cemetery remains as such. See Goldman v. Mollen, 168 Va. 345, 191 S.E. 627 (1937); Grinnan v. Fredericksburg Lodge, No. 4, 118 Va. 588, 88 S.E. 79 (1916); Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S.E. 769 (1903). If it becomes necessary to vacate the ground as a burying ground the person holding this license or privilege should have notice and the opportunity to remove the bodies and monuments to another place of interment, or, on his failing to do so, such removal should be made by others. See Grinnan, supra, 118 Va. at 593.

7Compare, also, § 62.1-98(c), which provides for removal and reinterment of bodies, under the direction of the court, in condemnation proceedings brought against public and private cemeteries by a public service corporation engaged in development of water power facilities.

8Cf. Grinnan, supra, 118 Va. at 592: "There can...be no question of the power of a court of equity to deal with a situation like the present, notwithstanding the absence of legislation on the subject, and to authorize, in its sound judicial discretion, the removal of graves or cemeteries in a proper case, after the consideration of all the facts and with due regard to the rights and feelings of all concerned."

Note that the requirements for a petition for condemnation specified in § 25-46.7(c) include the following: "A prayer asking for judgment that the property or the estate, interest or rights therein be condemned and the title thereto vested in the petitioner, and that just compensation for the property to be taken and the damages, if any, as a result of the taking and use by the petitioner, beyond the peculiar benefits, if any, by reason of such taking and use by the petitioner, be ascertained and awarded, and for such other relief as may be lawful and proper." (Emphasis added.)

CITIES COUNCIL MEMBER, PURSUANT TO CHARTER, MAY NOT BE ELECTED TO FILL VACANCY WITHIN ONE YEAR OF EXPIRATION OF TERM.

July 6, 1982

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

This is in reply to your letter of June 25, 1982, in which you inquire if a present member of the city council of the City of Fredericksburg may be appointed to fill a city council vacancy during a current term or within twelve months after the expiration of such term.

The vacancy in question on the city council is occasioned by the resignation of a member on June 21, 1982. I assume that the member being considered to fill such vacancy is among the members whose current terms expired on June 30, 1982.
Section 10 of the city charter for the City of Fredericksburg (Ch. 481, Acts of Assembly of 1942) reads in pertinent part as follows:

"No person elected to the council whether he qualify or not, shall during the term for which he was elected or twelve months after the expiration of that time, be elected by the council or appointed by the city manager, to any position or office of trust or profit of the city." (Emphasis added.)

The emphasized language of the foregoing quoted provision can admit of no interpretation other than to prohibit any elected member of council from being elected by the council to any position or office of the city within twelve months after the expiration of the term for which he was elected.

Pursuant to § 7 of the city charter, vacancies in the council are to be filled within 30 days by a recorded majority vote of the council, and those elected to fill such vacancies shall hold office for the unexpired term. Accordingly, I am of the opinion that no member of council can be elected to fill such a vacancy within one year following the expiration of the term for which he was elected.

CITIES. NO AUTHORITY UNDER § 29-213.17:1 TO LICENSE CATS.

July 6, 1982

The Honorable Thomas E. Glascock
Member, House of Delegates

This is in reply to your recent letter in which you inquire whether § 29-213.17:1 of the Code of Virginia authorizes a city to license cats as well as dogs.

Section 29-213.17:1 reads in pertinent part as follows:

"A. The governing bodies of counties, cities, and towns of this State are hereby authorized to adopt, in their discretion, ordinances which parallel the Virginia Dog Laws of 1977.

***

C. Nothing in this section shall be construed so as to prevent or restrict any local governing body from adopting local animal control ordinances which are more stringent than the Virginia Dog Laws of 1977."

The thrust of the above-quoted provisions is to permit localities to adopt ordinances which parallel the Virginia Dog Laws of 1977, and to authorize such localities to provide more stringent controls than are provided in the Virginia Dog Laws of 1977. Both provisions clearly relate to dog laws, admitting of no other construction which would extend the
permissive authority to controlling other animals. In short, the localities may parallel the State law relating to dogs, and provide more stringent control over dogs than is provided in the Virginia Dog Laws of 1977.

Had the General Assembly intended to authorize the local governing bodies to license cats, it would have enacted express authority to do so. I am unaware of any successful attempt to enact such legislation. Accordingly, I am of the opinion that § 29-213.17:1 does not authorize a city to license cats.

CITIES AND TOWNS. LIMIT ON TOWN INDEBTEDNESS CONTROLLED BY CHARTER PROVISION WHICH IS MORE RESTRICTIVE THAN ART. VII, § 10 OF VIRGINIA CONSTITUTION. CONTRACT OBLIGATION EXCEEDING CHARTER LIMITATION IS VOID AS TO EXCESS. MAYOR AND COUNCILMEN NOT PERSONALLY LIABLE ON TOWN CONTRACT IN ABSENCE OF PERSONAL ENDORSEMENT.

September 15, 1982

The Honorable Michael G. McGlothlin
Commonwealth's Attorney for Buchanan County

This is in reply to your letter in which you make several inquiries concerning the power of the Town of Grundy to borrow money. You relate that the town has outstanding loans with local lending institutions totaling two hundred thousand dollars, which were made for the purpose of paying the costs of repair of property damage resulting from floods in 1977 and 1979, and that the town proposes to borrow an additional sixty thousand dollars to retire other debts incurred on open account with local businesses, which debts remain unpaid because of diversion of funds to pay the costs of repair of damage resulting from floods in 1982. The town proposes to repay all of these loans this year from monies anticipated to be derived from the collection of revenue for the current year. You ask the following questions, which I will answer seriatim:

"(1) May a town borrow money in accordance with the limitations imposed by Article VII, Section 10 of the Virginia Constitution, notwithstanding the fact that its charter places more restrictive limitations on its ability to borrow money than are imposed by the Constitution?"

Article VII, § 10 of the Constitution of Virginia (1971) places constitutional restrictions on the power of localities to incur debt. This section does not of itself grant any borrowing power to localities but instead limits the power which the General Assembly may confer by statute or by city or town charter. The powers of the Town of Grundy to incur debt are contained in § 14 of the town's charter, which states in pertinent part as follows:
"The Town Council shall have the power and authority, without a reference thereof to the vote of the people, to issue certificates of indebtedness, revenue bonds or other obligations, of the town, in anticipation of the collection of the revenue of the town for the then current year, provided, that such certificates, bonds and other obligations mature within five years from the date of their issue, and be not past due, and do not exceed the sum of five thousand dollars...." (Emphasis added.)

Because the above authority conferred by the General Assembly in the town charter does not exceed constitutional limitations, I am of the opinion that it is controlling as to the amount of indebtedness which the Town of Grundy may incur in this or any other year in anticipation of collection of the town revenue for the year in question.

In your second question you ask:

"If a promissory note is executed by a town, as maker, through its mayor with the requisite council approval, in favor of a lending institution, as holder, in excess of the borrowing ceiling established in its charter, would the mayor's and council's action be ultra vires, and, thus, void ab initio, and would such action render the mayor and/or council personally liable in the absence of a personal guaranty agreement or endorsement to such lending institution?"

In answer to the first part of your question, I must advise that a town's contract for indebtedness beyond the limitation contained in its charter, as in the present case, is void, at least to the extent of the excess. As to the second part of your question, it is presumed that the contract was made on the credit and responsibility of the public body itself, and not on that of its agent. Thus, a public agent contracting on behalf of the government is not personally bound by the contract unless he has waived his immunity in some fashion, such as by endorsing or guaranteeing the obligation, as you suggest, or if his personal liability otherwise may be implied from the attendant circumstances. You do not indicate that the officers engaged in any action which could be construed to waive their immunity or which could be construed to guarantee the notes personally. Based on that understanding, I am of the opinion that the actions in making the note, under the conditions which you describe, would not render the mayor or council members personally liable on the obligation.

In your third question you ask:

"If a lending institution lends money to a town in excess of the borrowing ceiling established in such town's charter, and the debt is evidenced by a promissory note executed by the town, as maker, through its mayor in his official capacity with the requisite
counsel approval, in favor of such lending institution, as holder, may such lending institution recover the indebtedness from the town in the absence of a personal guaranty agreement or endorsement?

In the absence of a personal guaranty or endorsement, recovery, if any, must come from the town as maker of the obligation. Anyone contracting with a municipal corporation is charged with notice of the limitations upon its power to make the contract. An agreement with a town in which the town incurs an indebtedness beyond the limitation imposed in the town's charter is void, at least as to the excess, and recovery cannot be had on the instrument. However, I am of the opinion that the lending institutions may have a right of recovery of the funds already given the town under the principles enunciated in the second American-LaFrance decision, wherein the Court relied upon a number of authorities to the effect that property or money obtained by a municipal corporation by mistake or without authority of law pursuant to void but not illegal contracts must be returned. The only other means of which I am aware of adjusting the equities as to the funds already obtained would be on the express authority of an act of the General Assembly.

You also inquire as to whether funds of other, independent agencies within the town government, such as the fire department and the airport commission, may be transferred to the town's general fund in order to bring the town's outstanding obligations current, with repayment being made when town tax revenues are received for this year. If the organizations of which you speak are, in fact, independent entities, then I am of the opinion such transfers and repayments of funds by agreement would constitute loans to the town, to be repaid from the collection of revenues in the current year, and would, therefore, be limited to five thousand dollars as provided in the town's charter discussed above. There also may be limitations on the use of funds allotted to the agencies under consideration, about which I cannot express an opinion in the absence of more detailed information on the organizing authority and relationship to the town government in each case.

1Article VII, § 10 provides, in part, as follows: "(a) No city or town shall issue any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed ten per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes...." Article VII, § 10(a) enumerates certain classes of indebtedness which are excluded in determining the limitation for a city or town.

You advise that the town's charter is set forth in Ch. 206, Acts of Assembly of 1926. The charter subsequently was amended in Ch. 142, Acts of Assembly of 1938; Ch. 6, Acts of Assembly of 1952; and Ch. 119, Acts of Assembly of 1956.

Section 14 of the town's charter provides as follows in the last paragraph: "The provisions of this section shall not be construed to change or otherwise interfere with the provisions of general law permitting the borrowing of money by towns, regardless of the amount thereof, by the vote of the electors." You do not indicate that the obligations already incurred and proposed to be incurred would be for expenditures authorized by statute upon vote of the electors, or that the matter was submitted to the electors in the case of the debts already assumed. The power of a municipality to borrow money is strictly construed. See Lynchburg & Rivermont Street Ry. v. Dameron, 95 Va. 545, 28 S.E. 951 (1898); Richmond & West Point Land, Navigation and Improvement Co. v. Town of West Point, 94 Va. 668, 27 S.E. 460 (1897).


American-LaFrance & Foamite Industries, Inc. v. Arlington County, supra; Bunch's Ex'or v. Fluvanna County, 86 Va. 452, 10 S.E. 532 (1890).

The circumstances of each case must be examined against the obligation of all persons, including municipalities, to be just, and the integrity of property rights and the promotion of honorable public policy have equal force with technical rules of public policy. Id. See City of Richmond v. Pace, 127 Va. 274, 103 S.E. 647 (1920).

See, e.g., § 27-23.1 of the Code of Virginia which mandates that county funds raised to support fire departments and rescue squads established under that section shall not be applied to any other purpose. See, also, § 5.1-36.1, allowing for creation of joint airport commissions, each of which shall act in its own name and have the same powers as those granted to counties, cities and towns, but none greater. The power to loan money to other public bodies would have to be expressly conferred by the General Assembly or necessarily implied from those powers expressly granted. See 1979-1980 Report of the Attorney General at 60. See, also, 1980-1981 Report of the Attorney General at 127 (a county may not lend money to a town but it may appropriate money outright to the town, pursuant to § 15.1-544).
CIVIL PROCEDURE. AUTHORITY OF GENERAL DISTRICT COURT TO HOLD FURTHER PROCEEDINGS TO ASCERTAIN ESTATE OF DEBTOR.

September 23, 1982

The Honorable S. Lee Morris, Chief Judge
Portsmouth General District Court

This is in reply to your inquiries regarding proceedings to ascertain the estate of a debtor.

Your first inquiry is whether a general district court may hold further proceedings during the six-month period described in § 8.01-506(C) of the Code of Virginia, or whether it may only order that such proceedings be conducted before a commissioner.

Under §§ 8.01-506(A) and 8.01-506(B), a creditor who holds a fieri facias lien on the estate of a debtor may require him to be summoned before the court, or a commissioner appointed by the court, to respond to interrogatories regarding his estate. Under § 8.01-506(C), however, a creditor who has previously proceeded against the debtor may not do so again within six months, "[e]xcept that for good cause shown, the court may, on motion of the execution creditor, issue an order allowing further proceedings before a commissioner by interrogatories during the six-month period." (Emphasis added.)

Sections 8.01-506(A) and 8.01-506(B) provide that discovery proceedings may be held before the court or a commissioner; only in § 8.01-506(C) which prescribes the six-month rule, is reference to the court omitted. Had the General Assembly intended that the court conduct the proceedings it would have been a simple matter to have so stated, rather than providing for the issuance of an "order allowing further proceedings before a commissioner."

In your letter you make reference to § 16.1-103 which provides that where a writ of fieri facias has been issued on a judgment in a general district court, the general district court "shall have all of the powers and authority respecting interrogatories conferred by §§ 8.01-506 to 8.01-510 upon any court or judge mentioned therein," and that a commissioner before whom the debtor is required to appear has the same powers and authority as if the summons had been issued under § 8.01-506. Thus, the general district court has powers coextensive with those granted in § 8.01-506, and it may, for good cause, entertain further proceedings within the six-month period, but, whether such proceeding be brought in the general district or any other court from which the fieri facias issued the proceeding is limited by subsection (C) to referring the matter to a commissioner.

Your second inquiry is whether a debtor properly incarcerated for failure to appear and answer under § 8.01-508 is entitled to bail. In my opinion, he is not.
First, the language of the statute, itself, does not permit release on bail. It provides that upon failure of the debtor to appear, to answer, or to deliver property, "the commissioner or the court shall issue a writ directed to any sheriff requiring such sheriff to...keep him safely until he shall make proper answers...." (Emphasis added.) The statute is mandatory, does not require notice to the debtor before he is imprisoned, and does not require that a rule issue requiring the debtor to show cause why he should not be imprisoned. *Early Used Cars, Inc. v. Province*, 218 Va. 605, 610, 239 S.E.2d 98, 102 (1977).  

Furthermore, § 8.01-508 represents a species of civil, or coercive, contempt, and not criminal, or punitive, contempt. See *Local 333B, United Marine Div. v. Commonwealth*, 193 Va. 773, 779, 71 S.E.2d 159, 163 (1952); and *Fox v. Capital Co.*, 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed 67 (1936) for a discussion of the distinction. Civil contempt is coercive and looks to the future; criminal contempt punishes a past act. Bail is not available in cases of civil contempt, as its coercive purpose would be defeated. *Fox v. Capital Co.*, supra; *Walling v. Crane*, 158 F.2d 80, 83 (1946), modified on other grounds, 174 F.2d 646 (5th Cir. 1949). When the coercive effect is accomplished, however, the debtor must be released. *In Re Farr*, 111 Cal. Rptr. 649, 653 (C.A. 2d Dist. Div. I 1974); *Rosato v. Superior Court of Fresno County*, 124 Cal. Rptr. 427, 433 (C.A. 5th Dist. 1975). It must also be observed that the debtor always holds the keys and may effect his release by complying with the requirements of that statute.

For the foregoing reasons, I am of the opinion that the debtor does not have a right to bail in the situation you describe.

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1I note that in *Early* the Court summarized the proposed writ to be issued under § 8-438 (present § 8.01-510) and made reference to bail. I do not construe this summary of the proposed writ in that case to be a holding that provision must be made for bail under the statute.

CIVIL PROCEDURE. EXECUTION OF JUDGMENT. SALE PURSUANT TO LEVY.

May 19, 1983

The Honorable Emmett L. Wingo
Sheriff of Chesterfield County

This is in reply to your letter inquiring how process is handled when levy is made against a vehicle that is registered in two or more names. You also inquire what is to be done when levy is made against a vehicle which has a lien
on it and the vehicle is not worth the amount necessary to satisfy the lien.

As to multiple ownership, I will assume that the owners have an undivided interest which is subject to severance; hence, the vehicle is subject to levy and sale under execution for each individual's interest. The certificate of title to the vehicle will indicate, more so than the registration, those persons who are owners or who have liens against the vehicle. Although he has a judgment against one co-owner, the judgment creditor does not have greater rights in the vehicle on which he levies than the non-liable co-owners. Barnes v. American Fertilizer Co., 144 Va. 692, 130 S.E. 902 (1925). If the sheriff is in doubt as to ownership or prior claims, he should proceed as provided in § 8.01-367 of the Code of Virginia to require an indemnifying bond and subject the interest of the judgment debtor to sale.

If two or more owners or a lienor appear on the certificate of title, the officer should not proceed until ordered to do so. The claims to such property should be tried by the circuit court pursuant to § 8.01-365, or by the general district court, pursuant to § 16.1-119 if value of the car does not exceed $5,000.1

Property subject to a prior lien may be levied on and sold to satisfy a writ of fieri facias.2 If the lien is not due and payable, you should sell the property levied on subject to the lien. Although the lien amount is more than the vehicle is worth, once the judgment creditor has satisfied indemnifying requirements and you are directed to sell the property, you must do so, in spite of its value.3 As a practical matter, when the lien is not due and payable, it is doubtful that any purchaser other than the prior lienor would buy the vehicle. If, after the sale, the amount is insufficient to satisfy the judgment creditor, § 8.01-475 gives the creditor the right to sue out additional levies on other property of the debtor until the lien is completely satisfied. See Richardson v. Wymer, 104 Va. 236, 51 S.E. 219 (1905). If the prior lien is due and payable, then you should apply the proceeds first to satisfy the lien and the residue, if any, to satisfy the fieri facias. If the residue be insufficient, then the judgment creditor may sue out additional executions under § 8.01-475.

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1Section 8.01-365 provides: "When a writ of fieri facias issued from a circuit court, or a warrant of distress, is levied on property, or when a lien is acquired on money or other personal estate by virtue of § 8.01-501, and when some other person than the one against whom the process issued claims the property, money, other personal estate, or some part or the proceeds thereof, then either (i) the claimant, if such suspending bond as is hereinafter mentioned has been given, (ii) the officer having such process, if no
The indemnifying bond has been given, or (iii) the party who had the process issued, may apply to try the claim, by motion to the adverse party, to the circuit court of the county or city wherein the property, money, or other personal estate is located." (Emphasis added.)

Section 8.01-480 provides: "Tangible personal property subject to a prior security interest, or in which the execution debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a fieri facias. If such prior security interest be due and payable, the officer levying the fieri facias may sell the property free of such security interest, and apply the proceeds first to the payment of such security interest, and the residue, so far as necessary, to the satisfaction of the fieri facias. In the event the property is to be sold free of such prior security interest, the judgment creditor shall give written notice by certified mail to each secured party of record as hereafter specified, as his name and address shall appear on record, of the proposed sale, or to any secured party of whom the judgment creditor shall have actual knowledge. Such notice shall be given to each secured party who is of record at the State Corporation Commission or at the Division of Motor Vehicles or in the clerk's office in the city or county in Virginia, where the debtor has resided to the knowledge of the judgment creditor at any time during a one-year period prior to the sale. Certification of such notice shall be delivered to the sheriff or other officer conducting the sale pursuant to execution of the judgment, who shall announce that except as to such person so notified, the sale is subject to any prior security interest of record, other than one of record at a place where the debtor may have resided more than one year previously. If such prior security interest be not due and payable at the time of sale, such officer shall sell the property levied on subject to such security interest."

Section 8.01-490 proscribes unreasonable distress or levy. There is authority from other jurisdictions which holds the levying officer liable for failing to levy on sufficient property to satisfy the demand and cost. See 93 A.L.R. 316; 70 Am.Jur.2d Sheriffs, Police, and Constables § 64 (1973). If the value of the car is less than the amount of the prior lien, it raises a question of reasonableness in levying on the property.

CIVIL PROCEDURE. EXECUTIONS. PROPERTY PREVIOUSLY LEVIED UPON BUT REMAINING UNSOLD CANNOT BE RELEASED UNTIL CREDITOR ABANDONS LEVY OR UPON COURT ORDER.

February 25, 1983

The Honorable William L. Heartwell, III
Commonwealth's Attorney for Botetourt County

This is in reply to your recent letter in which you inquire as to the obligations of the sheriff to both the judgment creditor and debtor after a writ of fieri facias was
returned to the creditor "not sold for want of bidders." The writ of *fieri facias* is the customary writ directing the sheriff to levy on property in satisfaction of an execution.

Section 8.01-485 of the Code of Virginia provides that a writ of *venditioni exponas* may issue when the property remains unsold after the duly advertised sale under the writ of *fieri facias*. A writ of *venditioni exponas* commands the completion of the execution already begun. *Beebe v. United States*, 161 U.S. 104, 112 (1895). Unlike a sale under the original writ of *fieri facias* where a sheriff may in his discretion postpone the sale for want of a sufficient bid, the sale under the writ of *venditioni exponas* must be made if a single purchaser bids at the advertised sale. See *Beebe*, supra. Section 8.01-485 also provides that where the initial sale failed for want of bidders, the advertisement for the sale shall state that fact and the advertised sale will be made "peremptorily." However, the request for the issuance of this writ must originate from the creditor or his attorney. *Burks Pleading and Practice* 716 (4th ed. 1952).

If after the writ of *fieri facias* has been returned unsold for want of bidders, the creditor fails to seek a writ of *venditioni exponas*, the sheriff cannot immediately return the property to the debtor. "[A] mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant or a release of the levy." *Walker v. Commonwealth*, 59 Va. 13, 50 (1867). After an execution has been issued, levy made and the property seized, the sheriff is a mere bailee and if he surrenders the property, he "does so at his peril...." *Sage v. Dickinson*, 74 Va. 361, 365 (1880).

Section 8.01-485 does not resolve the unusual situation presented here. However, § 8.01-479 which discusses the time for enforcement of the lien of *fieri facias* is instructive. Section 8.01-479 provides that property levied upon prior to the return date specified in the writ of *fieri facias* but unsold on such date may be sold within a reasonable time after the return date. If the creditor fails to pursue the matter after a "reasonable time" has elapsed, the sheriff may consider the levy to have been abandoned. A "reasonable time" is, of course, a factual situation, dependent upon the circumstances of each case. The test of reasonable time to maintain the property with the view of satisfying the underlying judgment by subsequent sale hinges upon whether an intention to abandon the execution is manifest from the acts of the creditor. See *Palais v. DeJarnette*, 145 F.2d 953 (4th Cir. 1944), and cases cited therein.

Consequently, the sheriff should maintain proper custody of the property until one of the following circumstances occurs: (1) the creditor seeks a writ of *venditioni exponas*, (2) the court grants a motion to quash the execution, or (3) the actions or inactions of the creditor are such that an intention to abandon the levy is manifest. Although not required, the sheriff may avoid potential problems in
determining the creditor's intent to abandon the levy if he notifies the creditor of his intent to release the levy.

CLERK OF COURT. NOT REQUIRED TO RECORD DEED IF BUSINESS OR RESIDENCE ADDRESS OF GRANTEE NOT PROVIDED. NO LIABILITY ATTACHED IF CLERK REFUSES TO RECORD. FORFEITURE MAY TAKE PLACE IF CLERK DOES RECORD DEED ABSENT SUCH ADDRESS. PURPOSE OF STATUTE TO ASSIST TAXING AUTHORITIES.

January 3, 1983

The Honorable G. M. Weems
Treasurer of Hanover County

You advise that many deeds are received in the clerk's office without showing an address for the grantee. This creates a problem for you in locating the address of the taxpayer. You requested my opinion as to whether the clerk is absolutely prohibited from placing on record any deed that is not accompanied by a current business or residence address of the grantee or a designee. Apparently, the clerk has expressed some concern as to his liability if he refuses to record an instrument even though such address is not shown.

The duty of the clerk concerning the recording of writings set out in § 17-59 of the Code of Virginia was amended in 1979 by inserting the following language:

"[B]ut no deed shall be accepted for record by the clerk unless it be accompanied by a current business or residence address of the grantee or a designee; provided that if the deed is accepted for record and spread on the deed books, it shall be deemed to be validly recorded for all purposes." (Emphasis added.)

At the same time that § 17-59 was amended, § 58-797 was also amended. See Ch. 527, Acts of Assembly of 1979. Before the amendment to § 58-797, the clerk was required by that section to place the address of the grantee on the recording receipt, if the address were known. The amendment struck the phrase "if known" and added language so that the applicable portion of the statute now reads that the receipt, among other things, must state "the address of the grantee, given pursuant to § 17-59...." Thus, the manifest purpose of the amendments to §§ 17-59 and 58-797 was to equip the local taxing authorities with the address of the grantee or a designee in order to facilitate the collection of taxes.

The emphasized proviso in the above quoted portion of § 17-59 indicates that a clerk is not absolutely forbidden by § 17-59 from accepting and recording a deed that does not contain the required address. Obviously, the purpose of the proviso is to preserve the validity of a deed despite the absence of the address of the grantee or his designee. However, the clerk's recodereation of the instrument without
requiring the address exposes him to the forfeiture provision of § 17-59, which reads:

"Any clerk failing to comply with the provisions of this section or of § 17-79 shall, for every such failure, forfeit the sum of twenty dollars."

The clerk cannot be rendered liable to others for damages for failing to record a deed which was not accompanied by the grantee's or a designee's address, because the address is required by statute. The requirement of § 55-106 to admit to record an acknowledged deed presented to him contains the proviso, "[e]xcept when it is otherwise provided...." As above indicated, § 17-59 provides that exception.

To summarize, the clerk is required to comply with § 17-59 before placing a deed to record. His failure to require the address of the grantee exposes him to a forfeiture penalty of twenty dollars. On the other hand, the clerk may refuse to record a deed without the address, and such refusal does not expose him to liability for failure to record a deed as otherwise required by § 55-106.

CLERKS. CERTIFICATE OF TRANSFER AND MARGINAL NOTATION OF ASSIGNMENT OF DEBT ARE TREATED IN SAME MANNER FOR RECORDATION TAX AND CLERK'S FEE.

March 1, 1983

The Honorable James E. Hoofnagle, Clerk
Circuit Court of Fairfax County

You have asked three questions concerning the appropriate fee and tax to be charged for recording of evidence of assignment of debt secured by real estate. Your questions, specifically relating to certificates of transfer, are as follows:

"a. What is the correct charge for a one page certificate of transfer, three dollars and fifty cents (§ 55-66.7) or nine dollars (§ 14.1-112)?

b. Is there a difference between a certificate of transfer and a notice, memorandum, or statement of assignment? If so, what is the distinction?

c. While § 58-61 brings out that '...no additional recordation tax shall be required...'; subparagraph 5 under that section remains silent on collecting recordation tax when what we call a certificate of transfer is recorded. Do we collect recordation tax on all certificates of transfer that are over three years from the date of the deed of trust?"
I will answer your question (b) first because that discussion will provide the basis for the answers to your other questions.

Section 55-66.1 of the Code of Virginia provides that "[w]henever any debt secured on real estate or personal property by mortgage, deed of trust or vendor's lien has been assigned, transferred or endorsed to another..." that person "may cause a memorandum or statement of the assignment...to be entered in the margin of the page in the book where such encumbrance...is recorded." Section 17-60.1, enacted in 1975 in order to adapt recording procedures to modern document storage methods, provides that where microphotographic processes make marginal notations on recorded instruments impractical or impossible, "an appropriate certificate, certificate of satisfaction...or other separate instrument...shall be recorded and indexed according to law."

In a prior Opinion to the Honorable Frederick F. Jackson, Clerk, Circuit Court of the City of Alexandria, dated June 5, 1978, found in the 1977-1978 Report of the Attorney General at 326, this Office noted that "'certificates of transfer' were developed under the authority granted by § 17-60.1 and modeled after the forms for certificates of satisfaction and partial satisfaction found in § 55-66.4:1...." The certificate of transfer and the marginal notation of assignment merely serve to put parties on notice that the debt has been assigned. The distinction is one of form, rather than substance. The certificate is recorded and indexed separately simply because it is a separate document; however, it has no more legal significance than a marginal notation. The Jackson Opinion holds that for purposes of determining liability under the recordation tax statutes and liability for the clerk's fee, "a certificate of transfer is to be treated in the same way as a marginal notation."

Your question (a) requests advice on the correct clerk's fee for a one page certificate of transfer. You question whether the fee is determined under § 14.1-112, the general fee schedule for clerks of circuit court, or under § 55-66.7 which provides a clerk's fee for recording a certificate of satisfaction or partial satisfaction when there is a release under the authority of that chapter. The Jackson Opinion holds that the clerk's fee for a transfer is determined under § 55-66.7. The current fee under that statute for a certificate of transfer would be three dollars and fifty cents.

Your question (c) concerns the recordation tax due on certificates of transfer that are recorded after three years from the date the original deed of trust was recorded. Section 58-61(A)(5), enacted in 1979, exempts from additional recordation taxes "[a] notice of assignment of a deed of trust or mortgage recorded within three years of the date of recordation of the deed of trust or mortgage." Because
certificates of transfer are to be treated in the same manner as marginal notations, and a notice of assignment is the legal equivalent to a marginal notation, the term "notice of assignment" in § 58-61(A)(5) includes a "certificate of transfer."

The § 58-61(A)(5) exemption for a notice of assignment or certificate of transfer during the initial three-year period following recordation of the original deed of trust or mortgage suggests that a tax would be due upon recordation after the three-year period had expired. However, for the reasons which follow, I find that the exemption is unnecessary because no recordation tax is due at any time when a notice of assignment or certificate of transfer is recorded.

The Jackson Opinion discussed possible recordation tax liability under the authority of § 58-58 which provided for a recordation tax "[o]n every contract or memorandum thereof relating to real or personal property...." That Opinion holds that neither a marginal notation of assignment nor a certificate of transfer triggered a recordation tax under § 58-58. I am unable to find authority in § 58-58, as amended to date, or in any other recordation tax statute for taxing recordation of marginal notations of assignment or certificates of transfer. Therefore, it is my opinion that no recordation tax is due when certificates of transfer are recorded after three years from the date of the original deed of trust.

The Honorable Stuart B. Fallen, Clerk
Circuit Court of Charlotte County

October 14, 1982

This is in reply to your recent letter requesting an Opinion regarding allowances by counties to the county clerk. Specifically you inquired:

"1) Can a governing body stop paying a county clerk without due process as to why such allowance is being discontinued?

2) Can a governing body take this action outside of an open meeting and with no official minutes of such action being recorded?

3) Is the county clerk due compensation until such time as Item 1 and Item 2 are resolved?"

Paragraph (E) of § 14.1-143.2 of the Code of Virginia provides in part:
"The governing body of any county or city may continue to supplement the salary of an incumbent clerk of the circuit court for additional services pursuant to § 14.1-164.1...or for other additional services for which no statutory fees are provided. Any such supplemental salary shall be paid wholly by such county or city and shall be paid only to those clerks who received such supplement at any time from January 1, 1981 through March 10, 1982. Such supplements, in addition to any supplements paid to the clerks, deputies or employees shall not be considered in determining the excess to be paid into the state treasury pursuant to § 14.1-140 whether paid directly to the clerk or paid to his deputies or employees. Any clerk elected or appointed for the first time subsequent to March 10, 1982 shall not receive a local supplement." (Emphasis added.)

Section 14.1-164.1 provides:

"The governing body of every county is empowered to determine what annual allowances, payable out of the county treasury, shall be made to the county clerk of such county not to exceed seven thousand five hundred dollars." (Emphasis added.)

Reading these two sections together, it appears that where the clerk of the circuit court of a county also acts as the county clerk, the board of supervisors may continue to supplement the salary of the clerk of the circuit court, if the supplement was paid between January 1, 1981, and March 10, 1982. There is no requirement, however, that this supplement be paid to the clerk of the circuit court.

Due process under the Fourteenth Amendment requires that state governments provide minimal procedural safeguards, including some form of notice and a hearing, before taking action that deprives an individual of "liberty" or "property." There is no question of deprivation of liberty in this instance, hence, in order for the clerk to be entitled to such due process guarantees, there must be a property interest involved. The allowance of a supplement to the circuit court clerk is within the discretion of the board of supervisors. Therefore, a circuit court clerk has no property interest in the supplement to the circuit court clerk's fee within the meaning of the due process clause of the Fourteenth Amendment. Accordingly, I am of the opinion that the board of supervisors is entitled to summarily stop paying a county clerk such allowance without violating the due process provisions of the Fourteenth Amendment of the Constitution of the United States.

Turning to your second inquiry, I do not believe any official action of the board would be required to discontinue the supplement in this case.
Under the provisions of § 15.1-122, upon the appointment and qualification of a county administrator authorized by § 15.1-115, "the county clerk of such county shall be relieved of his duties in connection with the governing body and all of his duties shall be imposed upon and performed by the executive secretary [now the county administrator]." You have advised that a county administrator has been appointed for Charlotte County. Therefore, the circuit court clerk no longer carries out the duties of the county clerk. By operation of law, the basis for the supplement to the circuit court clerk's salary no longer exists and, therefore, the circuit court clerk is no longer entitled to such supplement. No official act of the governing body of the county is necessary to stop the payment of such supplement. Indeed, once the duties devolve to the county administrator, the county is no longer authorized to pay such supplement to the circuit court clerk under § 14.1-143.2(E). Because formal action by the board of supervisors would not be needed, it is not necessary that the determination to stop such payment be made in open meeting and recorded in the minutes pursuant to the Virginia Freedom of Information Act. Accordingly, I am of the opinion that your second question should be answered in the negative.

In response to your third question, I am unaware of any provision of law that would entitle the clerk of the circuit court to receive the allowance authorized by § 14.1-164.1 while a resolution to your first two questions is being sought.

1See Board of Regents v. Roth, 408 U.S. 564 (1972).
2See §§ 14.1-143.2(E) and 14.1-164.1.
3See §§ 2.1-343 and 2.1-344 which detail the open meeting requirement and the procedure for convening in executive session.
4You could, of course, pursue any judicial remedy which may be available to you.

April 27, 1983

The Honorable Michael Lee Cantrell, Clerk
Circuit Court of Wise County

This is in reply to your request for my opinion whether a county board of supervisors may pay all or part of the salary of an employee assigned to the office of clerk of the circuit court. You relate that the Wise County Board of Supervisors from 1976 through 1981 paid the salary of one
full time person, hired by you as your deputy, who performed duties consistent with the official duties of your office. The board of supervisors abolished the position on December 31, 1981, apparently on the county attorney's advice that the board had no legal authority to create and fund it.

The authority to determine the number of deputies and assistants a clerk of the circuit court may have and what their compensation should be rests by statute, with the State Compensation Board. See § 14.1-141 of the Code of Virginia. See, also, § 14.1-142, which authorizes the Compensation Board to make adjustments in the allowances for such deputies and assistants on the written application of the clerk and on good cause shown. Section 14.1-142 goes on to provide that "[t]he board of supervisors or other governing body of a county or the council of a city may by resolution adopted and certified lay before the State Compensation Board any recommendation it may desire to make with respect to the expense account of any officer mentioned in § 14.1-136 as to increase or decrease of expense."

Section 14.1-11.4 authorizes the board of supervisors to supplement the salary of a clerk's deputy as follows:

"Notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the sergeant, sheriff, treasurer, commissioner of the revenue, clerk of the circuit court, director of finance, or attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy or employee established in this title, in such amounts as it may deem expedient. Such additional compensation shall be wholly payable from the funds of any such county or city." (Emphasis added.)

Upon reading the above quoted statutes together and applying them to the circumstances presented in your inquiry, I conclude that (a) the number of deputies and assistants which you, as clerk of the circuit court, may employ is determined by the State Compensation Board, pursuant to § 14.1-141; (b) the board of supervisors is not authorized to create and separately fund a position in your office apart from those authorized by the Compensation Board, although it may make any recommendation it desires regarding the number of such positions pursuant to § 14.1-142; and (c) the board of supervisors may supplement the compensation of any of the deputies and assistants authorized by the Compensation Board for your office, pursuant to § 14.1-11.4.

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1Section 14.1-141 provides, in part, as follows: "The State Compensation Board shall determine: (1) How many deputies and assistants, if any, are necessary to the efficient performance of the duties of the office of the officer filing a report required by § 14.1-136 [which
includes every clerk of a court of record except the clerk of the Supreme Court, (2) what should be the compensation of such deputies and assistants, (3) what allowance, if any, should be made for office expenses and premiums on official bonds, and (4) the manner in which such compensation should be paid or such allowance made."


2Note § 14.1-143.2, enacted in 1982, which prescribes the annual salaries for clerks of circuit courts, and particularly subsection E thereof, which preserves local authority to supplement clerks' salaries pursuant to § 14.1-11.4, but only for those clerks who received such supplements at any time from January 1, 1981, through March 10, 1982.

3By way of contrast note, e.g., § 14.1-70, which states that the Compensation Board shall fix the number of deputies which a sheriff may appoint (with certain exceptions), but which was amended in 1979 to include the following sentence: "The governing body of any county or city may employ a greater number of uniformed law-enforcement deputies than fixed by the Compensation Board, provided that the county or city shall pay the total compensation and all employer costs for such additional deputies." Note, also, § 15.1-9, which provides, in part, that "[e]very county and city may, with the approval of the Compensation Board, provide for employing such assistant or assistants to the Commonwealth's attorney as in the opinion of the governing body may be required."


CLERKS. FILE COPY OF ASSESSMENT AND ACCOMPANYING LETTER HELD TO BE SUFFICIENT TO PERMIT DOCKETING OF LIEN.

May 17, 1983

The Honorable Teddy Bailey, Clerk
Circuit Court of Dickenson County

This is in reply to your letter of April 26, 1983, in which you inquire whether a Final Order of Civil Penalty Assessment issued by the Division of Mined Land Reclamation of the Department of Conservation and Economic Development is in a form which can be docketed.

Section 45.1-246(D) of the Code of Virginia directs the clerk to record a "true copy of the final order..." assessing a penalty for violation of coal surface mining laws. The
recorded assessment then is a lien on property of the person against whom it is docketed. Section 45.1-246(A) provides that the penalty is assessed after the Director of the Department of Conservation and Economic Development (the "Director")\(^1\) (1) determines that a violation has occurred, (2) determines that the amount of the penalty is warranted, and (3) "issues an order requiring that the penalty be paid."

There is no statute or duly enacted administrative regulation which specifies either the form of the final order to be used by the assessment officer or the administrative services director in carrying out the responsibility delegated by the Director. The form of the final order generally used by the Department of Conservation and Economic Development in an uncontested case is a letter to the offender signed by an "assessment officer" which states in pertinent part that (1) no information has been submitted that the violations have been abated, (2) the final assessment "will be" a specified amount, (3) that the offender has fifteen days to pay the penalty or appeal. Following the lapsed time, a file copy of this letter is mailed to the clerk by the department's administrative services director with a cover letter stating that no payment was made nor an appeal taken, and requesting that the order be docketed.

You question whether the file copy is sufficient to constitute a "true copy of the final order" within the meaning of § 45.1-246(D). Because it is a file copy, it shows on its face that a further appeal is available, and it states that the penalty "will be" the specified amount, rather than using the more customary present tense, such as "is hereby." Determining the forms of the final order of assessment is a matter for the Department of Conservation and Economic Development. The department's use of carbon paper stamped "file copy," while a departure from the usual form of an administrative order, nevertheless fulfills the statutory requirement that you be sent a "true copy." The letter of assessment, like a judgment, cannot be "final" until the period for appeal has expired; however, the cover letter sent to you after the appeal period has run, indicating no payment or appeal had occurred, was sufficient instruction to you to permit the lien to be docketed.

In my opinion, the file copy and cover letter taken together fulfill the statutory requirements of § 45.1-246(A) for filing by your office.

\(^1\) By Delegation of Authority Statement dated September 14, 1982, the Director delegated this authority to the Mined Land Reclamation Commissioner, pursuant to his authority to delegate in § 10-8.1.

December 22, 1982

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

You have requested my opinion whether the circuit court clerk may refuse to issue execution on an abstract of judgment obtained in the juvenile and domestic relations district court because (1) the papers in the case have not been returned to the circuit court or (2) because the clerk has discretion to decline such issuance.

The requirements for issuance of execution by the circuit court clerk on judgments rendered in a lower court are embodied in §§ 16.1-116 and 16.1-279 of the Code of Virginia. The general rule is stated in § 16.1-116, which provides, in pertinent part:

"When a judgment has been rendered in a civil action in a court not of record and the papers in the action have been returned to the clerk of the circuit...court for filing and preserving, executions upon...the judgment may be issued by the clerk of such circuit...court...provided, that such judgment has been duly entered in the judgment lien docket book of such court." (Emphasis added.)

The requirement that the case papers be returned to the clerk for filing and preservation comports with the directive of § 16.1-115, which states in pertinent part:

"All papers connected with any civil action or proceeding in a district court...(1) Except as otherwise provided in this section...shall be retained for six months after the action or proceeding is concluded, and at the end of such period they shall be delivered to the clerk of the circuit court where they shall be properly filed ...and preserved...." (Emphasis added.)

Any judgment resulting from proceedings in a juvenile and domestic relations district court under § 16.1-279(I) is treated differently, however. With certain exceptions, disposition of papers connected with such proceedings is governed by § 16.1-304, which states in pertinent part that such papers "shall be properly indexed, filed and preserved..." in the juvenile and domestic relations district court. In furtherance of the principle of confidentiality regarding proceedings in juvenile and domestic relations courts, the statutory scheme for handling judgments of such courts is a specific exception to the requirement of § 16.1-116 that case papers be filed in the circuit court prior to issuance of execution by such court.

In essence, your inquiry poses the question of whether the language "executions upon such judgment may be issued by the clerk of such circuit court" in $16.1-279(I)$ gives the clerk discretion to decline such issuance. (Emphasis added.) This Office has held that although the word "may" is generally construed as permissive and discretionary, it is often construed as mandatory where it is necessary to accomplish the manifest purpose of the legislature. See 1977-1978 Report of the Attorney General at 102 (purpose of the legislature in enacting $16.1-116$ was to enable judgment creditors to obtain executions upon abstracts of judgments); 1974-1975 Report of the Attorney General at 83.

The above reasoning applies to the word "may" as used in $16.1-279(I)$. Therefore, it is my opinion that the clerk of the circuit court, upon proper application of a judgment creditor and after receipt and docketing of a certified abstract of judgment rendered pursuant to $16.1-279(I)$ by a juvenile and domestic relations district court of the same judicial district, has a mandatory duty to issue the requested execution even though the papers in the case have not been filed with such circuit court.

1 Section 16.1-279(I) states in pertinent part: "The judge or clerk of the [juvenile and domestic relations district] court shall certify and deliver an abstract of any judgment entered pursuant to this section to the clerk of the circuit court of the same judicial district, and executions upon such judgment may be issued by the clerk of such circuit court." (Emphasis added.)

Clerks. Mechanic's Lien. Recordation in all names listed as owners.

May 26, 1983

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

In your recent letter you enclosed a copy of a "Memorandum for Mechanic's Lien Claimed By Subcontractor" which was presented to you for recordation. You ask for guidance in indexing the instrument in view of the fact that the names and addresses of two owners are provided, as well as the name and address of the general contractor and the claimant. You are satisfied that the form conforms to the
requirements set forth in §§ 43-9 and 43-10 of the Code of Virginia.

This Office has historically expressed the view that a clerk of the court is under no legal obligation to pass upon the legal sufficiency of an instrument before recording it. 1965-1966 Report of the Attorney General at 40. It is only necessary for the clerk to determine if the legal requirements for recordation are met, such as being properly acknowledged. 1975-1976 Report of the Attorney General at 283; 1958-1959 Report of the Attorney General at 30.

The duty imposed upon the clerk under § 43-4, relating to the perfection of a lien by a contractor, is as follows: "It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinbefore provided to record and index the same as provided in § 43-4.1, in the name as well of the claimant of the lien as of the owner of the property...." There is no obligation on the clerk to verify whether the person named as the owner in the memorandum is in fact the "owner" as defined in § 43-1. Consequently, where the memorandum presented by the contractor lists two owners, the clerk should index the instrument in both names as well as the name of the claimant. Should those persons named not be the "owner" as required by statute, the parties have ample remedy to test the validity of the instrument.

In response to your inquiry, I am of the opinion that if you are satisfied that the "Memorandum for Mechanic's Lien Claimed By Subcontractor" is substantially in the form provided in § 43-10, you should record the instrument and index it in the names of the claimant and the owners, even though more than one, listed in the memorandum as the owners of the property.

CLERKS. SMALL ESTATE ACT PROCEDURE.

March 29, 1983

The Honorable James E. Hoofnagle, Clerk
Circuit Court of Fairfax County

You have asked several questions concerning § 64.1-132.2 of the Code of Virginia.

First, you ask for clarification as to the meaning and purpose of § 64.1-132.2. That section was enacted in 1981 as a part of the Virginia Small Estate Act (the "Act") which provides for administration of certain small estates without the involvement of a court and the attendant costs of traditional probate procedures. By complying with the affidavit procedure in the Act "a person claiming to be the successor of the decedent..." has legal authority to deal with third parties regarding property of the estate. Traditionally, the personal representative must qualify before a court or clerk of court by taking an oath or giving
bond in order to gain legal authority to act on behalf of the estate. See §§ 64.1-116 and 64.1-119. Such qualification triggers an obligation to file inventories and accountings with the commissioner of accounts, an appointee of the court. See §§ 26-12 and 26-17. I am of the opinion that the effect of the Act was to eliminate court involvement and reduce expense in the administration of estates that comply with the requirements.

Second, you ask whether qualification of the personal representative is required under the Act. For the reasons which follow, it is my opinion that qualification is not required. The affidavit mentioned previously must contain, among other things, statements that:

"3. No application for the appointment of a personal representative is pending or has been granted in any jurisdiction;

4. The will, if any, was duly probated and the list of heirs required by § 64.1-134 was duly filed...."

§ 64.1-132.2(A).

The requirement of the presence of paragraph three in the affidavit clearly indicates that not only is qualification not required, but it is prohibited if the affidavit procedure is used. Paragraph four refers to the "list of heirs required by § 64.1-134...." Note that reference is not made to the entire statute and the circumstances in which it applies, but to "the list...required by § 64.1-134...." The drafters of § 64.1-132.2(A)(4) simply described by reference the contents of the document to be filed when the affidavit procedure is used.

Section 64.1-134 requires "[e]very personal representative...at the time of his qualification..." to furnish a list of heirs to the clerk of court which is to be recorded in the will book.

Third, you ask whether, under the Act, the clerk's office should admit a will to probate and record, and simply include a list of heirs in the file. Section 64.1-132.2(A)(4) requires that the list of heirs required by § 64.1-134 [be] duly filed. We must look to § 64.1-134 for the filing procedures as well as the content of the list. Section 64.1-134 states that "[t]he clerk shall record such list in the will book and index in the name of the decedent as grantor and the heirs as grantees." Therefore, it is my opinion that the clerk may not simply include a list of heirs in the file; rather, he must record and index the list as required by statute.

Fourth, you ask whether the clerk should open a file in an intestate situation. The purpose of providing the affidavit procedure was to eliminate court involvement in estate administration in appropriate situations. The Act
requires no involvement by the court in the administration of an intestate's estate; therefore, I can determine no reason for the clerk to open a file.

Finally, you ask whether the affidavit should be kept in the clerk's records. The affidavit is effective when presented by the "claiming successor" to a third party who is a debtor of the estate or has possession of personal property of the estate. See § 64.1-132.2(A). Its effectiveness is in the "presentation" (§ 64.1-132.2(A)) or "deliver(y)" (§ 64.1-132.3) to the third party. I am of the opinion that recordation is not contemplated by the affidavit procedure.

Section 64.1-132.2 provides in pertinent part: "A. Sixty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or choses in action belonging to the decedent may make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or choses in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

1. The value of the entire personal probate estate, wherever located, does not exceed five thousand dollars;
2. At least sixty days have elapsed since the death of the decedent;
3. No application for the appointment of a personal representative is pending or has been granted in any jurisdiction;
4. The will, if any, was duly probated and the list of heirs required by § 64.1-134 was duly filed...."

COLLEGES AND UNIVERSITIES. BOARD OF VISITORS. ELIGIBILITY FOR REAPPOINTMENT OF FORMER MEMBER TO BOARD OF VISITORS OF MARY WASHINGTON COLLEGE.

October 14, 1982

The Honorable Prince B. Woodard, President
Mary Washington College

This is in reply to your letter of October 4, 1982, seeking clarification as to when a former member of the Board of Visitors of Mary Washington College (the "Board") will be eligible for reappointment to the Board. You have advised that the former member has served two consecutive four-year terms the last of which ended in June of 1981, and pursuant to § 23-91.38 of the Code of Virginia was, therefore, ineligible for reappointment at that time. In July of 1983, a vacancy will exist due to another member's ineligibility for reappointment under § 23-91.38. You ask if the former member who has not served on the Board since 1981 may be appointed for the new four-year term beginning July 1, 1983.
As you have stated, a previous Opinion of this Office held that a person who has served the maximum consecutive terms may not be appointed to the Board for a term that begins immediately following the one during which he last served; nor may he be appointed to fill a vacancy in any term which began prior to the expiration of his last term. Because the former member has not served on the Board since June of 1981 and because she will not be appointed to serve an unexpired term which began prior to the expiration of her term, she is eligible for appointment to a new four-year term beginning July of 1983.

1Section 23-91.38 provides: "No person shall be eligible to serve on the board of visitors for or during more than two successive four-year terms; but after the expiration of a term of two years or less, or after the expiration of the remainder of a term to which appointed to fill a vacancy, a member may serve two additional four-year terms if appointed thereto."

2Dated August 20, 1982, addressed to the Honorable Prince B. Woodard.

COLLEGES AND UNIVERSITIES. BOARD OF VISITORS. MAY HOLD ENDOWMENT FUNDS AND INTEREST INCOME THEREON INDEPENDENTLY OF STATE TREASURER.

August 12, 1982

Dr. George W. Johnson, President
George Mason University

You ask whether the Board of Visitors of George Mason University (the "University") may hold and invest endowment funds independently of the State treasurer.

This Office previously recognized that a public university

"may exercise discretion in accepting contributions and may impose conditions under which it will accept funds...while one institution may want its own tax exempt foundation to administer its endowment, another may choose to rely on one or more other types of financial management arrangements for such purpose...."


One such financial management arrangement would be a situation wherein the University deposits its gifts in a separate institutional endowment account. Section 2.1-180 of the Code of Virginia expressly exempts the institutions from the obligation to deposit endowment funds into the State treasury. In pertinent part, it specifically exempts: all "endowment funds or gifts to institutions owned or controlled by the State...[and] the income from such endowment funds or
gifts...." Any income from endowment funds is thus held independently of the State treasurer, and may be allocable at the discretion of the board of visitors. In the case of restricted gifts, of course, the principal and interest must be used in accordance with the donor's wishes.

The General Assembly has explicitly declared its approval of and encouragement for such independent endowments. Section 23-9.2 clearly sets forth the State policy that:

"in measuring the extent to which the State shall finance higher education in Virginia, the availability of the endowment funds and unrestricted gifts from private sources of institutions of higher education received by such institutions shall not be taken into consideration in, nor used to reduce, State appropriations or payments, but such funds shall be used in accordance with the wishes of the donors thereof to strengthen the services rendered by these institutions to the people of the Commonwealth." ¹

Accordingly, your question is answered in the affirmative.

¹Further indications of the legislative intent that the several public universities and colleges are vested with broad discretion in managing their endowments are seen in two statutes. Section 23-1 requires each institution to annually report to the State Council of Higher Education a simple statement of the kind and amount of all endowments. Section 23-9.14 withdraws from the State Council any "authority over the solicitation, investment or expenditure of endowment funds now held or in the future received by any of the public institutions of higher education."

COLLEGES AND UNIVERSITIES. COACHES. POSSIBLE VIOLATION OF CIVIL OR CRIMINAL LAWS WHERE COACH AGREES TO HAVE TEAM USE SHOES OF PARTICULAR MANUFACTURER IN RETURN FOR HIS RECEIVING MONEY OR MERCHANDISE FROM MANUFACTURER.

April 8, 1983

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

This is in reply to your recent letter in which you state that you have been requested to seek my opinion as follows:

"It is alleged that basketball coaches at state supported universities are being paid money or given merchandise by shoe manufacturers in return for that coach's team wearing the shoes of that particular
manufacturer. In most instances, these shoes are also provided free. The coaches are allegedly compensated for seeing that their school uses the products of that manufacturer making payment.

Could you please respond to the following inquiry: If a coach at a state supported college or university who is employed by the Commonwealth of Virginia receives for his personal benefit money or any other items of value to insure that the products of a particular manufacturer are used by his team, is that individual in violation of any civil or criminal laws or is that individual in violation of a conflict of interest statute?

The Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act") governs the conduct of officers and employees of State and local government. For the purposes of this Opinion, a basketball coach at a State supported university is deemed to be an employee of a governmental agency.

Section 2.1-349(a)(4) provides:

"(a) No officer or employee of any governmental agency shall:

***

(4) Solicit or accept money or other thing of value in addition to compensation, expenses or other remuneration paid directly to him or approved for him by the governmental agency of which he is an officer or employee for services performed within the scope of his official duties."

Section 2.1-351 provides, in part:

"No officer or employee of any governmental agency or advisory agency shall:

***

(c) Accept any gift, favor or service that might reasonably tend to influence him in the discharge of his duties."

If the coach's official duties for which he receives compensation from his college or university include arranging for the purchase of shoes for the team and if he receives money or other thing of value from the shoe manufacturer for his personal benefit in return for arranging the use by his team of shoes bought from a particular manufacturer, it would appear that the coach is in violation of the two sections of the Act quoted above. The fact that the shoes are provided at no cost does not change the fact that the coach receives something of value which appears to influence him in the discharge of his duties. I am of the opinion, therefore, that under the circumstances you describe a coach who accepts money or merchandise for his personal benefit in return for ensuring that his team uses the products of a particular
manufacturer may be in violation of §§ 2.1-349(a)(4) and 2.1-351(c).

In reaching the conclusions stated in the immediately preceding paragraph, I have followed the historic practice of my predecessors of accepting the factual statement as proffered. It is possible, however, that the facts may be different or that the coach's contract does not impose upon him the duty of arranging for the selection of shoes. Moreover, it is important to note that § 2.1-351(c) prohibits the acceptance only of gifts that "might reasonably tend to influence" the coach in the discharge of his duties. Thus, it is clear that all facts must be known and be carefully examined before a final decision can be fairly made.

In regard to your question about the application of certain criminal statutes, § 18.2-444 provides, in part:

"(2) An agent, employee or servant who, without the knowledge and consent of his principal, employer or master requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner as to his principal's, employer's or master's business; *** shall be guilty of a Class 3 misdemeanor."

Under the circumstances you describe, if the coach's employer was unaware of his arrangement with the manufacturer, the coach could be in violation of § 18.2-444(2).

Section 18.2-444 also provides, in part:

"(3) An agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master or to employ service or labor for his principal, employer or master receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; *** shall be guilty of a Class 3 misdemeanor."

Under the circumstances you describe, if the coach is authorized to procure the shoes, etc., by purchase or contract and if he receives, directly or indirectly, for himself or another, a commission, discount or bonus, there may be a violation of § 18.2-444(3).4

Section 11-75, a part of the Virginia Public Procurement Act, §§ 11-35 through 11-80, provides:
"No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The public body may recover the value of anything conveyed in violation of this section."

Under the circumstances you describe, if the coach has official responsibility for procuring the basketball shoes and receives money or anything more than nominal or minimal value without giving consideration of equal or greater value, there may be a violation of § 11-75.

You will note that no definite conclusion is drawn regarding whether there is a willful violation of any of the above statutes. The facts you have furnished are not sufficient to make such a determination.

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1See §§ 2.1-348(a) and 2.1-348(e). Although coaches may be paid from funds other than State funds, I am assuming that they have a contract with the college and participate in the Virginia Supplemental Retirement System and the State health insurance program.

2See 1976-1977 Report of the Attorney General at 229, which held that where the gift, favor or service is accepted by an individual on behalf of his school and is subsequently transmitted to the school for its purposes, there is no violation of § 2.1-351.

3I.e., the athletic department and/or the dean or president of the college.

4See 1981-1982 Report of the Attorney General at 174, holding that the offer of a free automobile to an employee of a business organization in order to induce the employer to purchase the equipment could be in violation of § 18.2-444(3).

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COLLEGES AND UNIVERSITIES. ELIGIBILITY FOR IN-STATE TUITION RATES.

September 21, 1982

The Honorable George W. Grayson
Member, House of Delegates

This is in reply to your letter of September 10, 1982, in which you ask whether a particular student enrolling at Thomas Nelson Community College would be entitled to in-state tuition rates. You indicate that the student is eighteen years old and has resided in Virginia for two months with her stepfather. You further indicate that the stepfather has been a resident of, and taxpayer in, Virginia since 1974.
Your question is answered by § 23-7(B) of the Code of Virginia which, in pertinent part, provides:

"[N]o person in attendance at a State institution of higher education shall be entitled to reduced tuition charges unless such person is and has been domiciled in Virginia for a period of at least one year immediately prior to the commencement of the term, semester or quarter for which any such reduced tuition charge is sought."

Assuming that the student in question is a Virginia domiciliary, eligibility for the in-state rate would still be precluded because the student has not, as indicated in your letter, satisfied the one year durational requirement required by § 23-7. Additionally, there is no authority under § 23-7 for allowing a student who is of the age of legal majority to vicariously claim eligibility through a stepparent domiciled in Virginia for the requisite term.

Accordingly, your question is answered in the negative on the facts you presented.

1The burden is appropriately on the student to provide factual evidence convincingly establishing her domiciled residence in Virginia. Section 23-7(F). Merely establishing that one resides in Virginia and satisfies tax obligations imposed by law does not automatically constitute Virginia domicile. It is quite possible that a student, residing in Virginia and paying Virginia taxes, remains domiciled in another jurisdiction. The question can only be resolved on a case-by-case review of all pertinent facts presented to the institution by the student. See Opinion to the Honorable A. Joe Canada, Jr., Member, Senate of Virginia, dated September 11, 1981.

2Unemancipated minors may claim eligibility through their parents, and under certain conditions, the legal guardian, if any. See § 23-7(A).

COLLEGES AND UNIVERSITIES. "FULL-TIME EMPLOYMENT" UNDER § 23-7.

January 17, 1983

The Honorable David G. Brickley
Member, House of Delegates

You ask whether, under the facts you set forth, a student seeking enrollment at a State institution of higher education would be entitled to reduced tuition rates under § 23-7(E) of the Code of Virginia.

Section 23-7 generally governs eligibility for reduced tuition rates. Subsection B sets forth the general rule that
"no person in attendance at a State institution of higher education shall be entitled to reduced tuition charges unless such person is and has been domiciled in Virginia for a period of at least one year immediately prior to the commencement of the...quarter for which any such reduced tuition charge is sought."

Subsection E provides an exception for military dependents, when the military parent is stationed in this State pursuant to military orders. To qualify for the exception (obviating the need to establish Virginia domicile under subsection B), the General Assembly has legislated specific conditions:

"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...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."

In the correspondence you presented, the student was not claimed by the non-military parent as a dependent for income tax purposes -- a condition explicitly required by § 23-7(E). As a result, the student would not be eligible for in-state tuition rates.

You also ask whether the parent's employment constituted full-time employment within the meaning of § 23-7(E), and whether the parent's taxable income and income taxes paid to Virginia are relevant to such an inquiry. You indicate that the parent works as a babysitter and as a pre-school aide from approximately 6:00 a.m. until 4:45 p.m. each weekday during the school year, and from 6:00 a.m. until 3:45 p.m. during the summer as a babysitter. I assume that the parent was compensated for the hours. You also indicate that the parent had an adjusted gross income of less than $4,000.00, and paid $38.75 in Virginia income taxes.

Section 23-7(E) eligibility is not dependent upon the amount of the parent's taxable income, nor the amount of income tax paid. Indeed, that section requires that the parent pay personal income taxes to Virginia without designation of any specific amount of taxable income or tax payment. Nonetheless, the amount of compensation received may be relevant to verify claims of compensable time on a full-time basis. The term "employed full-time" is not defined by § 23-7. Accordingly, absent contrary intention of the legislature, the meaning ascribed thereto is that generally understood in the community and reflected in the

Full-time employment manifestly does not require complete devotion of one's waking hours to gainful employment. West Virginia Judicial Inquiry Commission v. Allamong, 252 S.E.2d 159 (1979). It is commonly understood that forty hours per week of gainful employment constitutes full-time employment. Yet, full-time employment is not arbitrarily dependent on any specific number of working hours. Each case must be judged individually. For a given work activity, the pertinent inquiry is to ascertain the professional standard of what constitutes full-time employment, or, in other words, the amount of compensable time reasonably understood as constituting full-time employment for the given work activity. See, e.g., Grace v. Douglas, 134 N.W.2d 818 (Neb. 1965); Bass v. Maine Employment Commission, 250 A.2d 492 (Maine, 1969); Margie Bridals, Inc. v. Mutual Benefit Life Insurance Co., 379 N.E.2d 62 (Ill. 1978).

Resolution of the fact issue in this case is facilitated by your correspondence which indicates that the student "designated on the application for admission where the mother's occupation was listed as part-time." In view of this admission, I am unable to conclude that the institution's judgment was arbitrarily reached.

For the foregoing reasons and on the basis of the facts you presented, I am of the opinion that the student in question is not eligible for lower tuition rates under § 23-7(E).

1Your correspondence did not indicate whether the student claimed in-state tuition rates through the military parent. If the military parent paid Virginia income taxes, and satisfies the additional requirements of § 23-7(E), the student would be eligible. Section 23-7(E) specifically applies to "either parent" of the student, not just the non-military spouse.

2As pointed out, failure of the parent to claim the student as a tax dependent is dispositive of the student's eligibility for in-state tuition rates under § 23-7(E). Nonetheless, the question related to full-time employment is treated separately.


4See, also, Webster's New International Dictionary 1018 (2d.ed.), which defines "full-time" as "[t]he amount of time considered the normal or standard amount for working during a given period as a day, week or month" (emphasis added); and, see, The American Heritage Dictionary of The English Language which defines "part-time" as "less than the customary time."
5If any student's admission was erroneously provided, it is incumbent upon the student to convincingly establish that fact to the institution, whereupon the institution should re-examine the work activity of the parent. Nevertheless, a subsequent withdrawal of an admission freely given must be closely examined to be sure that a case is not being factually contrived to fit the standards established by the General Assembly.

COLLEGES AND UNIVERSITIES. STATE WORK-STUDY PROGRAM MAY EXCLUDE PROFIT MAKING PROPRIETARY SCHOOLS TO MEET INTENT OF LEGISLATURE.

June 24, 1983

Dr. Gordon K. Davies, Director
Council of Higher Education

You ask two questions regarding the new Virginia Work-Study Program (hereafter "Program") for which the Council of Higher Education (hereafter "Council") is preparing implementing regulations. Your first question is whether students enrolled in proprietary institutions, which are generally profit-making, are constitutionally eligible to participate in the Program if the Council elects to permit them to be included within the Program. Your second question is whether the Council may define "eligible institutions" as referenced in the underlying legislation in such a way as to limit participation in the Program to selected institutions or groups of institutions. I will address your questions in the order posed.

Your first question is governed by Art. VIII, § 10 of the Constitution of Virginia (1971). In pertinent part, that section provides:

"No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may...subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of...collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State...." (Emphasis added.)

I interpret your reference to "proprietary" schools as including schools which are privately owned and operated for profit. The Virginia Constitution does not explicitly make reference to the term. Article VIII, § 10 does permit an appropriation of public funds for educational purposes in furtherance of collegiate or graduate education of Virginia students in non-sectarian private schools. No restriction is
made as to whether the school is "for profit," but the legislature is empowered to establish appropriate limitations. Accordingly, in answer to your first question, it is my view that it is constitutionally permissible for the General Assembly to provide for proprietary (private for profit) schools to be eligible for the Program, provided that the expenditure is in furtherance of "collegiate or graduate education of Virginia students...." (Emphasis added.) See, for example, Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634 (1973).3

My opinion that inclusion in the Program of proprietary schools providing collegiate or graduate education is constitutionally permissible does not mean, with regard to your second question, however, that the inclusion of such schools is legislatively mandated. As noted, Art. VIII, § 10 constitutionally empowers the General Assembly to impose limitations upon student aid or loan programs. The enabling legislation for the Program must thus be scrutinized to determine whether the General Assembly has specifically empowered the Council to include within the Program students enrolled in non-sectarian proprietary schools which are profit-making, as well as those enrolled in nonprofit proprietary schools.4

In enacting the Program, the General Assembly has provided:

"In order to provide financial assistance to students attending eligible postsecondary institutions in the Commonwealth and to provide students, wherever possible, with employment related to their academic pursuits, there is hereby established the Virginia Work-Study Program." Section 23-38.70.

The legislation does not define the term "eligible postsecondary institutions".5 In view of the ambiguity, it is appropriate to glean legislative intent from the underlying legislative history which led to passage of the enactment.

The Program was initially proposed by the Council and recommended to the General Assembly. Pursuant to Joint Senate Resolution 81 of the 1982 General Assembly, a task force was constituted by the Council to examine student financial aid programs in the Commonwealth. In November 1982, the instant Program was submitted to the Governor and the General Assembly as a means of making student financial aid programs "more cost effective." See "Student Aid In Virginia: Proposals for Ensuring Continued Access To Higher Education - A Report From the State Council of Higher Education For Virginia," dated November 3, 1982, (hereafter "Report") Summary of Recommendations. The recommended program was expressly limited as follows:

"To ensure the most efficient use of state funds, only Virginia residents enrolled in full-time study in
eligible programs offered by public or private non-profit institutions of higher education approved to confer degrees in the Commonwealth of Virginia would participate in the state program." (Emphasis added.) Report at 50.

Such reports of committees constituted by the legislature to consider complex problems are persuasive in determining legislative intent, particularly where the resulting statute closely follows the committee recommendations. See 2A Sutherland Statutory Construction §§ 48.07, 48.11 at 206, 212 (4th ed. 1973) (footnotes omitted).

I have no basis for concluding that the legislature intended the term "eligible institutions" as embracing institutions not recommended by the study. Pursuant to § 23-38.70, the Council is given the power through the promulgation of regulations to implement the legislative intent. In keeping therewith, I am of the opinion that the Council is empowered to exclude by regulation profit-making proprietary schools from the Program, unless and until the General Assembly, by appropriate legislation, clearly sets forth a contrary intent.

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1The Program is codified at § 23-38.70 of the Code of Virginia and is to be effective July 1, 1984. The Council is statutorily mandated to develop implementing regulations and procedures.

2I understand from your correspondence that there are more than 100 proprietary institutions in the Commonwealth, and they offer programs ranging from computer science to cosmetology. Only one is currently approved by the Council to offer a degree program. See § 23-265, et seq.

3Article VIII, § 11 of the Constitution does not work a contrary result. It provides, in pertinent part: "The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education...." (Emphasis added.) This provision supplements Art. VIII, § 10 by authorizing financial assistance to students attending certain private sectarian institutions whose primary purpose is not to provide a religious or theological education. See Miller, supra.

4Absent the enactment of the Program, the Council would have no general authority to include proprietary schools in student aid programs. The Council's principal function is to coordinate the public institutions of higher education. See §§ 23-9.5, 23-9.6:1. It also has authority to assist private, non-profit institutions of higher learning by providing advisory services. See §§ 23-9.6:1(1), 23-9.10:2. The Program, codified at § 23-38.70, permits the Council to include certain private proprietary schools within its regulations. The only other statutory function concerning
proprietary schools possessed by the Council is that of regulating the conferring of post-secondary degrees and the granting of academic credits by such institutions. See §§ 23-265 through 23-276.

Such terminology is also referenced again in the body of the legislation without definition. Section 23-38.71(1).

COMPREHENSIVE CONFLICT OF INTERESTS ACT. GENERAL ASSEMBLY MEMBER. MAY NOT PATRON LEGISLATION IN WHICH HE HAS PERSONAL INTEREST IF SUCH LEGISLATION HAS SPECIFIC APPLICATION TO SUCH INTEREST.

March 10, 1983

The Honorable John Watkins
Member, House of Delegates

This is in reply to your letter of February 26, 1983, requesting an Opinion whether there would be a conflict of interests if you were to patron or co-patron inter-basin transfer legislation. You have indicated that family members who are not members of your immediate family own property along the river which would be affected by the proposed legislation and that you own stock in a corporation which rents portions of this property from those family members.

I am unaware of any specific provision of existing law which limits the type of legislation a member of the General Assembly may patron or co-patron. Section 2.1-352 of the Code of Virginia, which is part of the Virginia Conflict of Interests Act (the "Act"), governs whether a government official may participate in the consideration of and voting on matters before his agency in which he might have a material financial interest. This section, however, does not apply to members of the General Assembly.

I draw attention, however, to § 2.1-358(c)(iv), also part of the Act, which provides:

"No member in order to further his own financial interests, or those of any other person, may disclose or use confidential information acquired in the course of his official duties."

Accordingly, a member of the General Assembly may not use or disclose confidential information acquired in the course of his duties in furtherance of his or another's personal financial interest. Section 2.1-602(3) of the newly enacted Comprehensive Conflict of Interests Act, effective July 1, 1983, if signed by the Governor, similarly prohibits the use of confidential information acquired by reason of one's public position for the benefit of himself or another. Although these provisions do not specifically deal with what type legislation a member may sponsor, they may give you guidance in making such a determination.
I draw your attention further to § 2.1-610 of the new Act which prohibits a member of the General Assembly from acting in any manner on behalf of the General Assembly when (1) he has a personal interest in a transaction and (2) the transaction has specific application to his personal interest. You may have a personal interest in the transaction by virtue of a financial interest in the corporation which is the lessee of certain riverfront property. If so, you would be prohibited from acting in any manner on behalf of the General Assembly if the transaction, i.e., sponsoring the proposed legislation or voting on it, has specific application to your personal interest.

"Specific application" as used in § 2.1-610 means:

"a transaction which affects the personal interest of the officer or employee specifically, as opposed to a transaction which affects the public generally, although in the latter situation the officer's or employee's interest, as a member of the public, may also be affected by that general transaction."

Therefore, if the legislation that you contemplate sponsoring affects the public generally, even though your interest may also be affected, the transaction would not be of specific application and you would not be prohibited under the new Act from being its patron or co-patron. If, however, the contemplated legislation affects your interest specifically, you would not be allowed to patron or co-patron such legislation.

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1Section 2.1-610 provides in pertinent part: "Each officer of all state governmental agencies, including members of the General Assembly...shall disqualify himself from participating in any transaction on behalf of his agency when (i) he has a personal interest in the transaction and (ii) the transaction has specific application to his personal interest."

2"Personal interest in a transaction" is defined in § 2.1-600 to exist where "an officer or employee of an agency...has (a) a personal interest in property or in a firm, corporation, partnership or business entity that...(i) will benefit or suffer from the action of the agency considering the transaction...."

3I also call your attention to Rule 69, Rules of the House of Delegates, which, in pertinent part, provides that "no member who has an immediate and personal interest in the result of the question shall either vote or be counted upon it." Historically, this Office has declined to interpret or apply the Rules of the House to a particular factual situation because to do so would improperly invade the province of the legislature. See 1977-1978 Report of the Attorney General at 31.
COMPREHENSIVE CONFLICT OF INTERESTS ACT. MEMBER OF BOARD OF SUPERVISORS EMPLOYED BY COMPANY DOING BUSINESS WITH COUNTY. VIOLATION DEPENDS UPON WHICH AGENCIES ARE INVOLVED AND AUTHORITY OF MEMBER TO PARTICIPATE IN PROCUREMENT OF CONTRACT ON BEHALF OF COMPANY OR GOVERNMENTAL AGENCIES.

March 25, 1983

The Honorable Harry J. Parrish
Member, House of Delegates

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

"Would the controller of a small business enterprise, less than (50) fifty employees, who has no ownership of the company but is paid in excess of ($10,000) ten thousand dollars, be in violation of the new conflict of interest law (S.B. 23) if he were a member of the County Board of Supervisors and the employing company engaged in supplying some of the county requirements?

The employee performs all functions of a controller with responsibility for all accounting, payroll, accounts receivable, accounts payable, general ledger, inventory control and management statements, but does not participate in actual bid preparation, nor does he normally act in a sales capacity. All contracts between the company, the county and county school board have resulted from awards on competitive bids."

Senate Bill 23, passed by the 1983 Session of the General Assembly enacted the Comprehensive Conflict of Interests Act ("CCOIA"), §§ 2.1-599 through 2.1-634 of the Code of Virginia, and repealed the existing Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358, effective July one.

Whether the member of the board of supervisors in question would be in violation of the CCOIA depends upon (1) which of the governmental agencies of the county contract with the company employing him, and (2) his authority on behalf of the company and the governmental agency. I will assume that the school board does not utilize the county purchasing agent, but, rather, makes its own purchasing decisions independent of the control of the board of supervisors or those employees subject to the supervisors' control.

By definition, each component part of the county government constitutes a separate "governmental agency." See § 2.1-600. By virtue of § 2.1-606(A), the member would be prohibited from having a personal interest in (i) any contract with his governing body, or (ii) any contract with any governmental agency which is a component part of his local government and which is subject to the ultimate control of the governing body of which he is a member, or (iii) any...
contract other than in a contract of regular employment with any other governmental agency if such person's governing body appoints a majority of members of the governing body of the second governmental agency.

Clearly, as a general rule, if the agencies which contract with the company by which the member is employed are (1) the board of supervisors itself, (2) a component part of the county government which is subject to the ultimate control of the board of supervisors, or (3) one for which the majority of members are appointed by the board of supervisors, the member would be in violation of § 2.1-606(A) if his company continues to engage in contracts after July 1, 1983, unless one of the exceptions applies.

I point out an exception to the prohibition against such contracts in § 2.1-608(A)(4), which reads as follows:

"An officer or employee whose sole interest in a contract with the agency is by reason of employment by the contracting firm or governmental agency, provided such officer or employee or his spouse, or other relative residing in the same household does not participate and has no authority to participate in the procurement or letting of such contract on behalf of the contracting firm and such officer or employee does not have authority to participate in the procurement or letting of the contract on behalf of his agency...."

(Emphasis added.)

Assuming, as indicated in your letter, that the employee of the company has no authority to participate in the procurement or letting of the contracts on behalf of the company, the first condition in the exception in § 2.1-608(A)(4) would be satisfied. However, it still remains to be determined if the second condition is also satisfied, i.e., the person must not have authority to let the contract on behalf of the governmental agency. If not, § 2.1-606(A) would not apply; hence, there would be no violation of the CCOIA if his company continues to engage in contracts with governmental agencies of the county after July 1, 1983.

The member clearly has authority on behalf of the board when the board is a party to the contract. Likewise, with respect to the other agencies of the county, if the board has ultimate control over the contracts, the condition for the exception would not be met; hence the prohibition in § 2.1-606(A) would apply. On the other hand, if the contract is with an agency of the county government which has independent authority to contract, aside from board's control, the member would have no authority to participate in the contract; hence, the exception would apply.

In summary, based on the factual situation set forth in your letter, I am of the opinion that the member of the board of supervisors would be in violation of the CCOIA only if his
company continues to contract with (1) the board of supervisors itself, or (2) with an agency over which the board exercises control in contracts, or the member is given authority to participate in the procurement or letting of such contracts on behalf of his company.

Section 2.1-600 defines "personal interest," in pertinent part, as "a personal and financial benefit or liability accruing to an officer or employee or to such person's spouse, or any other relative who resides in the same household. Such interests shall exist by reason of...(iii) income from a corporation, firm, partnership or other business entity***[which annually] exceeds $10,000 or may reasonably be anticipated to exceed $10,000...."

COMMISSIONERS OF REVENUE. CHANGING REAL ESTATE RECORDS TO REFLECT CHANGE OF NAME UNDER § 8.01-217.

May 27, 1983

The Honorable Willard R. Finney
Member, House of Delegates

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

"Section 8.01-217 of the Code of Virginia provides how the name of a person may be changed and provides that the clerk of the court shall spread the order upon the current deed book in his office, index it in both the old and the new names. If this section is followed and the clerk's office indexes the order in the current deed book, would this be sufficient for the Commissioner of Revenue to change his records to show the new name on the real estate tax ticket?"

While there is no express provision of Title 58 of the Code concerning taxation which mandates that real estate records be changed to reflect a change in name, I do note the provisions of § 58-796 which, in pertinent part, direct the commissioner of the revenue annually "to ascertain...the person to whom" real estate is chargeable with taxes. A prior Opinion of this Office relied upon that section to suggest that real estate records should be changed to reflect the new name of a woman who had recently married. See 1965-1966 Report of the Attorney General at 46. That Opinion stated that the new name should be used while preserving the former name.

Accordingly, I am of the opinion that your inquiry should be answered in the affirmative. It is not necessary for the property owner to prepare a deed conveying the property from himself in his prior name to his new name. Nor am I aware of any regulation imposed by the Department of
Taxation under § 58-959, pertaining to tax ticket forms, which would prevent the commissioner from changing the real estate records.

COMMISSIONERS OF REVENUE. DEPUTIES NEED NOT BE APPOINTED.

July 8, 1982

The Honorable Esten O. Rudolph, Jr.
Commissioner of the Revenue for Frederick County

This is in response to your letter inquiring whether it is necessary for a commissioner of the revenue to have sworn deputies under his title. Section 15.1-48 of the Code of Virginia provides:

"The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court may... appoint one or more deputies...." (Emphasis added.)

The plain meaning of § 15.1-48 is to give the enumerated officers the discretionary power to appoint deputies.1 This Office has consistently opined that constitutional officers have exclusive control over the personnel policies of their offices.2 Accordingly, I am of the opinion that a commissioner of the revenue is not required to appoint any deputies.


COMMISSIONERS OF REVENUE. REAL ESTATE ASSESSMENT. COMMISSIONER MAY CORRECT ASSESSMENT ON PROPERTY FOUND TO HAVE LESS ACREAGE THAN INDICATED ON DEED IF PLAT IS RECORDED.

July 14, 1982

The Honorable Gerald H. Gwaltney
Commissioner of the Revenue for Isle of Wight County

You have asked whether a real property tax assessment may be corrected by a commissioner of revenue after the date of assessment where a plat is recorded which shows the property to contain less acreage than the amount on which the assessment is based.
A previous Opinion of this Office, found in the 1972-1973 Report of the Attorney General at 85, indicates that such an assessment may be corrected if the commissioner of revenue is satisfied that the amount of acreage on which the original assessment was based is incorrect and if a plat has been recorded showing the correct amount of acreage to be less than that on which the assessment was made. That Opinion also indicates that, if both of these conditions are satisfied, then

"[The commissioner of revenue] may exonerate the landowner from the payment of that portion of the taxes erroneously assessed, in accordance with the provisions of § 58-1142, and in preparing subsequent land books he may extend the taxes on the basis of the per acre value ascertained in the general reassessment multiplied by the number of acres indicated by the recorded plat."

Correction of a tax assessment under § 58-1142 of the Code of Virginia is available only where an application for correction has been made to the commissioner of revenue or other official within three years from the last date of the tax year for which the assessment is made. If a timely application is filed, § 58-1142 directs that:

"If the assessment exceeds the proper amount, the Commissioner or such other official shall exonerate the applicant from the payment of so much as is erroneously charged if not paid into the treasury of the county or city; and if paid, the governing body of the county or city shall, upon the certificate of the Commissioner or such other official with consent of the town, city or Commonwealth's attorney that such assessment was erroneous, direct the treasurer of the county or city to refund the excess to the taxpayer, with interest, if authorized pursuant to § 58-1152.2, provided such application was made within three years from the last day of the tax year for which such assessment was made...."

This language of § 58-1142 is mandatory. I am, therefore, of the opinion that, if an application has been timely filed and the assessment determined to be erroneous in accordance with the guidelines noted above, the amount of taxes erroneously assessed must be exonerated or refunded to the taxpayer in accordance with the provisions of § 58-1142.

April 4, 1983

The Honorable L. Wayne Carter
Commissioner of the Revenue for the City of Salem
You have asked two questions concerning § 58-46 of the Code of Virginia. First, you ask whether you are in violation of the statute if another party has a key to your office to use in emergency situations and to gain access for cleaning purposes. Second, you ask whether the regular copy machine operator, in addition to yourself and your staff, is authorized to make the necessary copies of confidential records.

The pertinent language in § 58-46 states:

"[I]t shall be unlawful for the...commissioner of the revenue...or any other State or local tax or revenue officer or employee to divulge any information acquired by him...while in the performance of his public duties...[A]nd, provided further, that this inhibition does not extend to...any act performed or words spoken or published in the line of duty under the law...."

In answer to your first question, the statute prohibits the act of "divulg[ing] any information...." Giving a key to another party for use as you specified is not an act of "divulg[ing] any information...." The statute is intended to prohibit dissemination of confidential information. It is not intended to limit all access to the office where that information is housed. It is my opinion that you are not in violation of § 58-46 if you give a key to your office to another party for the reasons you specify.

In answer to your second question, § 58-46 does not prohibit employees of local tax and revenue officers from access to confidential records if the employees are performing their public duty. Although the regular copy machine operator may not be on your staff, if he is an employee of a local government office designated by you, he may make copies of confidential records as needed in the office. He, also, is prohibited from divulging any information acquired in the performance of his duties. See 1974-1975 Report of the Attorney General at 524.

COMMISSIONERS OF REVENUE. WORKING HOURS AND OTHER PERSONNEL POLICIES SET BY PRINCIPAL.

July 21, 1982

The Honorable Elinor W. Downey
Commissioner of the Revenue for the City of Clifton Forge

You have asked whether the city council has been granted authority by statute or other provision of law "to set the office hours, vacations...etc., for constitutional officers and employees...." Your letter makes reference to several prior Opinions of this Office, all of which stand for the proposition that, in the absence of a statute or provision of special law such as the city charter, a constitutional officer maintains exclusive authority over personnel matters
involving vacation, office hours, sick leave and holidays for his employees.


I have reviewed the charter of the City of Clifton Forge, Ch. 217, Acts of Assembly of 1918, and all of its succeeding amendments, and I do not find any authority which would enable the city council to remove from your discretion those matters of personnel policy mentioned earlier.

COMMUNWEALTH'S ATTORNEYS. ASSISTANTS. FULL-TIME WORK REQUIREMENT. COMMONWEALTH'S ATTORNEY MAY NOT EMPLOY ASSISTANT ON LESS THAN FULL-TIME BASIS EVEN THOUGH ASSISTANT DOES NOT ENGAGE IN OUTSIDE LAW PRACTICE.

October 21, 1982

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

This is in reply to your recent letter in which you make the following inquiry:

"Under the current law, is it possible for a Commonwealth Attorney for a jurisdiction to employ an Assistant Commonwealth Attorney for less than forty (40) hours if that Assistant Commonwealth Attorney does not practice law outside of the Commonwealth Attorney's office.

In other words, is there any requirement that an Assistant Commonwealth Attorney work a forty hour week or be a fulltime Commonwealth Attorney in respect to spending fulltime there. Or, could an Assistant Commonwealth Attorney only work half a week."

There is no statute of which I am aware that specifies the number of hours to be included in a normal, full-time work week for assistant Commonwealth's attorneys or distinguishes full-time work from part time work in terms of a particular number of hours worked per week. You suggest in your inquiry that a normal work week consists of forty hours which is the commonly accepted interpretation of that term. I will assume for purposes of this inquiry that your question is directed at an arrangement involving less than full-time work by an assistant on a regular basis, however the term may be defined.

Section 15.1-821 of the Code of Virginia provides, in pertinent part, as follows:
"In cities having a population of more than thirty-five thousand, Commonwealth's attorneys and all assistant attorneys for the Commonwealth shall devote full time to their duties, and shall not engage in the private practice of law...."

In interpreting this provision, prior Opinions of this Office have treated it as stating two separate requirements, that is, Commonwealth's attorneys and their assistants shall (1) devote full time to their duties and (2) not engage in the private practice of law. See Reports of the Attorney General 1981-1982 at 76; 1980-1981 at 68; 1979-1980 at 91, 92, 93; 1976-1977 at 38. With regard to the full time requirement, one of the Opinions states the applicable standard as follows:

"The operative limitation here is that the Commonwealth's attorney shall devote full time to his duties. Full time employment normally allows of a limited amount of collateral or personal business activity (for example, farming or investments) so long as the activity does not interfere with the individual's employment duties, and the individual's availability during normal working hours." (Emphasis added.) See 1979-1980 Report of the Attorney General at 91, 92.

It is clear that less than full time work by an assistant Commonwealth's attorney necessarily admits of regular absence during at least a portion of the hours of the normal work week when the individual otherwise would be available to give attention and priority to the public's business. See 1979-1980 Report of the Attorney General, supra. In answer to your inquiry, I am of the opinion that the Code of Virginia precludes employment of an assistant Commonwealth's attorney on less than a full time basis even though he or she does not practice law outside of the Commonwealth's attorney's office.

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1A similar provision applies to counties with more than thirty-five thousand population. See § 15.1-50.1. You do not indicate the jurisdiction in question, but I will assume that its population exceeds thirty-five thousand and that the quoted requirements are therefore applicable.

2Note that the prior Opinions usually dealt with situations involving participation in other activities of a public practice nature, and that the determination of whether such activities interfered with the requirement of full time devotion to duty, when discussed, turned on a factual analysis. The circumstances of the instant inquiry - less than full-time work with no outside law practice, public or private - have not been considered.

3This interpretation of the full-time requirement is supported by the directive that the State Compensation Board, in determining salaries for assistant Commonwealth's attorneys, "shall consider the provisions of §§ 15.1-50.1 and
15.1-821 requiring that such attorneys serve on a full-time basis...." See § 14.1-53. In this context "full-time" clearly is being distinguished from "part-time." Compare §§ 14.1-70 and 14.1-78, which specifically provide for part-time deputies of sheriffs.

COMMONWEALTH'S ATTORNEYS. COMPENSATION. EXPENSES OF OFFICE. INCIDENTAL COSTS INCURRED IN PROCEEDING TO REMOVE A CITY COUNCILMAN ARE TO BE INCLUDED AMONG EXPENSES OF OFFICE.

September 16, 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 under what authority the Commonwealth may pay the incidental costs incurred by your office in a proceeding to remove a city councilman from office pursuant to § 24.1-79.5 of the Code of Virginia. You point out that § 24.1-79.92 obligates the attorney for the Commonwealth to represent the Commonwealth in such a proceeding but that no mention is made of who shall pay his expenses. Section 24.1-79.10 does permit the court to award costs and reasonable attorney fees to the officeholder charged under the removal proceeding if the proceeding has been dismissed in his favor.

Title 14.1 establishes the compensation of constitutional officers and provides the manner in which the expenses of their offices shall be set. In my opinion, the expenses about which you inquire should be included in the expenses of office which are fixed annually by the State Compensation Board in accordance with § 14.1-51, based upon the written request of each officer and the supplemental information obtained through questionnaires pursuant to § 14.1-50. If you believe that proper allowance has not been made for the expenses under consideration, the only remedy of which I am aware is to request an appropriate increase from the Compensation Board, in writing, explaining in detail the facts and circumstances which you believe would justify a change.

1Section 24.1-79.5 provides for circuit court removal from office of elected city officers for incompetency, neglect of duty or misuse of office which materially adversely affects the conduct of such office. It further provides that such a proceeding shall be upon petition signed by a number of registered voters equal to ten percent of the total number of votes cast for the office when the incumbent officer was last elected.

2Section 24.1-79.9 provides as follows: "In any trial under this article the attorney for the Commonwealth shall represent the Commonwealth. If the proceeding is against the attorney for the Commonwealth then the court shall appoint
some attorney to represent the Commonwealth. Any such officer proceeded against shall have the right to demand a trial by jury. The Commonwealth and the defendant shall both have the right to apply to the Supreme Court for a writ of error and supersedeas upon the record made in the trial court and the Supreme Court may hear and determine such cases."
The statutory predecessor to § 24.1-79.9 is § 15.1-66, which was repealed by Chs. 515, 595, Acts of Assembly of 1975.

In your letter you refer to costs of a "court reporter, depositions and any other incidental expenses incurred."

Section 14.1-51 provides, in pertinent part, as follows: "The [Compensation] Board shall...carefully consider the questionnaires and written requests filed as required by § 14.1-50 and consider the work involved in the discharge of the duties of the respective officers, the amount expended or proposed to be expended by each...and after such consideration the Board shall fix and determine what constitutes a fair and reasonable salary which is to be paid to the clerks, assistants and deputies of each such officer, and all other expense items requested." (Emphasis added.)

See § 14.1-66; 1969-1970 Report of the Attorney General at 60, 61 (compensation includes expenses of office - "When a Commonwealth's Attorney is confronted with an expense which falls outside of his allotted compensation, then he may request an allowance from the Compensation Board to cover such expense or to reimburse him.")

COMMONWEALTH'S ATTORNEYS. EMPLOYMENT OF PART-TIME ASSISTANTS IN JURISDICTIONS SHARING SUCH OFFICIALS WITH AGGREGATE POPULATIONS OF MORE THAN 35,000 BUT INDIVIDUAL POPULATIONS OF LESS THAN 35,000. IN SUCH CIRCUMSTANCES, PART-TIME ASSISTANT MAY BE HIRED. FULL-TIME REQUIREMENTS OF §§ 15.1-50.1 AND 15.1-821 ARE NOT APPLICABLE.

August 31, 1982

The Honorable Howard P. Anderson, Jr.
Commonwealth's Attorney for Halifax
County and the City of South Boston

You have requested my Opinion as to whether you, as Commonwealth's attorney for Halifax County and the City of South Boston, are entitled to request the employment of a part-time assistant Commonwealth's attorney. You indicated that the aggregate population of these two political subdivisions exceeds 35,000, but on an individual basis, neither jurisdiction has a population greater than 35,000.

The applicable law in regard to the employment of a part-time assistant Commonwealth's attorney is found in §§ 15.1-9, 15.1-50.1 and 15.1-821 of the Code of Virginia.

Section 15.1-9 is the general provision providing for the employment of assistants to Commonwealth's attorneys. In pertinent part it reads:
"Every county and city may, with the approval of the Compensation Board, provide for employing such assistant...to the Commonwealth's attorney as in the opinion of the governing body may be required...."

Subsequent sections place qualifications on this general provision with regard to the employment status of such assistants. Section 15.1-50.1 provides that in counties having a population of more than 35,000, all assistants to Commonwealth's attorneys shall "devote full time to their duties...." Likewise, in reference to cities with populations in excess of 35,000, § 15.1-821 mandates that all assistants to Commonwealth's attorneys "devote full time to their duties...."

A review of the legislation in this area reveals that the full-time status requirement for assistants as first enacted in 1974 applied only to cities. See Ch. 470, Acts of Assembly of 1974. A similar provision for counties was not enacted until 1977. See Ch. 623, Acts of Assembly of 1977. There is, however, no similar statutory provision applicable to the facts you have presented, i.e., the sharing of a Commonwealth's attorney by two or more units of government which, in the aggregate, have a population greater than 35,000, but individually do not exceed this population figure.

The only reference to aggregation of the population of political subdivisions sharing a Commonwealth's attorney appears in § 14.1-53. This section states in relevant part:

"Whenever an attorney for the Commonwealth is such for a county and city together...the aggregate population of such political subdivisions shall be the population for the purpose of arriving at the salary of such attorney...." (Emphasis added.)

This section addresses only the salaries for and not the status of assistants to Commonwealth's attorneys. It does not refer or apply to the full-time versus part-time status of such assistants.

Moreover, the legislative history accompanying the introduction of H.B. 1734, which was enacted as Ch. 623, Acts of Assembly of 1977, is relevant to the question at hand. The report of the Virginia Advisory Legislative Council (the "Council") which studied the issue of full-time Commonwealth's attorneys reveals the following:

1. As a long range proposition, the report states Commonwealth's attorneys and their assistants should serve full-time. "Economic traditional and political factors, however, inhibit a recommendation that this policy be undertaken at once. Accordingly...the legislation appended to implement [this report], is intended as a first step toward this goal...." 1977 House Document No. 19, Report on Full-Time Commonwealth's Attorneys of the Virginia Advisory Legislative Council to the
Governor and General Assembly of Virginia, p. 5. (hereinafter House Doc. No. 19).

2. Based on the latest population studies available, the report lists the cities and counties which would be affected by the Council's recommendation that Commonwealth's attorneys and their assistants devote full-time to their duties. House Doc. No. 19, pp. 6-7. All of the jurisdictions listed are individual cities or counties; no political subdivisions sharing such offices appear on the list.

3. The Council recognized that smaller jurisdictions have no need for full-time Commonwealth's attorneys. In reference to two or more political subdivisions sharing such officers or their assistants, the report raised a constitutional question as to a 1976 amendment to § 15.1-40.2, which establishes procedures whereby a constitutional officer can be shared. This question, the report states, "should be settled before a serious study of these problems [of sharing such officers] be undertaken." House Doc. No. 19, p. 9.

This expression of legislative intent clearly indicates that the question of full-time assistants to Commonwealth's attorneys in political subdivisions sharing such officers was not addressed in the 1977 enactment of § 15.1-50.1 and amendments to § 15.1-821 of the Code.

Accordingly, in light of (1) the legislative history discussed previously and (2) the absence of specific legislation requiring an assistant to the Commonwealth's attorney in a situation such as you describe to be full-time, it is my opinion that you are entitled to request a part-time assistant.

COMMONWEALTH'S ATTORNEYS. REQUIRED TO PURCHASE OFFICE SUPPLIES, ETC., THROUGH COUNTY'S CENTRAL PURCHASING DEPARTMENT.

August 6, 1982

The Honorable E. Bruce Harvey
Commonwealth's Attorney for Campbell County

This is in reply to your letter inquiring whether a Commonwealth's attorney is required to make his purchases of supplies, equipment and other materials for his office through the county's central purchasing department established pursuant to § 15.1-127 of the Code of Virginia. As you are aware, this Office has previously ruled that various provisions of the Code require constitutional officers to comply with the purchasing procedures of localities. Your question, however, is whether this conclusion is still valid in view of the amendment of
§ 14.1-64, effective July 1, 1980, to provide that the Commonwealth shall bear the total cost of salaries, expenses and other allowances for the office of the attorney for the Commonwealth.2

Although this amendment of § 14.1-64 increased the amount reimbursed to localities by the State for salaries and expenses connected with the operation of certain constitutional offices, it did not alter the basic procedure by which such costs are paid. The locality makes the initial expenditures and is then reimbursed by the State, but only for so much of the salaries and expenses as are approved by the State Compensation Board.3 Localities remain authorized to supplement the compensation of constitutional officers4 and are still required to furnish them with office space and certain equipment.5

In an Opinion issued to the Honorable J. Ronnie Minter, Commissioner of the Revenue for the City of Martinsville, dated May 24, 1982, this Office again ruled that constitutional officers must comply with the locality's central purchasing procedures. The rationale is that the General Assembly has specifically authorized localities to adopt centralized purchasing procedures in order to secure the monetary savings achieved by centralized, rather than piecemeal, purchasing of goods, supplies, equipment and materials with tax dollars.6 This rationale is not affected by the amendment to § 14.1-64.

Because localities continue to make the initial expenditure for such expenses and because the General Assembly has recognized the savings to be achieved by centralized purchasing, I am of the opinion that the Office of the Commonwealth's attorney must comply with the locality's central purchasing procedures.

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3See §§ 14.1-50, 14.1-51. Section 14.1-51 requires the State Compensation Board to take into account localities' plans for pay and compensation, and for adjustments of salaries and expenses for the ensuing fiscal year in setting approved salaries and expenses for operating constitutional offices.
5See § 15.1-258.
August 10, 1982

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

This is in reply to your recent letter in which you ask:

"1. Does a new five-year franchise negotiated with the current franchisee effective upon the termination of the existing franchise constitute an 'amendment' or 'extension' of the existing franchise under § 15.1-314 of the Code of Virginia (1950), as amended, and thus require advertising and competitive bidding in accordance with Sections 15.1-308 through 15.1-314 of the Code of Virginia (1950), as amended?

2. What exactly determines whether an agreement with the existing franchisee is a new franchise or an 'extension' or 'amendment' of the current franchise?

3. In light of the decision of the United States Supreme Court in Community Communications Company, Inc. vs. City of Boulder, Colorado, U.S. [102 S.Ct. 835] (decided January 13, 1982)...and the 1982 amendment to Section 15.1-23.1 of the Code of Virginia (1950), as amended, what potential risks or anti-trust law implications would there be if the city decided to negotiate a new five-year franchise with the existing franchise holder without advertising and competitive bidding?

4. In light of the 1982 amendment to Section 15.1-23.1...and assuming that the city complies with all applicable provisions of Virginia law, does the City of Fredericksburg enjoy the 'state action' exemption from Sherman Act liability announced in Parker vs. Brown, 317 U.S. 341 (1943) in its action in granting a cable television franchise?"

I shall address your first two questions together.

Article VII, § 9 of the Constitution of Virginia (1971) provides that "[n]o franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years...." It also requires advertising and public bidding prior to granting "any such franchise or privilege for a term in excess of five years, except for a trunk railway...." In accordance with these constitutional restrictions, §§ 15.1-308 through 15.1-313 of the Code of
Virginia prohibit granting a franchise for longer than forty years and require public advertising and bidding prior to granting a franchise for a period in excess of five years. Section 15.1-314 provides:

"No amendment or extension of any such franchise, right or privilege that now exists, or that may hereafter be authorized, which extends or enlarges such franchise, right or privilege, either as to the time during which it is to last or as to the territory in which it is to be enjoyed, shall be granted by any city or town until the provisions of the six preceding sections (§§ 15.1-308 to 15.1-313) shall have been complied with...." 

You indicate that Media General, Inc. was awarded a franchise to provide cablevision service in 1973 as the lowest bidder pursuant to §§ 15.1-308 through 15.1-313. Section 19(a) of the 1973 ordinance enacted by the City of Fredericksburg setting forth the terms and conditions upon which Media General, Inc. may exercise this franchise provides:

"The term of the franchise set forth in this ordinance shall be for a period from and after the effective date of this ordinance, up to and including August 31, 1983, at which time said franchise shall terminate unless renewed."

You indicate that Media General, Inc. has approached the City of Fredericksburg with a proposed agreement which would provide for continued cablevision service from Media General, Inc., for five years, an increase in the fee received by the city from 2 1/2% to 3% of the company's gross annual receipts, expanded channel capability, greater "particularization" of available services and an option for the city to acquire the system by purchase or condemnation at fair market value. You point out that an annexation agreement between the City of Fredericksburg and Spotsylvania County, if approved by a three-judge panel, would be effective January 1, 1983, so that any agreement with Media General, Inc. after August 31, 1983, would enlarge the territory in which it provided cablevision service.

Short-term grants of franchises or similar privileges for a period of five years or less are exempt from the constitutional and statutory requirements of public advertising and bidding.¹ This exemption was allowed because it "conforms with the municipalities' argument that they can best judge what leases or other uses ought to be made of public property and that the localities ought not to be inhibited by cumbersome constitutional requirements.² Whether the proposed five-year agreement with Media General, Inc. is exempt from the requirements of public advertising and bidding depends upon whether this agreement is construed as a new short-term franchise rather than as an "amendment" to or "extension" of the company's present franchise. If
construed as a new short-term franchise, such an agreement would be exempt from the public advertising and bidding requirements.

Section 19(a) of the 1973 ordinance provides that the franchise will terminate on August 3, 1983, "unless renewed." Assuming as a factual matter that this language refers to the life of the franchise itself, the proposed agreement could be construed as creating a new short-term franchise upon different contractual terms.

In Vinton-Roanoke Water Co. v. City of Roanoke, 110 Va. 661, 66 S.E. 835 (1910), the Virginia Supreme Court held that municipal contracts with private persons or corporations are to be construed the same as any other contract. A contractual provision for "renewal" is generally said to require the making of a new contract whereas a provision to "extend" does not. However, whether a provision for "renewal" calls for a new contract creating new rights upon different terms is a question of fact. The Court of Appeals of Maryland has stated that: "Renewal" is not a word of art and has no legal or technical signification, and whether a lease, in providing for renewal, contemplated merely an extension or a whole new contract was dependent upon the intentions of the parties. Schaeffer v. Bilger, 186 Md. 1, 45 A.2d 775, 777, 163 A.L.R. 706 (1946). Accordingly, whether the proposed agreement, assuming it is for a period of no more than five years, constitutes a new franchise is a question of fact to be determined in light of the facts and circumstances of the case. In this case, the fact that the existing ordinance speaks of the termination of the franchise together with the fact that the proposed agreement calls for a different duration, improved service (more channels and greater particularization), increased consideration and a purchase option for the city and possibly an increased territory of service indicate that a new franchise upon different contractual terms is contemplated.

It should be noted that construing the proposed agreement as a new short-term franchise exempt from the requirements of public advertising and bidding would not frustrate the purpose of these requirements, because Media General, Inc. was originally awarded the franchise through this process. If the new agreement were a short-term one, the purpose of allowing periodic review of the uses of public property and avoiding its being tied up permanently would be served.

In summary, I am of the opinion that public advertising and competitive bidding are not required where an existing franchise is terminated and awarded to the same party under substantially different terms as in this case for a period of not more than five years.

I shall address your third and fourth questions together.
In Boulder, supra, the United States Supreme Court, in a plurality opinion, held that municipal action in granting cable television franchises does not enjoy the "state action" exemption from antitrust liability under the Sherman Act enunciated in Parker v. Brown, 317 U.S. 341 (1943), where the state's position is one of mere neutrality respecting municipal actions challenged as anticompetitive. The majority stated that municipal action is not exempt unless it is the action of a state in its sovereign capacity, or unless it constitutes action in furtherance, or implementation of clearly articulated and affirmatively stated state policy. Citing its decision in City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 416, 417 n.48 (1978), the court stressed that its decision did not threaten the power of states to authorize municipalities to provide services on a monopolistic basis pursuant to the execution of legitimate governmental programs and noted that "[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), the court indicated that state action immunity would be granted only if the state policy is clearly articulated and affirmatively expressed and actively supervised by the state. The Boulder court did not address the requirement of active supervision because the requirement of an articulated policy had not been met.

In response to the Boulder decision, the Virginia General Assembly amended § 15.1-23.16 to provide that municipal governing bodies "may grant a license or franchise, or issue a certificate of public convenience and necessity to no more than one community antenna television system...." Additional licenses, franchises or certificates may be granted, but only if the governing body finds, after a public hearing, that such awards will enhance the public welfare. Municipalities are also authorized to regulate such systems.

Although § 15.1-23.1 tends to restrain competition by giving municipalities the power to exclude other companies from operating cable television systems within their corporate limits, it does so for the proper purpose of protecting the public welfare. Furthermore, municipalities are not prohibited from granting additional cable television franchises so long as they determine, after a public hearing, that it will serve the public welfare to do so. The United States Supreme Court has recognized that states can confer upon municipalities the power to restrain competition in the interest of the public welfare. The only question that remains is the degree of state supervision required to insulate municipalities from antitrust liability. Assuming § 15.1-23.1 is adequate in this respect, based on the express authorization of the legislature to the municipality to supervise the operation of cable television, I am of the opinion that the City of Fredericksburg's action in granting cable television franchises is exempt from federal antitrust liability.
Finally, even assuming the inadequacy of § 15.1-23.1 to secure the "state action" exemption from federal antitrust liability, the practice of granting a series of short-term franchises to the same franchisee should not, as a factual matter, constitute a violation of federal antitrust law. The mere granting of a franchise does not create any implied contract that the municipality will not grant another one to a competitor.8 The mere fact that other companies do not have a franchise does not render the franchise granted an exclusive one so long as nothing prevents granting additional franchises to competitors.9 Because § 15.1-23.1 permits the granting of additional franchises if it is in the public welfare to do so, I am of the opinion that the City of Fredericksburg's granting of a series of short-term franchises to the same franchisee would not subject it to federal antitrust liability.

In conclusion, I am of the opinion that the City of Fredericksburg will violate neither State nor federal law by entering an agreement with its existing franchisee for a period of five years or less without public advertising and bidding. Federal regulations would, however, recommend that a public hearing be held prior to entering such an agreement.10

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1See II Howard Commentaries on the Constitution of Virginia (1974) at 856 (required only for grants in excess of five years).
2Id.
4Cf. Sunac Petroleum Corp. v. Parkes, 416 S.W.2d 798, 803 (Tex. 1967) (mineral lease on "substantially different" terms from the original lease, for new consideration, after property proved productive, and made over a year after the expiration of the original lease was a new lease so that the lessee had no continuing royalty rights).
7Boulder, supra; City of Lafayette, supra.
8Knoxville Water Co. v. Knoxville, 200 U.S. 22 (1906).
9See In the Matter of the Application of the Union Ferry Co. 98 N.Y. 139 (1885).
10See 47 C.F.R. § 76.31 (1981). This regulation pertains to franchise standards providing recommended procedures for granting franchises.

COMMUNITY ANTENNA TELEVISION SYSTEMS. FRANCHISE. MAY BE TERMINATED UPON FINDING OF VIOLATION OF MATERIAL TERM IF PROCEDURAL SAFEGUARDS ARE COMPLIED WITH.
February 28, 1983

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

This is in reply to your request for an opinion regarding the franchise that was awarded by the board of supervisors to a community antenna television system. You stated that the board is apprehensive that the cable television company may not be providing adequate service to existing customers and may not have extended service to as many areas of the county as it promised. You have inquired what alternatives the county has to enforce this franchise.

From the documents which you enclosed, it appears that the Board of Supervisors of Amherst County granted an exclusive franchise to the James River Cable Company to construct, operate and maintain a cable television franchise in the county upon the terms and conditions set forth in the ordinance adopted July 3, 1973. Section 18 of the ordinance gives the county the right to terminate the franchise if the

"Grantee shall by act or omission violate any material term or condition of this Ordinance, and, within thirty (30) days following written demand by the County shall fail to effect compliance."

Sections 18 and 19 of the franchise ordinance provide for (1) a time during which the cable television company may attempt to effect compliance with the ordinance after written demand by the county, and (2) public notice and hearing when any inquiry, proceeding, investigation or other action is taken or proposed to be taken by the board of supervisors in regard to the cable television franchise. I am of the opinion that these procedural safeguards are sufficient to comply with any procedural due process rights which the franchisee may possess under the Constitution and that termination of the franchise after following such procedures would be a valid act by the county if there was found to be an uncorrected violation of any material term or condition.

After any such termination has been effected, the county is authorized to award a franchise to another company pursuant to § 15.1-23.1. Because the county awarded an exclusive right, privilege and franchise to construct, operate and maintain a cable television franchise in the county, the award of a second franchise may take place only after the termination of the first franchise.

I am, accordingly, of the opinion that if the procedures set forth in the franchise are followed, the franchise may be terminated if there has been a violation of any material term or condition of the franchise and that, upon such termination, a franchise for cable television may be awarded to another company.
The terms of the franchise were set forth in the ordinance of July 3, 1973, and the final approval was given on September 5, 1973. In 1974, Amherst County Cablevision, Inc. acquired the franchise from James River Cable Company, with the permission of the county, under the same terms of the original franchise.


COMMUNITY ANTENNA TELEVISION SYSTEMS. NOTICE REQUIRED TO BE GIVEN BY COUNTY IN AWARDING FRANCHISE TO SECOND COMPANY PURSUANT TO § 15.1-23.1.

September 29, 1982

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in reply to your letter of September 14, 1982, inquiring whether in awarding a franchise or certificate of public convenience to a second cable television company in the county pursuant to § 15.1-23.1 of the Code of Virginia, the county must advertise the required public hearing in a newspaper of general circulation in the county for two successive weeks pursuant to § 15.1-504 or for four successive weeks pursuant to § 15.1-308. You have also asked, if it is determined that advertisement for four weeks is required, whether only two weeks' notice of the public hearing is sufficiently defective to invalidate the franchise. You have advised that the board of supervisors has recently awarded a second cable television franchise authorizing service to a portion of Washington County. The franchise was approved by the board after a public hearing which was held after advertisement in a newspaper of general circulation in the county for two weeks prior to the hearing.

Section 15.1-307 and Art. VII, § 9 of the Constitution of Virginia (1971) which place restrictions on granting franchises and selling public property, and § 15.1-308 which prescribes the procedure for advertising the ordinance proposing to grant the franchise, deal with the granting of franchises generally by cities and towns. Section 15.1-23.1, however, specifically pertains to the granting of cable television franchises and governs such grants by counties as well as cities and towns. It is an accepted rule of statutory construction that a statute applicable to a special or particular state of facts must be treated as an exception to a general statute so comprehensive in its language as to cover all cases within the purview of the language used.1

Because § 15.1-23.1 pertains specifically to the granting of cable television franchises by counties, cities
and towns, I conclude that § 15.1-23.1 controls as to the granting of a second cable television franchise in the county. This section requires only that "a public hearing [be held] at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant" with no indication of any notice requirements for the hearing. In such a case, I am of the opinion that the usual notice for the adoption of county ordinances applies. Section § 15.1-504 requires that a county advertise a proposed ordinance for two successive weeks prior to its passage. I, therefore, am of the opinion that proper advertisement in a newspaper for two weeks prior to the public hearing held by the board of supervisors is sufficient notice for the purposes of § 15.1-23.1.


2Even assuming, arguendo, that the four-week notice is required, the Supreme Court of Virginia has held that the failure strictly to observe the directions of the franchise statute as to notice did not invalidate a franchise where the purpose of the provision is to require publicity and the purpose was obtained. Therefore, if full opportunity were given to the public to express their views and the public did indeed attend and express such views, the granting of the cable television franchise would not be invalidated because it had only been advertised for two successive weeks rather than four successive weeks prior to the public hearing. See Town of Victoria v. Victoria Ice, Light & Power Co., 134 Va. 124, 114 S.E. 89 (1922).

CONSOLIDATED LABORATORY SERVICES. HAS DUTY OF DELIVERING COPY OF CERTIFICATE OF CHEMICAL ANALYSIS TO COMMONWEALTH'S ATTORNEY OR LAW-ENFORCEMENT AGENCY REQUESTING FORENSIC LABORATORY SERVICES UNDER § 2.1-429.1, AND, UPON REQUEST, TO A DEFENDANT OR HIS ATTORNEY UNDER § 2.1-433.

November 19, 1982

The Honorable Sidney Barney
Commonwealth's Attorney for the City of Petersburg

This is in reply to your request for an Opinion regarding the delivery of certificates of chemical analysis prepared by the Division of Consolidated Laboratory Services (the "Division") pursuant to §§ 19.2-187 and 54-524.77:1 of the Code of Virginia. First, you inquire whether § 19.2-187 imposes a duty, and upon whom that duty is imposed, to deliver a copy of the certificate to (a) the court, (b) the Commonwealth's attorney, (c) the attorney for the defendant, and (d) a defendant who has waived the right to counsel.
Additionally, you ask whether the defendant's attorney has an ethical duty to try to obtain a copy of the certificate at least seven days prior to trial under § 19.2-187. Finally, while you question the applicability of § 54-524.77:1 to criminal proceedings, you have asked for my opinion on the question.

In response to your first inquiry, § 19.2-187 does not impose any requirement of delivery, other than the timely filing with the clerk, as a prerequisite to admissibility. Because the responsibility for preparation of a criminal case for trial falls upon the Commonwealth's attorney, if he wishes to introduce the certificate into evidence, then the filing will be his responsibility. While the statute is silent as to any responsibility on the part of the Division for delivery of a copy of the certificate, the Division, through its Bureau of Forensic Science, has a duty to provide forensic laboratory services upon request of any Commonwealth's attorney or law-enforcement unit. See § 2.1-429.1. Consequently, the Division would be responsible for providing a copy of a certificate of chemical analysis to the Commonwealth's attorney or law-enforcement agency requesting forensic laboratory service. There is, however, no requirement that a copy of the certificate be provided to the defendant or his attorney, although it may be obtained by either request to the Division pursuant to § 2.1-433 or from the Commonwealth's attorney by a discovery motion under Rule 3A:14(b)(1) of the Rules of the Supreme Court of Virginia.

Unlike § 54-524.77:1, which provides that a copy of the certificate "shall be delivered to the parties in interest" (emphasis added), § 19.2-187 only requires that the certificate be filed with the clerk of court seven days prior to trial if the certificate is to be admitted into evidence. Under this latter section, timely filing of the certificate with the clerk is a prerequisite to admissibility. Gray v. Commonwealth, 220 Va. 943, 945, 265 S.E.2d 705, 706 (1980). But note, however, that the filing of the certificate with the clerk is mandated only if the Commonwealth seeks to have the certificate admitted into evidence. See 1974-1975 Report of the Attorney General at 125.

In response to your second inquiry, I am unaware of any ethical duty on the part of a defendant's attorney to try to obtain a copy of the certificate at least seven days prior to trial, other than that which may exist by reason of an attorney's ethical obligation to represent his client competently and zealously. DR 6-101 and DR 7-101 of the Code of Professional Responsibility.

In answer to your third question, by its own language, § 54-524.77:1 is applicable only to hearings held "pursuant to the Administrative Process Act § 9-6.14:1 et seq." Consequently, in view of this language and, moreover, in view of the fact that a similar, but specific provision, § 19.2-187, is applicable in criminal cases, it is
my opinion that § 54-524.77:1 does not apply to criminal proceedings.

1Section 19.2-187 provides in part: "In any hearing or trial of any criminal offense, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or authorized by such Division to conduct such analysis or examination, or performed by [specified Federal law-enforcement units]...when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided that the certificate of analysis shall be filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial."

2Section 54-524.77:1 provides: "In any hearing held pursuant to the Administrative Process Act § 9-6.14:1 et seq.) [sic], a certificate of analysis of a chemist performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or authorized by such Division to conduct such analysis or examination, when such certificate is duly attested by such chemist, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein. A copy of such certificate shall be delivered to the parties in interest at least seven days prior to the date fixed for the hearing.

Any such certificate of analysis purporting to be signed by any such chemist shall be admissible as evidence in such hearing without any proof of the seal or signature or of the official character of the chemist whose name is signed to it."

CONSOLIDATIONS AND Mergers. CONSOLIDATION AGREEMENT. REFERENDUM. TERMS OF CONSOLIDATION AGREEMENT AMONG COUNTY AND INCORPORATED TOWNS MAY NOT BE CHANGED BY BOARD OF CONSOLIDATED COUNTY AFTER APPROVAL BY VOTERS IN REFERENDUM.

June 7, 1983

The Honorable Thomas J. McCarthy, Jr.
County Attorney for Pulaski County

This is in reply to your letter concerning an agreement between Pulaski County and the Towns of Dublin and Pulaski which provides for the consolidation of those three jurisdictions into one county. Section XIII of the agreement, relating to property disposition and the assumption of debt, provides as follows in subsection C:

"[T]he debt evidenced by water and sewer revenue bonds in the Towns of Dublin and Pulaski shall be liquidated by revenues received from customers of each of the"
respective water and sewer systems. In no event shall the customers of the Pulaski County Public Service Authority's water and sewer systems be responsible for liquidation of said debts."

Subsection D of § XIII refers to the Pulaski County Public Service Authority's debts and provides as follows: "In no event shall the customers of the Shires of Dublin's and Pulaski's water and sewer systems be responsible for liquidation of said Authority's debt...."

Section XXIII of the agreement, in subsection A, establishes five separate classes of customers for the consolidated utility systems of the three jurisdictions, and further provides as follows:

"Any new customers of the Pulaski Utility Department who receive the services as above set forth after the effective date of this agreement shall be assigned to one of the above customer classes on the same basis as if said user had been a customer on December 31, 1983. Nothing in this agreement shall be construed as prohibiting the creation of additional classes of customers by the Board of Supervisors of the consolidated County of Pulaski after the effective date of this agreement."

You ask whether, in the event the voters of the three jurisdictions approve the proposed consolidation in the required referendum, the board of supervisors of the consolidated county could change either the terms of Section XIII of the agreement, to obligate non-users of the water systems for debts of the systems, or the classifications of utility customers established in Section XXIII.

Chapter 26 of Title 15.1 of the Code of Virginia sets forth provisions for the consolidation of local governmental units. Article 4 thereof contains the procedures applicable to the proposed consolidation of Pulaski County with the incorporated towns within its borders.1 Pursuant to § 15.1-1131, the governing bodies of eligible localities may voluntarily enter into a joint agreement for consolidation which is submitted to the electorate for approval as discussed below. If the governing bodies decline to enter into such an agreement for submission to the voters, the governing bodies may be required to do so on petition of five percent of the voters in their respective jurisdictions pursuant to § 15.1-1132. Section 15.1-1133 specifies the required provisions of any consolidation agreement, and § 15.1-1135 lists optional provisions which may be included in an agreement.

The original of a consolidation agreement must be filed in circuit court along with a petition on behalf of the several governing bodies asking for a referendum on the question of consolidation. See § 15.1-1131.
Section 15.1-1137 requires publication of the consolidation agreement for four successive weeks before the court enters an order for the referendum, pursuant to § 15.1-1138, in which the consolidation question is submitted to the voters pursuant to § 15.1-1139. The consolidation becomes effective after approval by a majority of the qualified voters of each of the jurisdictions proposing to consolidate. See § 15.1-1140.

It is clear that the agreement prescribed in Art. 4 of Ch. 26 is central and essential to any proposed consolidation of local governments. The vote of the electors on the question is their expression of approval or disapproval of the consolidation agreement itself, and not just of the bare concept of consolidation. See, e.g., 1962-1963 Report of the Attorney General at 38 ("If a majority of those voters participating in the election in each jurisdiction shall approve the agreement, it shall be effective from the date specified therein...[T]he essence of consolidation is the ratification of the agreement by the electorate...").

The procedure prescribed in Art. 4 of Ch. 26 is a statutory delegation of the General Assembly's authority, under Art. VII, § 2 of the Constitution of Virginia (1971), to provide by general law for the consolidation of local governments, and a consolidation agreement adopted through this procedure must be accorded the same weight as an enactment of the legislature. See 1978-1979 Report of the Attorney General at 70; 1972-1973 Report of the Attorney General at 61. Accordingly, I am of the opinion that if consolidation is approved in the referendum, the obligations and classifications set forth in §§ XIII and XXIII of the consolidation agreement, quoted above, could not be changed by unilateral action of the board of the consolidated county, such changes instead would require an act of the General Assembly.

With regard to your question as to the basic validity of the agreement itself and its enforceability after approval in a referendum, I must presume that the governing bodies involved acted in accordance with the statutes in drafting and approving the agreement and did not include therein any provision which violates State law or public policy. If you have specific questions about any portion of the agreement which would require interpretation of the Constitution or laws of the Commonwealth, I will be happy to review them upon request.

1 See § 15.1-1130.1 which provides in pertinent part as follows: "By complying with the requirements and procedure hereinafter specified in this article...any county and all incorporated towns located entirely therein, may consolidate into a single county or city." (Emphasis added.)

The statutory provisions for consolidation of governmental units contained in Art. 4 of Ch. 26 are to be
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strictly construed. Compare Opinion to the Honorable A. Dow Owens, County Attorney for Pulaski County, dated January 28, 1983 (copy enclosed); 1978-1979 Report of the Attorney General at 70; 1960-1961 Report of the Attorney General at 74 (the consolidation alternatives available pursuant to Art. 4, Ch. 26 are limited to those specified in § 15.1-1130.1, and the procedural steps in Art. 4 must be adhered to in order to effect consolidation).

2See, also, Walker v. Massie, 202 Va. 886, 887, 121 S.E.2d 448 (1961), wherein the court recognizes, in dictum, that the subject matter of the agreement is submitted to the voters for their approval or disapproval.

3Note that there presently is no statutory provision for subsequent amendments to a consolidation agreement, other than that in § 15.1-1135(11), which allows for amendments to the form of county government established in the agreement pursuant to that subsection, and which requires General Assembly approval of any such amendments. Compare 1976-1977 Report of the Attorney General at 57.

CONSTITUTION. APPELLATE JURISDICTION UNDER ART. VI, § 1 IS CONFERRED ON SUPREME COURT BY LEGISLATURE.

February 4, 1983

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

You have inquired whether the Constitution of Virginia (1971) places any restriction on a criminal defendant's right of appeal.

The appellate jurisdiction of the Supreme Court of Virginia is provided in Art. VI, § 1 of the Constitution. This constitutional provision provides that, subject to certain expressed limitations not applicable to your inquiry, "the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth." With respect to such jurisdiction, however, this constitutional provision is not self-executing but merely bestows upon the Supreme Court the capacity to receive appellate jurisdiction. The jurisdiction is received when conferred by the legislature. Peyton v. King, 210 Va. 194, 169 S.E.2d 569 (1969). The legislature has provided for appeals in criminal cases by defendants through the enactment of § 19.2-317 of the Code of Virginia.

This statute currently permits a criminal defendant to appeal to the Virginia Supreme Court after a final judgment of guilt. Sturgill v. Commonwealth, 175 Va. 584, 7 S.E.2d 141 (1940). The jurisdiction of the Supreme Court in relation to appeals, however, is purely statutory and can be changed or modified by the legislature at any time. See Elder's Ex'ors v. Harris, 75 Va. 68 (1880); Thrasher v. Lustig, 204 Va. 399, 137 S.E.2d 286 (1963).
In view of these authorities, it is my opinion that the Constitution of Virginia places no restriction upon an appeal by a criminal defendant. Appellate procedures affecting the criminal defendant are, quite simply, a matter of statute and rule of court.

CONSTITUTION. GENERAL ASSEMBLY. MEMBERS MAY NOT SERVE AS SUBSTITUTE JUDGE. QUALIFYING CREATES VACANCY IN JUDGESHIP.

February 17, 1983

The Honorable James Edward Sheffield, Chief Judge
Circuit Court of the City of Richmond

This is in response to your inquiry of February 14, 1983, as to whether a substitute judge in the Juvenile and Domestic Relations District Court of the City of Richmond may serve as a member of the General Assembly.

Article IV, § 4 of the Constitution of Virginia (1971) expressly prohibits a judge serving as a member of the General Assembly. That section provides in pertinent part:

"No person holding a salaried office under the government of the Commonwealth, and no judge of any court...shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him."

Unquestionably, a substitute judge of a court not of record is a "judge." Substitute judges are appointed by the chief judge of the circuit court having jurisdiction within the district for a term of six years. See § 16.1-69.9:1 of the Code of Virginia. Their jurisdiction, salary and responsibilities are fixed by statute and the Canons of Judicial Conduct.

In view of the foregoing, I am of the opinion that upon qualification as a member of the General Assembly, the office of substitute judge of the Juvenile and Domestic Relations District Court of the City of Richmond became vacant.

CONSTITUTIONAL OFFICERS. CANNOT BE CONTROLLED IN PERFORMANCE OF DUTIES BY CITY OR COUNTY OFFICIALS ABSENT STATUTORY AUTHORITY.

July 2, 1982

The Honorable Ruben F. Emerson
Sheriff of Gloucester County

This is in response to your inquiry, as stated in a letter sent by Lt. David M. Hudgins, as to whether the Gloucester County School Board has the authority to require
the sheriff to give the order for students and faculty to re-enter a school building after a bomb threat.

Article VII, § 4 of the Constitution of Virginia (1971) provides that a sheriff shall be elected by the qualified voters of each county or city. As a constitutional officer, he cannot be controlled by a local governing body. "It has been consistently held that such a constitutional officer cannot be controlled in the performance of his duties by city or county officials unless there is specific statutory authority for such control." See 1975-1976 Report of the Attorney General at 51. I have found no express authority permitting a school board to direct a sheriff to perform the duties described in your letter. I am, therefore, of the opinion that the school board may not require your office to give a re-entry order.

CONSTITUTIONAL OFFICERS. OFFICES ABOLISHED UPON CONSOLIDATION OF LOCAL GOVERNMENT. NOT ENTITLED TO CONTINUE IN OFFICE AFTER OFFICE ABOLISHED.

April 6, 1983

The Honorable Kathleen C. Miller, Clerk
Circuit Court of the City of Clifton Forge

This is in response to your request for my opinion on the status of constitutional officers in the event of consolidation of a city and county. Specifically, you wish to know if such officers will be assured of their positions until their current terms of office end.

Your inquiry has been previously considered by the Supreme Court of Virginia in the case of Walker v. Massie, et al., 202 Va. 886, 121 S.E.2d 448 (1961). In that case, the City of Newport News was formed by the consolidation of the former cities of Warwick and Newport News pursuant to a consolidation agreement in conformity with Art. 4, Ch. 9 of Title 15 of the Code of Virginia, the forerunner to current Art. 3, Ch. 26 of Title 15.1. The consolidation was validated by Ch. 141, Acts of the Assembly of 1958. By the consolidation, all prior offices were abolished. The court there stated, in part:

"We hold that under § 117 of the Constitution, the General Assembly had authority to enact subsection 8 of § 15-222.3 of Article 4, Chapter 9, Title 15 of the Code of 1950, which provides, 'That in the event of establishment of a consolidated city, there shall be a new election of officers therefor whose election and qualification shall terminate the terms of office of their predecessors;***.'

The former city of Warwick is no longer in existence. It was not entitled to a city sergeant after July 1, 1958. The charter of the consolidated city of Newport
News makes provision for a city sergeant, in accordance with subsection (d) of § 117 of the Constitution, and a city sergeant has been duly elected. Since any public office is the creation of some law, it continues only so long as the law to which it owes its existence remains in force, and when such law is authoritatively abrogated, the office ceases, unless perpetuated by some other legal provision.

The constitutional provision for a city sergeant applies only when and where there is a city. When a charter of a city is repealed, and it is no longer a city, there is no such office as sergeant for such city. When the city of Warwick ceased to exist, all of its offices fell. 202 Va. at 891.

The question arises as to the effect, if any, the constitutional revision had on the foregoing decision. You refer to Art. VII, § 4 of the Constitution of Virginia (1971) which reads in pertinent part:

"The General Assembly may provide for county or city officers or methods of their selection, including permission for two or more units of government to share the officers required by this section, without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held. A county or city not required to have or to elect such officers prior to the effective date of this Constitution shall not be so required by this section.

The General Assembly may provide by general law or special act for additional officers and for the terms of their office."

This provision was added to the revised Constitution to make possible, subject to local referendum, certain changes in the local constitutional officers. The electors of a locality now have the ultimate voice in deciding whether the status of any of that locality's officers ought to be changed, either by sharing of two or more offices, abolishing or altering such offices. See Report of the Commission on Constitutional Revision 231; II Howard Commentaries on the Constitution of Virginia 827-831 (1974); 1970-1971 Report of the Attorney General at 30.

Section 4 of Art. VII leaves the discretion in the localities to merge the functions of officers with other units of government. Under such circumstances, the current terms cannot be reduced. This is not the same situation as
exists when a consolidation is undertaken as may be authorized by § 2 of Art. VII.

The second sentence in the third paragraph of § 4 was added to protect incumbent officeholders during the current term of office if the locality takes action to make the changes authorized by the section. This section did not change or affect the power of the General Assembly to provide for the consolidation of local governments or abolition of local governments as authorized by Art. VII, § 2, former § 117 of the Constitution which was the basis for the consolidation of the cities of Newport News and Warwick.

As stated by Professor Howard:

"Section 4 gives constitutional status to an officer only so long as his county or city exists. If through boundary changes, consolidation, merger, or other changes permitted by the Constitution and statutes a county or city ceases to exist, then that locality's constitutional offices also cease to exist. Section 4 does not operate to require that an incumbent officer serve out his term once his county or city is no longer in being." II Howard, supra, at 831.

In view of the foregoing, I am of the opinion that the decision of Walker, supra, continues to control your inquiry. Accordingly, upon the consolidation of a city and county, constitutional officers of those localities will not be assured of their positions until their terms of office end. On the other hand, in a merger of any offices of one locality with another, as authorized in Art. VII, § 4, the terms of the current officers cannot be reduced.

1Under current statutory provisions for consolidation of a city and county, the county and city cease to exist and the terms of office terminate, unless the consolidation agreement or plan provides for a continuance of such officers in similar position with the resultant city. See § 15.1-1160.

CONSTITUTIONAL OFFICERS. TRAVEL BY COUNTY OWNED VEHICLE FOR OFFICIAL BUSINESS MAY BE REQUIRED UNDER CERTAIN CIRCUMSTANCES.

August 10, 1982

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You have asked whether the board of supervisors may require constitutional officers and their employees to use county owned motor vehicles on official business when such vehicles are available or, alternatively, forfeit reimbursement for use of their private vehicles.
Travel budgets of the constitutional officers have been approved by the Compensation Board based upon mileage estimates and rates for reimbursement of privately owned vehicles used on official business. Travel expenses of commissioners of the revenue are borne in the proportion of one half by the Commonwealth and one half by the county. See § 14.1-64 of the Code of Virginia. The policy of the Commonwealth concerning reimbursement of State employees traveling on State business is codified in § 14.1-5. In the policy of the Commonwealth, employees electing to use privately owned vehicles may have their reimbursement reasonably limited to a rate equivalent to the cost per mile for operation of State owned vehicles.

Although the localities would be empowered to establish a policy to limit or restrict reimbursement in a manner to encourage the use of county vehicles, I am of the opinion that they may not require a forfeiture of all reimbursement for travel performed with a privately owned vehicle.

You are referred to a prior Opinion of this Office rendered in 1978 and found in the 1978-1979 Report of the Attorney General at 56. The two relevant questions in that Opinion asked (1) whether, "when the State Compensation Board has fixed the expenses for the operation of a constitutional office, a county may establish a budget for that office which contains a lower level of funding..." and (2) "whether a governing body may require its approval of specific purchases before funds may be expended for the purchase of materials and the employment of individuals by a constitutional officer, which do not exceed the amounts appropriated for these purposes [by the State Compensation Board]." The earlier Opinion answered both of these questions in the negative.

The 1978 Opinion did acknowledge that constitutional officers may be required to purchase supplies and equipment through the county's central purchasing agent, citing a 1975 Opinion of this Office found in the 1975-1976 Report of the Attorney General at 62. This requirement proceeds from the assumption that the board of supervisors has adopted a plan for centralized, competitive purchasing by the county administrator in accordance with § 15.1-127. The 1975 Opinion noted that "[t]his power emanates from a recognition by the General Assembly of the monetary savings to be achieved by single source purchasing on a competitive bid basis of all goods and services which the county is obligated to purchase in order to serve its citizens."

Requiring the use of county owned vehicles, if available, in the performance of public duties is a reasonable means of limiting the cost of government, but the county may not bar reimbursement for the use of privately owned vehicles if the use of such vehicles is necessary for the constitutional officer to conduct the affairs of his office in an efficient and timely manner.
January 14, 1983

The Honorable Cynthia D. Kinser
Commonwealth's Attorney for Lee County

You have asked whether an officer or director of a corporation, who signs a check drawn on the corporate account without designating his title or position with the corporation, can be prosecuted for a violation of § 18.2-181 of the Code of Virginia. In the factual situation you have presented, the check was returned from the bank for insufficient funds and the check was issued "for goods and other items" that do not fall within the contemplation of § 18.2-182. That section deals with checks issued for the payment of wages or in payment for labor performed for a firm or corporation.

The question of whether § 18.2-181 applies to checks drawn on a corporate account was raised by the defendant in Payne v. Commonwealth, 222 Va. 485, 281 S.E.2d 873 (1981). Because the question was not squarely posed by the facts of that case the Court refrained from deciding the matter. The Court noted however, that

"§ 18.2-181 proscribes 'any [worthless] check' made, drawn, uttered, or delivered with fraudulent intent by 'any person,' and...it does so without distinguishing between personal and corporate bank accounts." 222 Va. at 488.

Thus, although the Court has not directly decided the matter, the Court has indicated that § 18.2-181 does not distinguish between personal and corporate accounts.

Because the language of § 18.2-181 plainly states that it applies to "[a]ny person who, with intent to defraud, shall make or draw...any check...", I am of the opinion that a corporate officer who writes a check on the corporate account may be prosecuted under that section provided there is evidence of an intent to defraud. A check drawn on the corporate account is "any check" within the meaning of the statute. Similarly, a corporate officer is "any person" within the meaning of the statute regardless of whether he designated his corporate title or position at the time he signed the check.

This interpretation of the statute is consistent with the Virginia case law concerning the criminal liability of corporate officers in general. See Crall and Ostrander v. Commonwealth, 103 Va. 855, 49 S.E. 638 (1905); Bourgeois v. Commonwealth, 217 Va. 268, 227 S.E.2d 714 (1976). It is also consistent with prior Opinions of the Attorney General concerning the criminal liability of corporate officers for bad checks under the particular statutes in effect at the

CORRECTIONS. IF PROBATION IS REVOKED, PRISONER SHOULD BE CREDITED WITH TIME SPENT IN JAIL AWAITING TRIAL.

March 22, 1983

The Honorable David K. Mapp, Jr.
Sheriff of the City of Norfolk

You have asked the following question concerning jail credit:

"An inmate is arrested on a charge and is sentenced to probation. He is later arrested for violation of probation. Does he get jail credit for time spent in the jail awaiting trial on the original charge or is violation of probation a separate charge on which no jail credit can be given for time spent awaiting trial on the original charge?"

The Code of Virginia provides that an inmate shall have credited against his term of confinement "all time actually spent..." in jail awaiting trial or pending an appeal. See § 53.1-187.1

When probation is revoked and "the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed." See § 19.2-306. On the other hand, if a sentence was originally imposed and suspended, upon revocation of probation "the original sentence shall be in full force and effect...." Id. It is my opinion that in either case, revocation of probation does not constitute a separate offense for purposes of jail credit, and an inmate should have deducted from his sentence all time spent in jail awaiting trial on the original charge as well as any time served prior to the imposition or execution of the sentence.

There is authority for the proposition that an indigent unable to make bail is constitutionally entitled to have preconviction time spent in jail credited to his sentence. Durkin v. Davis, 390 F Supp. 249 (E.D. Va. 1975), rev'd on other grounds, 538 F.2d 1037 (4th Cir. 1976).

CORRECTIONS. INTERNAL INVESTIGATIONS UNIT OF DEPARTMENT OF CORRECTIONS HAS BEEN DETERMINED BY DIRECTOR OF DEPARTMENT OF PERSONNEL AND TRAINING NOT TO BE LAW ENFORCEMENT AGENCY. UNDER § 2.1-114.5:6(1), INTERPRETATION IS BINDING ON DEPARTMENT OF CORRECTIONS.
March 11, 1983

The Honorable Raymond K. Procunier, Director
Department of Corrections

You have inquired whether an investigation conducted by the internal investigations unit of the Department of Corrections, established pursuant to § 53.1-16 of the Code of Virginia, qualifies as an "official investigation" mentioned in the Employee Standards of Conduct promulgated by the State Department of Personnel and Training. The initiation of an official investigation into allegations of criminal conduct creates an exemption to the ten day time limit for the suspension of an employee pending completion of an investigation for disciplinary reasons. You indicate that effective investigations by your internal investigations unit have been hampered by the return of the employee after ten days but before the investigation is completed.

The Employee Standards of Conduct policy was prescribed by the State Director of Personnel with the concurrence of the Governor and is designed, in part, to implement § 2.1-114.5(J). Section 2.1-114.5(J) was adopted in 1978 by the General Assembly and provides that the Department of Personnel and Training shall

"Establish and administer rules and regulations relating to disciplinary actions, provided however, that no disciplinary action shall include the suspension without pay for more than ten days of any State employee who is under investigation without a hearing conducted either by a level of supervision above the employee's immediate supervisor or by his agency head."

Also, in 1978, the General Assembly adopted Senate Joint Resolution No. 18 (the "Resolution") which observed that occasion State employees had been relieved of their duties without pay for lengthy periods of time for purposes of disciplinary investigations. The Resolution requested the Secretary of Administration and Finance "to study personnel regulations and determine necessary changes in order to establish a procedure for administrative leave for employees relieved of duty for purposes of disciplinary investigations."

On December 6, 1978, Secretary Walker submitted his report in response to the Resolution. His report concluded with the statement: "with these changes no employee may be deprived of pay for more than ten days on suspension for disciplinary reasons, nor may an employee be deprived of pay for more than ten days pending a disciplinary (department) investigation." (Emphasis added.) See 1979 Senate Doc. No. 15 at 4.

Among the changes referred to by Secretary Walker was the concept embodied in the March 1979, Employee Standards of Conduct which limits employee suspensions pending agency
disciplinary investigations to ten days. Excepted from the ten day limit were suspensions pending completion of court action or an "official investigation." The Standards of Conduct, by their own terms, limit "official investigation" to those investigations "conducted by State Police and/or other Federal, State, or local government law enforcement agencies."

You have enclosed a copy of a letter from the Director of Personnel and Training in which she states her interpretation that the Department of Correction's investigators are an internal organizational unit within the Department of Corrections and, therefore, not a "law enforcement agency" as that phrase is intended to be used in the Standards of Conduct.

Section 53.1-16 authorizes the Director of Corrections to designate a supervisor and no more than six members of the "internal investigation unit" of the department to have the same powers of a sheriff or a law enforcement officer in the "investigation of allegations of criminal behavior affecting the operations of the Department." Merely clothing the internal investigation's unit with the powers of a law enforcement officer for this limited purpose does not establish the internal investigation unit as a "law enforcement agency." Indeed, it is clear from the legislative history referenced above that the General Assembly was concerned by lengthy employee suspensions pending departmental investigations and the administration's response has been to limit lengthy suspensions to those associated with court action or an independent police investigation.

Section 2.1-114.5:6(B1) provides that the Director of the Department of Personnel and Training is the final authority in establishing and interpreting all personnel practices and policies affecting State employees subject to the Virginia Personnel Act. As a result, the Director's interpretation of the phrase "law enforcement agencies" is within her statutory authority and there is no indication that her interpretation is either arbitrary or capricious. To the contrary, it appears that the Director's interpretation meets the General Assembly's expression of concern and is consistent with the administration's responses in 1978 and 1979.

I am of the opinion, therefore, that the Director's interpretation of the phrase "law enforcement agencies" as used in the Standards of Conduct was properly within her discretion and that there is no indication that she has abused her discretion.

CORRECTIONS. JUVENILES. JUVENILE'S PARENTS HAVE PRIMARY RESPONSIBILITY FOR PAYMENT OF MEDICAL EXPENSES INCURRED WHILE BEING TRANSPORTED TO DETENTION CENTER. IN EVENT PARENTS ARE UNABLE TO PAY EXPENSES, PROVISIONS OF § 63.1-134 MAY APPLY.
June 1, 1983

The Honorable Walther B. Fidler, Judge
Juvenile and Domestic Relations District Court

You have asked who is responsible for payment of hospital bills incurred by a juvenile while being transported to a detention center by the sheriff pursuant to court order. I am informed that the juvenile in question was before the court on a petition filed by a juvenile intake officer at the request of a citizen who had been assaulted by the juvenile. Importantly, you advise that legal custody of the juvenile had not been taken away from the juvenile's parents. I am further informed that the illness requiring hospitalization occurred prior to the juvenile's arrival at the detention center and was the result of a stomach disorder occasioned by anxiety.

As you point out, there is no fund from which there is any express statutory authority to pay for medical services for juveniles while being detained in a detention center prior to commitment or other disposition by the court. There is ample authority for the court to require an investigation, which may include the physical condition of a child before final disposition. Additionally, the court may order physical examination and treatment of any child within its jurisdiction under the law. Under such circumstances, the law contemplates the payment of the costs by the person responsible for the care and support of the child. Section 16.1-275 reads in part:

"Whenever a child concerning whom a petition has been filed appears to be in need of nursing, medical or surgical care, the juvenile court or the circuit court may order the parent or other person responsible for the care and support of the child to provide such care in a hospital or otherwise and to pay the expenses thereof.

If the parent or other person is unable or fails to provide such care, the juvenile court or the circuit court may refer the matter to the authority designated in accordance with law for the determination of eligibility for such services in the county or city in which a child or his parents have residence or legal domicile."

It is, therefore, apparent that the legislature contemplated that the burden of medical services for juveniles falls first upon the person responsible for their care and support.

Section 20-61 provides that it is a misdemeanor for parents to willfully neglect or refuse to provide support and maintenance for their child under the age of eighteen. Further, it was recognized in Mc Claugherty v. Mc Claugherty, 180 Va. 51, 21 S.E.2d 761 (1942), that in Virginia, the rule prevails, even in the absence of statute, that it is the...
common-law duty of a father to support his infant child. This legal obligation of support has been confirmed by the Supreme Court as recently as 1979 in the case of Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

The foregoing authorities clearly stand for the proposition that the responsibility for the care and maintenance of a child lies with his parents. Because legal custody of the child in question was not taken from his parents, I am of the opinion that his parents are responsible for his medical expenses.3

1Section 16.1-273 of the Code of Virginia.
2Section 16.1-275.
3In the event that the parents are indigent and unable to pay the child's medical expenses, then pursuant to § 16.1-275 the court may refer the matter to the authorities designated by law for a determination of eligibility for payment under the program for hospitalization and treatment of indigent persons. See §§ 16.1-322.1 and 63.1-134, et seq.

COSTS. AWARD OF COSTS IN MANDAMUS ARE AT DISCRETION OF COURT.

July 7, 1982

The Honorable Harvey B. Morgan
Member, House of Delegates

You have asked my opinion on the following question: "If an individual or an organization petitions for a Writ of Mandamus to force compliance by a governmental entity with a state-mandated requirement, and the Writ is issued, can the petitioner sue for recovery of his legal costs in forcing the issue, and to what extent?" You inform me that the Gloucester-Mathews Humane Society is considering action against King and Queen and King William Counties for alleged non-compliance with State regulations regarding animal pounds.

This Office has previously ruled that any citizen may force a local governing body to establish and maintain a pound by action in mandamus. See 1978-1979 Report of the Attorney General at 93. If a writ of mandamus should be awarded against a local governing body to establish and maintain a pound, the court may, in its discretion, award costs. See § 8.01-648 of the Code of Virginia. I therefore answer your inquiry in the affirmative.

Included in the costs which may be taxed are "fees for the performance of services by public officers, costs of executing an order of publication, allowances for the attendance of witnesses, costs for depositions taken out of state, premiums on indemnification bonds, and other matters
COSTS. CONTEMPT PROCEEDINGS AGAINST LITIGANTS THAT REFUSE TO PAY COSTS OF COMMISSIONERS AND SURVEYOR IN PARTITION PROCEEDINGS.

July 14, 1982

The Honorable R. William Arthur, Judge
Circuit Court for Wythe County

You have asked whether the court has the power to use contempt proceedings to enforce a decree apportioning the court costs of a partition suit between the litigants and to collect the costs from a litigant who has refused to pay his specified share of the costs.

In the partition suit, the court appointed commissioners to go upon the land and to determine and report to the court whether the land was susceptible of partition in kind. The commissioners reported in the affirmative and a decree was entered affirming the report. No appeal was taken from the final decree, which apportioned the court costs pro rata between the parties to the suit. The costs included the fees of the commissioners and the allowance to the surveyor. The disappointed litigant has declined to pay his part of the costs and the commissioners and the surveyor have, as a result, gone uncompensated for their services.

The contempt power of the courts is an inherent power of self-defense and self-preservation which may be regulated by the legislature but cannot be destroyed or diminished so as to render it ineffectual. Yoder v. Commonwealth, 107 Va. 823, 57 S.E. 581 (1907). The legislature has promulgated § 18.2-456(5) of the Code of Virginia which is a reasonable regulation of the exercise by the courts of the power to punish for contempt. Yoder, supra. That statute provides that the court may issue attachments for contempt, and punish them summarily, for "[d]isobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Pursuant to this section, the failure of any person to obey a lawful order of a court may be punished as a contempt. Cf. 1978-1979 Report of the Attorney General at 61.

Inasmuch as the litigant who refuses to pay the costs of the commissioners and a surveyor is disobeying a decree of
Although this matter arose between the private litigants, the payment of these costs is not a matter between private parties, but rather a matter between one private party and the court. Unlike the usual civil action in which costs which are awarded against a party have previously been incurred by the prevailing party, these costs were not incurred by the other litigant. Rather, they were incurred by persons appointed by the court to perform services on behalf of the court in resolving the issues in dispute. As such, these persons were acting on behalf of the court, and the refusal to pay these costs is a direct affront to the court. The inherent dignity and power of the court is being challenged in this matter, and the refusal to pay the costs constitutes a willful disobedience to a lawful order of the court. Self-preservation of the court justifies use of the court's contempt power in these circumstances.

In Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968), the Supreme Court of Virginia held that § 53-221, which provided for incarceration of convicted persons who failed to pay the costs of criminal prosecutions, was unconstitutional because it violated the protection of the Thirteenth Amendment of the United States Constitution against involuntary servitude. The court held that, because the costs assessed against the person convicted of a crime are not part of the punishment for the crime, his confinement for nonpayment of court costs was not confinement for punishment for a crime. In that case, the defendant was an indigent. Wright v. Matthews is distinguishable for two reasons. First, Wright involved a criminal proceeding and the confinement to jail was in addition to other confinement arising out of a criminal prosecution. Second, no consideration was given to the ability of the defendant to pay and no exceptions were made for persons who had no ability to pay. In Camden v. Virginia Safe Deposit Co., 115 Va. 20, 78 S.E. 596 (1913), the Supreme Court held that, in a proceeding for contempt, the inability of a party to pay money in accordance with an order because of poverty, insolvency, or other cause beyond his control should be taken as satisfaction and that he should not be held in contempt. Accordingly, if the litigant disobeying the decree in the case which you present can demonstrate to the court that he could not comply with the order because of poverty, insolvency or another cause beyond his control, the court should not hold him in contempt.

With respect to the procedure to be followed, the Supreme Court of Virginia has divided contempt proceedings into two classes. If the action of the court is taken to preserve its inherent dignity and power, the contempt is criminal; if the action is taken to preserve and enforce the rights of private parties, the contempt is civil. Local 333B, United Marine Division v. Commonwealth, 193 Va. 773, 77 S.E.2d 159, cert. denied, 344 U.S. 893 (1952). See 1974-1975 Report of the Attorney General at 64. In the instant case, the contempt proceeding would be to preserve the power and
dignity of the court because its judgment has been disobeyed; hence, the proceeding would be criminal in nature. Therefore, the court must follow the proper procedures for conducting a criminal contempt hearing. Steelworkers v. Newport News Shipbuilding, 220 Va. 547, 260 S.E.2d 222 (1979).

Accordingly, I am of the opinion that, under the facts which you have described, the court has the power to enforce its decree and to collect the court costs by contempt proceedings.

1 Read literally, this section would permit the court to use the contempt sanction whenever any private party failed to comply with any part of an order of the court even when the failure inured only to the detriment of another party litigant. It is not necessary in this Opinion to address that proposition because the issue presented by you is a matter between one private party and the court, as discussed infra.

COSTS. CRIMINAL CASES. CONVICTION IS REQUIRED FOR DEFENDANT TO INCUR COURT RELATED EXPENSES SUCH AS ATTORNEY’S FEES.

February 25, 1983

The Honorable Diane Bruce, Clerk
Circuit Court of Rappahannock County

You have asked whether attorney's fees to pay a court appointed attorney may be withheld from an indigent defendant's cash bond after the Commonwealth's attorney has decided not to prosecute (nolle prosequi) the case in circuit court.

Section 19.2-163 of the Code of Virginia requires a defendant, if convicted, to pay court appointed attorney's fees as part of the costs taxed against him. However, where the Commonwealth's attorney has decided not to prosecute, there has been no conviction as contemplated by the Code, and consequently, there is no statutory authority for the court to require the defendant to bear the costs of court appointed counsel.

Previous Attorney General Opinions have similarly concluded that a conviction is required before court costs can be taxed against a defendant. See 1968-1969 Report of the Attorney General at 46, which held that a defendant did not incur the cost of court appointed counsel when he was acquitted. See, also, 1965-1966 Report of the Attorney General at 55, which found that court costs are not to be assessed in cases which result in acquittals. Accordingly, I am of the opinion that the indigent defendant's cash bond must be returned in full to him.
COSTS. FINES AND COSTS PAID BY IMPOSTER ARRESTED ON TRAFFIC
OFFENSE MUST BE PAID INTO STATE TREASURY TO CREDIT OF
LITERARY FUND.

August 4, 1982

The Honorable James H. Harvell, III, Judge
Seventh Judicial District

This is in reply to your recent inquiry regarding a
problem in the traffic division of the general district court
involving the payment of fines and costs by imposters using
the name or operator's license of another person. As you
explained the disposition procedure, after the court learns
of the imposter situation, the court dismisses the charges
against the named accused, because he is not the actual
offender. You ask how to dispose of the money already paid
by the imposter?

While it may not be possible to identify the true
offender, the fact remains the money he has paid in fines and
costs were collected for offenses committed against the
State. Section 19.2-353 of the Code of Virginia provides as
follows:

"The proceeds of all fines and penalties collected for
offenses committed against the State, and directed
by Article VIII, Section 8 of the Constitution of Virginia
to be set apart as a part of a perpetual and permanent
literary fund, shall be paid and collected only in
lawful money of the United States, and shall be paid
into the State treasury to the credit of the Literary
Fund, and shall be used for no other purpose
whatsoever."

It is, therefore, my opinion that the money must be paid
into the State treasury to the credit of the Literary Fund.
In order to properly identify the source of these funds, when
the general district court judge dismisses the charges
against the named accused, he can also recite the facts and
circumstances involved in the case before directing payment
of the money into the Literary Fund.

COUNTIES. AUTHORIZED TO DEVELOP OR PERMIT DEVELOPMENT OF
ROADS ON LANDS DEDICATED AS ROADWAYS NOT PART OF SECONDARY
SYSTEM, IF ROADWAYS HAVE BEEN DEDICATED, ACCEPTED AND NOT
ABANDONED. NO LIABILITY ATTACHES FOR ACCIDENTS OR INJURIES
ON SAID ROADWAYS.

October 4, 1982

The Honorable V. Earl Dickinson
Member, House of Delegates

In your recent letter you presented three questions
concerning certain platted, but undeveloped roads in the
Village of Powhatan Courthouse. You indicated that a plat of the village shows various rights-of-way that have either never been used, or having been used, are no longer used; nor have they been taken into the State systems of highways. An adjacent landowner to one of the rights-of-way, the Powhatan Volunteer Rescue Squad, Inc., has requested Powhatan County to open these roads, or in the alternative, the squad seeks permission itself to clear these roads as platted. The squad would then maintain these roads as additional access to Route 13 which is publicly maintained by the Department of Highways and Transportation as part of the primary system of State highways.

You have asked:

1. "Does permission granted by the Board of Supervisors of Powhatan County to the Powhatan Volunteer Rescue Squad, Inc., expose Powhatan County to liability for accidents or injuries which may occur on said right of way?"

2. "Is the status of such roads on public land subject to a simple vote of authorization granted to a private party to proceed with opening and maintaining a roadway, that of a public roadway or a private drive?"

3. "In light of State law concerning highways and roadways, does the County have the authority to allow, by simple vote of the Governing Body, a private party to develop a roadway on Public Lands?"

In answer to your first question, the counties and their governing bodies are considered integral parts of the State. As such, they share sovereign immunity from tort claims of whatever nature. Mann v. County Board of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957). This immunity was reaffirmed by the General Assembly in 1982 when it amended the Virginia Tort Claims Act to provide that the passage of the Tort Claims Act was not to be considered "to remove or in any way diminish the sovereign immunity of any county." Chapter 397, Acts of Assembly of 1982; § 8.01-195.3 of the Code of Virginia. Thus, any permission granted by the board of supervisors to the Powhatan Volunteer Rescue Squad, Inc. in this instance will not expose the county to tort liability.

In response to your second question, your letter does not present a sufficient factual basis to permit a definitive answer. It would be necessary to establish whether the platted rights-of-way have been dedicated and accepted, expressly or by implication, as public lands even if, at present, the rights-of-way in question are not being used as such. See Ocean Island Inn v. Virginia Beach, 216 Va. 474, 220 S.E.2d 247 (1975). Likewise, it must be determined that the rights-of-way have not been abandoned, and that the plat has not been vacated in the manner prescribed by statute. Finally, one should determine that the facts do not support

If it can be determined that the rights-of-way were lawfully dedicated and accepted and have not been abandoned, I am of the opinion that the situation is analogous to that which pertains when a road is discontinued for maintenance, but not abandoned, by the Department of Highways and Transportation. Under the precepts of Ord v. Fugate, 207 Va. 752, 152 S.E.2d 54 (1967), a roadway that is discontinued remains a public right-of-way. Accordingly, the status of such platted, but unopened roads is public.

In answer to your final question, it should be noted that, generally, counties do not have authority to operate and maintain roadways. Section 33.1-67, et seq. However, § 15.1-26.2 allows any county to expend from the county's general fund so much of its general revenues as deemed appropriate for the construction and repair of public roads not in the system of State highways. Accordingly, in the case in question, the county could construct and maintain the roads. The question then is whether the county can allow a private party to construct and repair these roads. In my opinion, Powhatan County, under its general powers, could accept the benefits of the landowner's work by allowing the landowner to do the improvement. This could be accomplished by a non-exclusive lease or license agreement to construct or repair the road. See § 15.1-510. In either event, the board of supervisors may proceed by resolution.

COUNTIES. RECREATION. COUNTY HAS WIDE DISCRETION IN ESTABLISHING AND FUNDING RECREATION FACILITIES AND MAY FORGIVE LOAN TO RECREATION DEPARTMENT.

June 29, 1983

The Honorable Anthony P. Giorno
County Attorney for Patrick County

This is in reply to your letter relating that the Patrick County Board of Supervisors previously made a loan to the Patrick County Recreation Department in the amount of $14,125.26 for development of certain park facilities, and that the recreation department now requests that the county "forgive" the amount of the loan and not require the department to repay it. You ask my opinion as follows:

"First, was the loan to the Recreation Department proper in the first instance? If so, does the county now have the authority to forgive the loan, and not require the Recreation Department to repay it?"

Section 15.1-271 of the Code of Virginia, relating to systems of public recreation and playgrounds, reads as follows:
"Any city, town or county may establish and conduct a system of public recreation and playgrounds; may set apart for such use any land or buildings owned or leased by it; may acquire land, buildings and other recreational facilities by gift, purchase, lease, condemnation or otherwise and equip and conduct the same; may employ a director of recreation and assistants; and may expend funds for the aforesaid purposes."

Section 15.1-272 provides that "[t]he local authorities establishing such system may conduct the same through a department or bureau of recreation or may delegate the conduct thereof to a recreation board created by them or to a school board or to any other appropriate existing board or commission." The governing body of a county may also create a park authority, pursuant to Ch. 27 of Title 15.1, for the purpose of developing and operating public parks and recreation areas; it may create an authority pursuant to Ch. 29 of Title 15.1 for the purpose of developing and operating recreational facilities; or, pursuant to § 15.1-278, it may utilize a sanitary district to construct, maintain and operate parks, recreation areas and swimming pools, if a district has been established.

You do not specify whether the county recreation department has been created as part of the county administrative structure or as a separate entity, as authorized in the above-referenced statutes. If the department is part of the county administrative structure, then the funds and expenditures of which you speak can be characterized as county funds and expenditures, regardless of the fact that the transfer of the funds to the department for disbursement may have been styled as a "loan." If the recreation department is a separate entity created by the county governing body, then § 15.1-511.1 would apply, which reads as follows:

"The governing body of any county in this State may give, lend or advance in any manner that to it may seem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law." (Emphasis added.)

Thus, whether the recreation department is a part of the county structure or is a separate entity, the result is the same with respect to the question presented. The county is accorded wide discretion in choosing how it will establish and operate its recreation facilities and in deciding the manner in which it will make available funds for that purpose. Accordingly, your inquiry is answered in the affirmative.
You ask my opinion whether a county may temporarily use tax revenues generated for one purpose to meet other needs. The factual situation involves a proposal to raise cash for use in meeting county general fund obligations by temporarily borrowing from a district fund consisting of taxes levied and collected for the purpose of servicing debt incurred for school construction through loans from the State Literary Fund. The current balance of district levy funds far exceeds the amount required for annual debt service, although I will assume that it is less than the amount required to pay off all of the loan. The proposal is to transfer the excess cash to the county general fund pending receipt of tax collections in November and December of this year, after which event the amount transferred would be restored to the district fund.

You note in your letter that a prior Opinion of this Office, in the 1961-1962 Report of the Attorney General at 233, holds that taxes levied for a specific purpose may not be used for a different purpose. I refer you also to Opinions contained in the 1967-1968 Report of the Attorney General at 233 and in the 1964-1965 Report of the Attorney General at 30, which subscribe to the rule that funds derived from a district levy made for a specific purpose, such as to repay a loan from the Literary Fund, may not be diverted to another purpose until such indebtedness is repaid in full.1

This position is supported by language in the statute which applies to the present situation. Thus, § 22.1-159 of the Code of Virginia, which authorizes a county school board, with governing body approval, to borrow from the Literary Fund to construct school facilities to serve a portion of the county, states, in part, as follows:

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1See, also, § 15.1-526, which authorizes a county to develop and operate recreational facilities directly or to contract with any person, firm, corporation or municipality for such services. Compare 1971-1972 Report of the Attorney General at 99 (recreation director is county employee; funds to recreation director are county funds; no authority for separate agency fund for director).

"Taxes on property in the magisterial districts served by such facilities shall be levied by the governing body of the county and collected for the purpose of repaying such loan...." (Emphasis added.)

In view of the foregoing, and in the absence of specific statutory authority to the contrary, I am of the opinion that funds derived from district taxes levied for the specific purpose of providing debt service on loans to a school board from the Literary Fund may not be transferred to the county general fund for temporary use in meeting general fund obligations. In light of this conclusion it is unnecessary to answer your second inquiry whether the provisions of §§ 15.1-545 and 15.1-546, applicable to temporary borrowing, would apply to such a transaction.

1Note that the 1964-1965 Opinion adopted the view that any excess above the amount required to pay off the debt may be applied first to the payment of other indebtedness, and if there is no other indebtedness of any kind, it should go then into the general fund for appropriation by the county board. The 1967-1968 Opinion also noted, under the circumstances of that inquiry, that the propriety of expenditures out of such a fund for uses other than repayment of indebtedness is to be determined from the purpose of the levy as expressed by the board in the records of its actions. It would appear from your letter that there is no question as to the purpose of the levies in the present situation, in light of the fact that the county treasurer has placed the funds in separate accounts and you have identified them as being directed at annual debt service on the loans from the Literary Fund.

The Honorable A. Dow Owens
County Attorney for Pulaski County

This is in reply to your recent request for my opinion concerning certain provisions of Art. 4, Ch. 26, Title 15.1 of the Code of Virginia, as they relate to a proposed consolidation into one governmental unit of Pulaski County and the Towns of Pulaski and Dublin, which are located within the county. Sections 15.1-1137 through 15.1-1140 require publication of the consolidation agreement and the ordering and conducting of a special election to take the sense of the qualified voters in the county and each town as to whether the consolidation should occur. You ask the following questions:
1982-1983 REPORT OF THE ATTORNEY GENERAL

1. "[W]hether a resident of the Town of Pulaski, and the Town of Dublin, being a tax payer in both the County and the Town would be able to vote in the County referendum as well as the Town referendum."

2. "[W]hether or not a consolidation could proceed in the event all three (3) governing bodies would fail to agree as to the proposed 'Consolidation Agreement', i.e., could the County of Pulaski and one of the remaining Towns proceed with consolidation if the second Town had declined to agree to the same."

Section 15.1-1138 provides, in part, that after publication of a consolidation agreement, the chief judge of the circuit court of the county shall order an election to "take the sense of the qualified voters of each such county...and town on the question as hereinafter provided." (Emphasis added.) That section further provides that the election shall be held on the same day in the county and in each of the towns. Section 15.1-1139 provides that, on the appointed day, the regular election officers of the county and each town, respectively, "shall open the polls...and conduct the election in such manner as is provided by general law for other elections insofar as the same is applicable." (Emphasis added.) Section 15.1-1139 goes on to direct the preparation of the ballot and to prescribe the form of the question to be presented to the voters. Section 15.1-1140, relating to determination of the election results states, in part, that

"[i]f it shall appear by the report of the commissioners of election that a majority of the qualified voters of each county...and town voting on the question submitted are in favor of the consolidation...provided, however, that no separate vote on the question shall be required in towns within a county when such county proposes to consolidate in its entirety with a county or city having a common boundary, the judge...shall enter such fact of record...and shall notify the Secretary of the Commonwealth...." (Emphasis added.)

Thereafter, the county and the towns shall be consolidated on the effective date prescribed in the court's order for the election.

In light of the statutory language quoted above I am of the opinion that a referendum on the question of consolidation of a county with all incorporated towns located entirely therein involves one election in which the county and each of the towns are considered to be separate election units. See 1972-1973 Report of the Attorney General at 114; 1971-1972 Report of the Attorney General at 441. This being the case, the qualified voters of a town may vote only in the town and are not eligible to vote in the county on the same question.2 Compare 1968-1969 Report of the Attorney General at 89. Accordingly, your first question is answered in the negative.
I am of the opinion that your second question also must be answered in the negative. Section 15.1-1130.1 states, in part, as follows:

"By complying with the requirements and procedure hereinafter specified in this article, any one or more counties or cities having a common boundary, or any county and all incorporated towns located entirely therein, may consolidate into a single county or city." (Emphasis added.)

Section 15.1-1130.1 specifies the consolidation alternatives available pursuant to Art. 4, Ch. 26, Title 15.1 and the emphasized language, with its use of the word "all" rather than "any," makes it clear that each of the towns must be a party to the consolidation for that particular alternative to proceed. See, e.g., 1978-1979 Report of the Attorney General at 70; 1967-1968 Report of the Attorney General at 67.

1See § 15.1-1130.1, et seq., which provide procedures for consolidation of certain counties, cities and towns.
2See, also, § 24.1-268, which provides that a person who knowingly votes more than once in the same election shall be deemed guilty of a misdemeanor.
3The same or similar language is repeated in other Code sections in Art. 4. See, e.g., §§ 15.1-1131, 15.1-1131.1, 15.1-1135(12).

COUNTIES. TOWNS. WATER AND SEWER FACILITIES. CONTRACTS. COUNTY MAY CONTRACT TO APPROPRIATE MONEY TO TOWN FOR CONSTRUCTION OF WATER FACILITIES, WITH TOWN REIMBURSEMENT. MAY NOT AGREE TO MAKE PAYMENTS IN FUTURE YEARS.

February 10, 1983

The Honorable Geoffrey W. Cole
Commonwealth's Attorney for Clarke County

This is in reply to the recent letter from your office requesting my opinion as to the legality of a proposed agreement between Clarke County and the Town of Berryville, whereby the county agrees to appropriate money to the town to aid in construction of new water supply and transmission facilities and the town agrees to reimburse the county therefor from water availability fees paid to the town by county residents receiving water service in areas adjacent to the town.

The agreement calls for county appropriations to the town each year for nine years and town reimbursement from water service charges no less frequently than every five years after the first such appropriation until the total amount appropriated is repaid to the county. A question has
been raised as to its legality because of an Opinion of this Office that a county does not have authority to lend money to a town. See 1980-1981 Report of the Attorney General at 121.

The question presented in the above Opinion was whether a county has authority to lend money to an incorporated town to assist the town in raising matching funds for a federal grant. That Opinion recited statutory provisions specifically authorizing a county either to lend money or to appropriate it to various organizations and, finding no provision expressly granting the power to lend money to a town, concluded that a county does not have such authority. Following the Dillon Rule of strict construction, prior Opinions on this subject hold that a county has the power to lend money in those instances in which the power is expressly granted by statute or necessarily implied to effect the purpose of a statute.1

This Office also has had occasion, however, to review financing arrangements similar to the one proposed here. Those Opinions were based upon authority contained in repealed §§ 15-724, 15-725 and 15-726, the predecessors of §§ 15.1-304, 15.1-305, 15.1-306, respectively. In an Opinion contained in the 1959-1960 Report of the Attorney General at 312, it was stated that, although no statute authorizes a board of supervisors to make a loan to a town under the above cited Code sections, a county may appropriate funds to a town to finance a water facility project as part of a contract between the county and the town and that the town may reimburse the county over a six-year period. See, also, 1961-1962 Report of the Attorney General at 30. I concur in this view and am, therefore, of the opinion that the agreement under consideration here is valid insofar as it contemplates county appropriation of funds to the town for the project and town reimbursement of the amount appropriated.

I am also of the opinion, however, that the agreement is invalid insofar as it purports to bind the county to a fixed contractual obligation to make payments in future years, unless the arrangement is first submitted to the qualified voters of the county for approval. See Art. VII, § 10(b) of the Constitution of Virginia (1971); American-LaFrance and Foamite Industries, Inc. v. Arlington County, 164 Va. 1, 178 S.E. 783 (1935). Otherwise, any contract entered into in one fiscal year and requiring payments in future years must be made subject to the condition that the board of supervisors appropriate funds during each year in which a payment is to be made.4

2Section 15.1-305, relating to joint construction of projects as defined in §15.1-304, which would include the project here proposed, provides as follows: "Any two or more of the counties, cities and towns of this State through their respective boards of supervisors or councils may enter into such contracts and agreements as they may deem proper for or concerning the acquisition, construction, maintenance and operation of any project."

3Section 15.1-306 provides: "Any such counties, cities and towns so contracting with each other may also provide in any contract or agreement for a board, commission or such other body as their governing bodies may deem proper for the supervision and general management of a project and the operation thereof, prescribe their authorities and duties and fix their compensation.

Any such contract or agreement shall also set forth as nearly as may be ascerturable the amount of money necessary for the acquisition, construction, maintenance and operation of any project and the proportional part thereof to be provided by each county, city or town party thereto and shall authorize and direct the appropriation thereof by their respective governing bodies."


COUNTIES, CITIES AND TOWNS. ANNEXATION. DILLON'S RULE. CITY AND COUNTY HAVE AUTHORITY TO ENTER AGREEMENT LIMITING CITY'S ANNEXATION POWER, NOTWITHSTANDING DILLON'S RULE, PURSUANT TO REMEDIAL STATUTE WHICH MUST BE LIBERALLY CONSTRUED.

October 28, 1982

The Honorable Robert W. Ackerman
Member, House of Delegates

The City of Fredericksburg and Spotsylvania County have entered into an agreement which attempts to establish their respective rights of annexation and immunity from annexation. You have requested my opinion of the validity of certain of those provisions. Among other things, the agreement provides that the county acquiesces in the city's annexation of a specified portion of its territory, in exchange for which the city agrees not to initiate, institute or be a party to any proceeding to annex additional county territory, or to accept any annexation of territory, without the express consent of the county, for a period of twenty-five years.

Your question is stated as follows:

"Given the statutory scheme set out in Section 15.1-945.7, which encourages negotiation between the parties, is there expressed power or necessary and fairly implied power in the statutory scheme so as to
allow the City Council and the Board of Supervisors to bind successor governing bodies to the negotiated agreement between Spotsylvania County and the City of Fredericksburg, defining and limiting the future right of annexation by the City of Fredericksburg of Spotsylvania County."

Virginia generally follows the Dillon Rule of strict construction concerning the legislative powers of local governing bodies. Under that rule, localities may exercise those powers which are expressly granted or which are necessarily or fairly implied, and where there is doubt, the doubt is to be resolved against the existence of the power. See Tabler v. Board of Supervisors of Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980); Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977).

There are occasions, however, when a mechanical application of Dillon's Rule would be inappropriate. For example, in Nexsen v. Board of Supervisors of Elizabeth City County, 142 Va. 313, 128 S.E. 570 (1925), the Court cautioned against too strict a construction of a statute when such would defeat the intent of the General Assembly. Moreover, and of particular significance to this situation, the Supreme Court has recognized in a long line of cases the well established principle that remedial statutes are to be liberally construed to achieve the legislative purpose. See Scott v. Sylvester, 220 Va. 182, 257 S.E.2d 774 (1979) and Virginia Brewing Co. v. Webber, 167 Va. 67, 187 S.E. 447 (1936). In Webber, the Court, quoting from another case, stated, "that which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." 167 Va. at 72. Following this rule of liberal construction of remedial statutes, reasonable doubts must be resolved in favor of the applicability of the statute. The South Hill Production Credit Ass'n v. Hudson, 174 Va. 284, 6 S.E.2d 668 (1940). In Mayor v. Industrial Development Authority, 221 Va. 865, 275 S.E.2d 888 (1981), the Court followed a statutory requirement of liberal construction and resolved doubts concerning the exercise of governmental authority in favor of the exercise of that authority.

Turning to the instant question, relationships among local governments have long presented problems which are of continuing concern to the General Assembly, particularly with respect to city annexations of county territory. See Report of the Commission on City-County Relationships (House Doc. No. 27, 1975). In recognition of the changing capacities and practices of increasingly urbanized counties to provide urban services to their citizens, the Commission on City-County Relationships recommended a number of changes in the annexation statutes which were adopted by the General Assembly as amendments in 1979. See Ch. 85, Acts of Assembly of 1979. Thus, the statutes now provide means for a county to obtain immunity from annexation for all or part of its territory upon judicial hearing and determination that
certain conditions have been met. Similarly, a county may become an independent city by complying with procedures in the statutes. "Economic Growth Sharing" agreements also are authorized in which a city may relinquish its authority to annex all or part of a county in exchange for fiscal arrangements to share in the benefits of the county's economic growth. In a decision this term, the Virginia Supreme Court interpreted the 1979 amendments to the annexation statutes and reached the following conclusion, among others: "First, the state favors cooperation, rather than competition, among local governments." See County of Rockingham v. City of Harrisonburg, No. 812007, Slip opinion at 7 (Va. Sept. 9, 1982).

Section 15.1-945.7, enacted in 1980, is yet another recent expression of the State's interest in encouraging cooperation in interlocal affairs and in minimizing, to the extent possible, the costs, disruption and hostilities attendant to annexation actions. Section 15.1-945.7(E) specifically encourages units of local governments to negotiate agreements resolving their differences relative to annexation or partial immunity, "notwithstanding any other provision of law." That provision, like the 1979 amendments, is a remedial statute and must be liberally construed to achieve the goal of cooperation, rather than competition, among local governments.

I believe it can be fairly implied from the words of § 15.1-945.7 that localities may include in such agreements provisions for immunity from annexation and relinquishment of annexation, for such periods of time as they perceive are in their best interests. Any doubt as to the existence of such authority in this instance should be resolved in favor of its existence, in order to achieve the obvious purpose and intent of the General Assembly in these matters.

For the foregoing reasons, I am of the opinion that the county and city have the authority to enter into an agreement which includes a twenty-five year moratorium on annexation and, accordingly, your question is answered in the affirmative, subject, of course, to the determination of the court in a proceeding under the relevant statute.

1A copy of the agreement under consideration is attached as "Appendix A" to Report on the City of Fredericksburg - County of Spotsylvania Annexation and Immunity Agreement, Commission on Local Government, Commonwealth of Virginia, June, 1982.

2See § 2.01 of the agreement.

3See §§ 2.01, 2.04. Section 2.04 also contains a conditional commitment to extend the immunity period an additional five years.

4See, also, 2 McQuillen Municipal Corporations, § 10.21 (3d ed.): "This rule of strict construction of the powers of a municipal corporation is subject to certain limitations. For instance, powers cannot be so strictly construed as to defeat
the legislative intent, or to destroy the purpose for which
the grant was made, or where it would hamper a reasonable
exercise of powers, and the construction should conform to
the legislative policy of the state as to local affairs."

5 See §§ 15.1-977.1, et seq.
6 See §§ 15.1-977.1, et seq.
7 See §§ 15.1-1166, 15.1-1167. See also, 1981-1982 Report
of the Attorney General at 48, for a discussion of a proposed
economic growth sharing agreement under the new statutes.
8 I note that relinquishment of authority to annex for a
specified period of time is certainly a lesser act than
relinquishment of such authority forever, as may be clearly
done pursuant to § 15.1-1166.
9 Your question is phrased in terms of whether the present
governing bodies may bind their successors to the terms of
the agreement. The commentators generally hold that, in the
absence of statutory authority, the governing body of a
municipal corporation may not, by contract, bind its
successors either to forego or to exercise a governmental
power such as the power to annex. See 1981-1982 Report
of the Attorney General at 48. As discussed above, I believe
the authority contained in the annexation statutes to be
adequate to overcome any objection to the proposed agreement
on this ground.

COUNTIES, CITIES AND TOWNS. BOARD OF SUPERVISORS. LACKS
AUTHORITY TO ABOLISH SPECIAL SCHOOL DISTRICTS.

February 10, 1983

The Honorable Charles R. Hawkins
Member, House of Delegates

You ask whether the Pittsylvania County Board of
Supervisors has legal authority to abolish representation on
the Pittsylvania County School Board from three incorporated
towns in the county. Those towns are Hurt, Gretna and
Chatham.

Pittsylvania County operates as a traditional county
board form of government with a county administrator pursuant
to § 15.1-115 of the Code of Virginia. All of Pittsylvania
County constitutes a single operating school division; Hurt,
Gretna and Chatham do not have separately operating school
divisions. I am advised that the school board for
Pittsylvania County School District currently has twelve
members: seven who represent specific magisterial districts,
two who are selected at large, and three who represent each
of the three incorporated towns as above named.

You have referred to several prior statutory enactments
concerning the representation on the school board of these
incorporated towns. Examination of these enactments shows
that in 1932 all separate school districts were abolished in
Pittsylvania County and the county was established as the
unit "for all school purposes whatever, save only that of
representation." Chapter 416, Acts of Assembly of 1932. This legislation then provided:

"For the purpose of representation only, each magisterial district and each incorporated town having a population of one thousand or more, according to the latest United States census, in each of said counties shall constitute a school district, and the county school board shall be composed of one member from each such district in the county, to be appointed or elected as provided by law, provided that the member from a magisterial district shall not be a resident of any town which is, by this section, constituted a school district."

Thereafter, several changes and deletions were made to the provisions governing these "representational" or special town school districts throughout the Commonwealth. See Ch. 422, Acts of Assembly of 1942; Ch. 270, Acts of Assembly of 1950. In 1968, the following reenactment of the 1932 provision was passed:

"For the purpose of representation only, each magisterial district and each incorporated town*lying entirely in a single magisterial district in each of said counties shall constitute a school district, and the county school board shall be composed of one member from each such district in the county, to be appointed or elected as provided by law, provided that the member from a magisterial district shall not be a resident of any town which is, by this section, constituted a school district." (Emphasis in the original.) Ch. 798, Acts of Assembly of 1968.

These special town school districts for purpose of representation have been continued unaffected by subsequent statutory changes. See Ch. 225, Acts of Assembly of 1971; Ch. 559, Acts of Assembly of 1980.

Section 22.1-33 currently controls your inquiry:

"Special town school districts which now exist for the purposes of representation on division school boards shall continue." [1]

It is my opinion, therefore, that those incorporated towns of Hurt, Gretna and Chatham, which meet the legislatively prescribed criteria of special school districts for representational purposes only, continue to require representation on the county school board. See 1971-1972 Report of the Attorney General at 30, 354. Absent approval of the General Assembly, the Pittsylvania County Board of Supervisors has no authority under current law to abolish such town representation on the school board.
COUNTIES, CITIES AND TOWNS. BUDGETS. PROPOSED S.B. 106, RELATING TO AMENDMENTS OF LOCAL GOVERNMENT BUDGETS AFTER ADOPTION, WOULD CHANGE PRESENT PROCEDURAL REQUIREMENTS FOR SUCH AMENDMENT AND IMPOSE MONETARY LIMITATION ON AMOUNT OF ANY AMENDMENT.

February 18, 1983

The Honorable Stephen C. Gordy
Member, House of Delegates

This is in reply to your letter of February 16, 1983, concerning an amendment in the nature of a substitute for S.B. 106, dated February 11, 1983. You ask my opinion how the House version of the bill, if enacted, would change the current requirements for amending an adopted local government budget.

At the outset, it is important to note that the budget, except for the public school budget, is for informative and fiscal planning purposes only. It does not constitute an appropriation. At present, there is no statutory provision for amendments to local governmental budgets. A prior Opinion of this Office holds that a local government possesses the implied power to amend its budget as an incident to its express power to adopt the budget, and that the exercise of this implied power must be performed in the same manner set out for adoption of the budget. See 1981-1982 Report of the Attorney General at 109. Accepting that position as a premise, the current procedural requirements for amending a local budget would be those prescribed for budget adoption in § 15.1-162 of the Code of Virginia, which provides, in pertinent part, as follows:

"A brief synopsis of the budget which, except in the case of the public school budget, 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. The governing body of any county not
having a newspaper of general circulation may in lieu of the foregoing notice provide for notice by written or printed handbills, posted at such places as it may direct. The hearing shall be held at least seven days prior to the approval of the budget as prescribed in § 15.1-160...."

The substitute Bill now under consideration by the General Assembly proposes to add a new § 15.1-162.1, which reads as follows in its present form:

"Amendment of budget.—Every county, city and town may amend its budget from time to time by publishing a notice of a meeting and public hearing once in a newspaper having general circulation in that locality seven days prior to the meeting date. The notice shall state the local government's intent to amend the budget. Any amendment under this section shall be limited to an amount of money that does not exceed one percent of the total revenues shown in the adopted budget. The governing body of every county, city and town may adopt such amendment at the advertised meeting after first providing a public hearing during said meeting on the proposed budget amendments."

A comparison of the above two quotations reveals that they differ procedurally in the following respects:

1. Section 15.1-162 requires that an informational synopsis be published along with the public hearing notice, while proposed new § 15.1-162.1 requires only that the governing body's intent to amend the budget be stated in the notice of public hearing and meeting.

2. Proposed § 15.1-162.1 does not contain the option provided in § 15.1-162 of posting notice in lieu of newspaper advertisement in any county not having a newspaper of general circulation.

3. Section 15.1-162 provides that the advertised public hearing be held at least seven days prior to governing body action, while proposed § 15.1-162.1 directs the public hearing to be held during the same meeting in which a budget amendment may be adopted.

In addition to these procedural differences, it should be noted also that the proposed new statute in its present form differs in substance from § 15.1-162 in imposing a limitation on the amount of any budget amendment.

COUNTIES, CITIES AND TOWNS. CONSOLIDATION OF COUNTY AND TWO INCORPORATED TOWNS DOES NOT AFFECT TOWN ZONING ORDINANCES EXCEPT AS PROVIDED IN CONSOLIDATION AGREEMENT, AND DOES NOT OF ITSELF ALTER HIGHWAY FUND ALLOCATIONS.
June 20, 1983

The Honorable Daniel W. Bird, Jr.
Member, Senate of Virginia

This is in reply to your letter which was received on June 14, 1983, concerning the proposed consolidation of Pulaski County and the Towns of Dublin and Pulaski into one local government, pursuant to Art. 4, Ch. 26 of Title 15.1 of the Code of Virginia. A consolidation agreement has been entered into among the present existing three governing bodies, which will be submitted to the voters of the three jurisdictions for approval in a referendum scheduled for July 12, 1983. You ask my opinion on the following questions submitted to you by the Council of the Town of Pulaski:

1. Will the zoning ordinance in effect in the Towns of Dublin and Pulaski be enforceable within the Town Shires under the new County Government on January 1, 1984, and thereafter until amended or repealed by the Board of Supervisors of the Consolidated County of Pulaski, Virginia?

2. Will the Shires of Pulaski and Dublin still receive the funds under the same formula as they now receive highway allocations? (The Town of Pulaski receives funds measured by the number of miles of the different classification of highways within the boundary of the Town of Pulaski. Dublin has a population less than 3500 and receives funds under a different formula.)

With regard to the first question, the consolidation agreement provides as follows in § XIV:

"All ordinances in force and effect in the County of Pulaski, the Town of Dublin and the Town of Pulaski on December 31, 1983, shall remain in force and effect on the effective date of consolidation and thereafter until amended or repealed by the Board of Supervisors of the Consolidated County of Pulaski, except as provided herein, and except the Vehicle License Tax rate shall be that of the present county."

The consolidation agreement is central and essential to any proposed consolidation of the local governments involved, and, upon its approval by the voters, it must be accorded the same weight as an enactment of the legislature. See Opinion to the Honorable Thomas J. McCarthy, Jr., County Attorney for the County of Pulaski, dated June 7, 1983. As such, each of its provisions must be considered controlling over its subject matter, unless it conflicts with constitution or statute. Section XIV on its face does not appear to violate any constitutional principle or other provision of law, and, in accordance with its express language, the first question is answered in the affirmative.
With regard to the second question, the consolidation agreement, in §§ X and XI respectively, designates the shires of Dublin and Pulaski as special service tax districts and special service districts for the delivery of certain governmental services, including street and highway maintenance. 2 Section 15.1-1135 allows for such optional provisions in a consolidation agreement and provides, in relevant part, as follows, in subsection (12) thereof:

"[I]n any consolidation by a county and all the towns therein into a consolidated county...the area of any such town...may be designated as a special service district and the delivery of water, sewer and similar type services may be continued; in addition the consolidated county shall have the same powers, rights and duties with respect to the public right-of-way, streets and alleys within such district and receive State Highway Fund allocations as did such town or towns...prior to consolidation." 3 (Emphasis added.)

In my opinion, the intent of the above emphasized language of § 15.1-1135(12) is that a consolidation of local governments as proposed here, of itself, shall not affect allocations from the State Highway Fund. In effect, the former towns are treated as still being in existence for purposes of preserving their individual entitlements, although the allocation of those funds after consolidation shall be to the consolidated county. State Highway Fund allocations are established pursuant to provisions in Ch. 1 of Title 33.1 and are subject to adjustments which may be necessary as a result of changes in circumstances and the availability of funds for allocation, as provided in that Title. Subject to these caveats, the second question, above, is answered in the affirmative.

1"All laws should be general in their operation, but all places within the same [locality] do not necessarily require the same local regulation." R. F. & P. R. R. Co. v. City of Richmond, 96 U.S. 521, 529 (1877).


2See, also, § XII(A)(1) of the agreement, which provides that the entire cost of street and highway maintenance in the two shires shall be paid by residents and property owners in each of the respective shires, "less the contribution of funds for street and highway maintenance received from the Commonwealth of Virginia" in each case.

3Note, that § 15.1-1147 provides, in part, that "the streets of former cities and towns which have been consolidated as a part of the consolidated county shall become and remain a part of the State Highway System unless..."
COUNTIES, CITIES AND TOWNS. EXPENSES. JAILS AND PRISONERS. WHEN PORTION OF SECOND CLASS CITY (GALAX) IS ALSO PART OF COUNTY AND COUNTY MAINTAINS JAIL, COUNTY IS RESPONSIBLE FOR EXPENSES OF HOUSING PRISONERS ARRESTED IN THAT PORTION OF CITY LYING IN COUNTY.

November 8, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia

You have asked three questions regarding the responsibility for prisoners arrested in the City of Galax and committed to the jails in Carroll County or Grayson County. The City of Galax has only a 24-hour lockup facility; hence, a felon arrested in the city is delivered to the jail in Carroll or Grayson County, depending upon which portion of the city the offense was committed.

The City of Galax is unique among cities. The land area previously comprised the Town of Galax and portions of the counties of Carroll and Grayson prior to the transition into a city. Upon becoming a city of second class, the charter provided that the county sheriff, Commonwealth's attorney and circuit court clerk shall continue to exercise and have the same rights and privileges, perform the same duties, and have the same jurisdiction in that part of the area lying within the city, which was a part of and lying in Carroll County or Grayson County, before the time of the transition of the town into a city, as they had in such area of the town before such municipality became a city. The qualified voters residing in such areas of the city shall be entitled to vote for such officers, as well as the candidates for members of the legislature of said county, at the general election for such officers, as if the city had not been declared to be a city of the second class.

Your questions relating to prisoner care arise due to the occasions on which one of the county jails to which a prisoner is delivered refuses to accept the prisoner, requiring the city officials to deliver the prisoner to neighboring counties, which may be many miles from the City of Galax.

This Office has been further informed by a city official of Galax that Galax presently contributes financially to the operation of the jails of the two counties in two ways. First, the City of Galax contributes its share of the costs and expenses of various county officials (sheriff, Commonwealth's attorney, etc.) in the proportion that the population of Galax in each respective county bears to the aggregate population of the city and county. See former § 15-104 of the Code of Virginia, the predecessor of current
§ 15.1-1005. Second, the City of Galax pays a per diem cost for each inmate arrested in Galax and subsequently incarcerated in either jail, based on which side of Galax the offense was committed.

I shall now answer your questions in the order presented.

First, you ask which jurisdiction is responsible for expenses incurred when prisoners are not housed in the appropriate county jail because the sheriff of the appropriate county refuses to accept them due to overcrowding in his jail.

In an Opinion found in the 1981-1982 Report of the Attorney General at 333, this Office ruled that sheriffs may not collect per diem costs pursuant to former § 53-182 (currently § 53.1-91) from the county or city for which he is elected. As you have previously indicated, the citizens of Galax vote for their respective county sheriff, depending upon the location of their residence within Galax. Thus, I am of the opinion that the sheriffs of Carroll and Grayson Counties do not have authority to collect a per diem cost from Galax as indicated in the prior Opinion. The jail facility in each county is allocated such operating expense money for the jailer's use from the Department of Corrections in block grants. See §§ 53.1-84 through 53.1-86.

Further, I am of the opinion that the sheriff of either county should not refuse to accept prisoners from his respective portion of the City of Galax. Section 53.1-119 provides that a sheriff shall receive into his jail "all persons committed by the order of such courts, or under process issuing therefrom, and all persons committed by any other lawful authority." (Emphasis added.) Also, the charter of Galax, set out and approved in Ch. 562, Acts of Assembly of 1954, provides in §§ 12.01 and 12.02 that the sheriff of each county "shall continue to exercise and have the same rights and privileges, perform the same duties, have the same jurisdiction in that part of the area lying within the City, which was a part of [his respective county]...." (Emphasis added.) Finally, § 53.1-72 provides that the jail of each county shall be the jail "of every court established therein...."

These provisions lead me to conclude that the jail of each county is also the jail for that portion of Galax lying in each county. A sheriff cannot discriminately pick and choose his inmates who come from within his jurisdiction. Thus, in answer to your first question, I am of the opinion that the county is responsible for such expenses.

Your second question asks, "[i]s it the responsibility of the city to see that prisoners are transported back and forth for medical treatment, or court appearances?"
Section 53.1-126 places the responsibility for jail prisoners' food, clothing and medicine upon the sheriff. I assume from the facts presented that the sheriffs of Grayson County and Carroll County are the keepers of their respective jails. Accordingly, I must conclude that once a sheriff receives a prisoner from within his jurisdiction, he is responsible for the care and custody of that inmate, including transporting that inmate for medical treatment or for court appearances.

Your third question asks, "[o]nce the City delivers a prisoner to either jail, whether full or not, is the County not then responsible from that point on?"

This question is answered in the affirmative. As indicated in my answer to your first question, a sheriff should not refuse to accept prisoners from within his jurisdiction. If, under circumstances posited by you, the Carroll County jail were full, and the Carroll County sheriff received a prisoner from some portion of Carroll County other than the Galax portion of Carroll County, the sheriff would more than likely make arrangements with another jail to house that inmate. Under § 53.1-91, Carroll County would then have to reimburse the other sheriff for such assistance.

In summary, the jail for either county is also the jail for that portion of Galax lying in each respective county. Thus, if the jail is full when a prisoner arrives from the Galax portion of the county, I am of the opinion that the sheriff has a similar responsibility with respect to that prisoner as he does with any prisoner from within any other portion of his jurisdiction. Because both jails receive block grants from the Department of Corrections for the care and custody of inmates, and in light of the express prohibition against collecting expenses from the city or county for which he is elected, I further am of the opinion that neither sheriff is entitled to reimbursement from the city for prisoner expense under § 53.1-91.

1Section 53.1-91 reads as follows: "Each sheriff 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."

2For purposes of this Opinion, it will be assumed that the City of Galax constitutes a part of Carroll or Grayson County insofar as the county sheriff is concerned; consequently, neither county may charge the city for prisoner care for
COUNTIES, CITIES AND TOWNS. FIREARMS. ORDINANCES. ABSENT SPECIFIC STATUTORY AUTHORITY, MUNICIPALITIES MAY NOT ENACT ORDINANCES PROHIBITING LOADED FIREARMS FROM PUBLIC STREETS AND PUBLIC PLACES.

August 26, 1982

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

This is in reply to your recent letter requesting my opinion on the validity of an ordinance of the City of Franklin making it unlawful for any person to carry a loaded firearm in a public place within the city. In his letter to you concerning that subject, the city attorney acknowledges the absence of specific statutory authority for such an ordinance but inquires whether the general welfare clause of the city charter is sufficient to validate it.

In an Opinion which may be found in the 1955-1956 Report of the Attorney General at 40, it was held that a town ordinance with a substantially similar prohibition against carrying a loaded firearm in public was a valid enactment, based upon the authority contained in the town's charter allowing it to do all things necessary or expedient for promoting or maintaining the health and general welfare of its inhabitants, and to pass and enforce all ordinances which it may deem necessary for the protection of its citizens or their property. In a number of subsequent Opinions on the subject, however, this Office reached a contrary conclusion on the premise that the General Assembly, in adopting a specific prohibition against carrying loaded firearms under certain circumstances in certain counties (see present § 18.2-287 of the Code of Virginia), inferentially decided that the prohibition should not be effective in other counties. Accordingly, those Opinions concluded that local authority to regulate the carrying of loaded firearms must rest upon an express grant of power. See 1971-1972 Report of the Attorney General at 39, 296; 1959-1960 Report of the Attorney General at 74. See, also, 1956-1957 Report of the Attorney General at 35.

The most recent Opinion on the subject held that the conclusion reached in the first Opinion cited above was overruled by the subsequent Opinions and that municipalities may not enact ordinances prohibiting the carrying of loaded firearms on public streets and in public places, absent specific statutory authority. See 1974-1975 Report of the Attorney General at 184. I am unaware of any such authority.
having been enacted since the time of that Opinion nor do I find any reason to differ with that ruling. Accordingly, I am of the opinion that the City of Franklin's ordinance purporting to regulate the carrying of loaded firearms in public places is invalid.

1In an Opinion dated June 9, 1982, addressed to the Honorable Edward M. Holland, Member, Senate of Virginia, this Office expressed the view that § 15.1-510 is sufficiently broad to permit localities to regulate the sale of ammunition, but could not regulate the sale of handguns due to the State's preemptive action in the latter area.

COUNTIES, CITIES AND TOWNS. MAY PREPARE BUDGET AND APPROPRIATIONS ON BASIS OF ACCOUNTING OTHER THAN CASH BASIS.

May 6, 1983

The Honorable Charles K. Trible
Auditor of Public Accounts

You have asked whether a local government may prepare its budget and appropriations on a basis of accounting which does not reflect the actual timing of cash receipts and cash disbursements (modified accrual basis) without violating the general provisions of Virginia law. Your letter observes that your office has traditionally interpreted the Code of Virginia to require local budgets and appropriations to be on a cash basis of accounting (revenues recognized when received in cash and expenditures recognized when paid out in cash).

The subject of local government budgeting is addressed in Title 15.1, Ch. 4 of the Code. Section 15.1-160 states, in part, as follows:

"The governing body shall prepare and approve a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings...."

Section 15.1-161 states, in part, as follows:

"Opposite each item of the contemplated expenditures the budget shall show in separate parallel columns the aggregate amount appropriated during the preceding fiscal year, the amount expended during that year, the aggregate amount appropriated and expected to be appropriated during the current fiscal year, and the increases or decreases in the contemplated expenditures for the ensuing year as compared with the aggregate amount appropriated or expected to be appropriated for the current year."
Your question concerns whether the Code dictates a particular "basis of accounting" which local governments must use when they prepare and approve their budget as required by § 15.1-160. "Basis of accounting" refers to the time when revenues and expenditures are recognized in the accounts. See National Council on Governmental Accounting (NCGA) Statement 1, 11 (1979).

The language in the Code does not directly address the issue of the timing of revenue and expenditure recognition. Unless the General Assembly provides a specific definition, the general terms "revenues" and "expenditures" "must be given the meaning they have acquired from customary usage," Greer v. Dillard, 213 Va. 477, 479, 193 S.E.2d 668 (1973). Authoritative accounting literature uses those terms in general discussions of both cash and accrual accounting. NCGA Statement 1, supra. It is apparent that the legislature did not intend to restrict local governments to budget preparation on the cash basis because the plain language does not state that intention and the terms used in the statute are commonly identified with both the cash and accrual bases of accounting.

I know of no other provisions in the Constitution of Virginia (1971) or in the Code which could be interpreted to restrict the preparation of local governmental budgets on the cash basis.

Therefore, unless legislation is enacted to the contrary, based on the foregoing, it is my opinion that a local government may prepare its budget and appropriations on a basis of accounting which does not reflect the actual timing of cash receipts and cash disbursements without violating the general provisions of Virginia law.¹

¹Note that this Opinion addresses the subject of local governmental budget preparation. Section 2.1-156 gives the Auditor of Public Accounts the authority to set the "system of bookkeeping and accounting" which local governments must use in recording actual transactions. Ideally, the basis on which the budget is prepared should be consistent with the basis on which the accounts are maintained. NCGA Statement 1,13 (1979).
This is in reply to your recent letter inquiring as to the validity of an amendment to the Goochland County Subdivision Ordinance which will require future subdividers of land along existing State roads in the county to dedicate sufficient land to the Virginia Department of Highways and Transportation to insure the availability of twenty-five feet of public right-of-way to the centerline of the road. You suggest that subsections (c), (d) and (e) of § 15.1-466 of the Code of Virginia, when read together, provide a legal basis for such an amendment, and you ask my opinion of that conclusion.

Boards of supervisors have only those powers which are conferred upon them expressly or implicitly by statute. Virginia follows the Dillon Rule of strict construction, and any reasonable doubt as to the existence of a power must be resolved against the locality. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975). As it relates to local subdivision exactions, the Supreme Court of Virginia, in construing § 15.1-466, has held that a county does not have express or implied authority to require a subdivider to reconstruct portions of existing public highways abutting the subdivision. Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979). See 1979-1980 Report of the Attorney General at 406. The Court also has ruled that the statutes delegate no power to a local governing body to enact an ordinance requiring individual landowners to dedicate land for a road, the need for which is generated by public traffic demands rather than by the property proposed to be developed. Board of Supervisors of James City County v. Rowe, 216 Va. 128, 138, 216 S.E.2d 199 (1975). In Rowe the Court expressly refrained from deciding whether localities are empowered to require subdividers to dedicate land for access roads. Since the Rowe decision this Office has held that a locality may require a subdivider to dedicate land to support certain types of facilities whose need is substantially generated by the proposed development itself. See 1978-1979 Report of the Attorney General at 255.

Applying this principle to the Goochland ordinance, I note that the Goochland ordinance does not condition dedication upon a finding that the need for the dedication was substantially generated by the proposed development. In the absence of a requirement that such a finding of need be made, I must conclude that the ordinance fails to meet the requirements of Virginia law.

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1 The amendment, adopted August 3, 1982, and effective October 1, adds to the subdivision ordinance a new § 5.12 which reads as follows:
"Additional Right-of-Way Required:

With any subdivision of land along existing state roads which do not have a fifty (50) foot right-of-way, it shall be required that the subdivision plat indicate sufficient additional right-of-way to decrease the non-conforming right-of-way by one-half. If such subdivision should occur on both sides of the existing state road, it shall be required that the subdivision plat indicate additional right-of-way to bring the right-of-way into conformance with the fifty (50) foot standard and the road shall be shown on the plat in the center of the right-of-way. The said right-of-way shall be dedicated to the State Department of Highways and Transportation for future use."

The pertinent language of § 15.1-466 is as follows: "A subdivision ordinance shall include reasonable regulations and provisions that apply to or provide:

(c) For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage;

(d) For adequate provisions for drainage and flood control and other public purposes, and for light and air;

(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...."

For discussions supporting the conclusion that dedications required of a subdivider must relate to the subdivision's needs, both before and after Rowe, see Dolbeare, Mandatory Dedication of Public Sites as a Condition in the Subdivision Process in Virginia, 9 U.Rich.L.Rev. 435 (1975); Virginia Defines Scope of Local Power to Impose Dedication and Land Use Requirements Upon Individual Landowners - Board of Supervisors v. Rowe, 216 Va. at 128, 137-138. Similarly, the question of the validity of a mandatory dedication of land for highway improvements was not before the Court in Hylton, supra, because the developer had agreed to a dedication for that purpose. See 220 Va. at 439.

For discussions supporting the conclusion that dedications required of a subdivider must relate to the subdivision's needs, both before and after Rowe, see Dolbeare, Mandatory Dedication of Public Sites as a Condition in the Subdivision Process in Virginia, 9 U.Rich.L.Rev. 435 (1975); Virginia Defines Scope of Local Power to Impose Dedication and Land Use Requirements Upon Individual Landowners - Board of Supervisors v. Rowe, 216 Va. at 128, 137-138. Similarly, the question of the validity of a mandatory dedication of land for highway improvements was not before the Court in Hylton, supra, because the developer had agreed to a dedication for that purpose. See 220 Va. at 439.

A second possible defect is that the ordinance requires dedication to a third party, the Virginia Department of Highways and Transportation rather than Goochland County. Compare § 15.1-478 which provides that recordation of the plat transfers to the locality fee simple title to streets, alleys, etc.
COUNTIES, CITIES AND TOWNS. WELFARE. INDIGENTS. LOCAL GOVERNING BODY HAS AUTHORITY AND DUTY TO PAY COSTS OF BURIAL OF INDIGENT RESIDENTS ONLY AS PROVIDED BY STATUTES AND SOCIAL SERVICE REGULATIONS.

April 13, 1983

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

This is in reply to your request for my opinion whether the governing body of a county has either the authority or a duty to pay for the burials of indigent persons who die within the local jurisdiction under the following described circumstances. You relate that a private alcoholic treatment facility within your county customarily presents bills to the board of supervisors for payment for burial expenses of indigent persons who have come to that facility and thereafter have died. You ask, in particular, (a) whether the private treatment facility may be required to pay the burial expenses of an indigent resident of that institution, and (b) under what authority may the county pay the burial expenses of an indigent who leaves no responsible relatives and who was not a resident of the private institution.

Provision for aid to the poor is a proper public purpose for which a board of supervisors may incur obligations when authorized by the General Assembly. See Pirkey v. Grubb's Ex'or, 122 Va. 91, 100-101, 94 S.E. 344 (1917). Although there are no Virginia cases directly on point, it is generally held that, unless it is imposed by statute, a local government has no legal duty to furnish support to indigent persons or to pay for such support furnished by others. See 17 McQuillen Municipal Corporations §§ 47.04, 47.06 (3rd ed.).

Section 63.1-91 of the Code of Virginia, which is part of the Virginia Public Welfare and Assistance Law (the "Law"), provides, in pertinent part, as follows:

"The board of supervisors or other governing body of each county and the council or other governing body of each city in the State shall each year appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance and to provide services, including cost of administration, under the provisions of this law within such county or city."

The general relief provision of the Law, § 63.1-106, provides, in pertinent part, that "[i]f a local board has exercised its option to establish a program of general relief, a person shall be eligible for such components of the general relief program as the locality chooses to provide if he is in need of general relief." (Emphasis added.) General relief may be, and customarily has been, applied when a person dies without either financial means or relatives who have a duty to support him. See 1968-1969 Report of the
Attorney General at 23; compare 1932-1933 Report of the Attorney General at 18. The General Relief Manual (the "Manual") promulgated by the Virginia Department of Social Services pursuant to § 63.1-25 permits assistance for burial costs as a component of a local General Relief Plan (the "Plan"). See Ch. 100 of that Manual, relating to the Plan, and Ch. 300, relating to Short Term and Emergency Assistance. Thus, it may be concluded that the county would have a duty under § 63.1-91 to appropriate funds to pay the costs of indigent burials only if the local welfare board has exercised its option to establish a program of general relief and has further elected to include burial assistance within its Plan, and then only on behalf of individuals who meet certain established criteria and are certified as eligible for relief assistance by the local board. See emphasized portions of § 63.1-106, supra; §§ 63.1-107, 63.1-108, 63.1-109, 63.1-110; Manual §§ 301.1, 301.2.

Apart from the general relief program discussed above, § 63.1-51 would appear to provide additional authority within the welfare laws for payment of the costs of burial of the indigent. This section authorizes a local governing body to contribute funds to the credit of the local welfare board for the purpose of aiding needy persons in the locality, such funds to be disbursed in accordance with policies established by the local welfare board. See 1973-1974 Report of the Attorney General at 263, 265.

Finally, you should also take note of § 15.1-24, which provides, in 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."

A donation made to an eligible institution to assist the indigent would be authorized under § 15.1-24 as an appropriation of public funds for a lawful charitable purpose. The criteria for eligibility as a charitable institution under § 15.1-24 are discussed in Opinions found in Reports of the Attorney General 1976-1977 at 22; 1974-1975 at 44, 45, 106; and 1969-1970 at 34, 35.

In answer to your inquiry, on the facts that you present, it is my opinion that the board of supervisors has no duty to pay the bills you describe. If the locality has not opted to make burial assistance available within the of the statutes discussed above, then the private facility necessarily must take responsibility for any costs it incurs on behalf of the indigent persons coming under its care, including burial expenses. 2
Note that the conclusions reached herein, relating to the powers and duties of localities to appropriate funds to assist the indigent, do not address the authority or duty of a county to act in the event an abandoned dead human body poses a threat to public health. In that situation, such authority may be derived from § 15.1-510 ("[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."); and § 15.1-14(5) (every city and town may "[p]revent injury or annoyance from anything dangerous, offensive or unhealthy and cause any nuisance to be abated"); made applicable to counties by virtue of § 15.1-522.

Note, also, § 32.1-298, which provides that any person having charge or control of a dead human body which is unclaimed for disposition or required to be buried at public expense shall notify the State Health Commissioner and permit the Commissioner or his agents to remove such body, to be used for the advancement of health science.

Cf. Awtrey v. Norfolk and Western Railway Company, 121 Va. 248, 288, 93 S.E. 570 (1917), wherein the Court, in dictum, recognizes "a common law duty resting upon one who finds a dead stranger upon his premises to give him decent burial...." See, also, § 32.1-298, discussed in fn. 1, supra.

COUNTIES, CITIES AND TOWNS. ZONING. SPECIAL USE PERMITS. BOARD OF SUPERVISORS MAY ADOPT SPECIAL USE PERMIT PROCEDURE WHICH APPLIES DIFFERENTLY TO DIFFERENT CIRCUMSTANCES OR CATEGORIES.

March 2, 1983

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

This is in reply to your request for my opinion as to whether a county board of supervisors may structure its special use permit application and approval process to require one public hearing, before the board itself, for certain applications, and two public hearings, one before the board and one before the local planning commission, for other applications.

Section 15.1-496 provides for action on applications for special exceptions as follows:

"Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the zoning administrator in accordance with rules adopted by the board. The application and accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who
shall place the matter on the docket to be acted upon by the board. No such special exceptions or variances shall be authorized except after notice and hearing as required by § 15.1-431. The zoning administrator shall also transmit a copy of the application to the local commission which may send a recommendation to the board or appear as a party at the hearing." (Emphasis added.)

In addressing your questions, I will first consider whether the board may require that an application for a special exception be considered by the planning commission at a duly advertised public hearing. While the statutes do not clearly address the question, §§ 15.1-496 and 15.1-431 provide guidance. As quoted above, § 15.1-496 requires that the application be sent to the planning commission and the commission is given the authority to send a recommendation to the board. Of course, a recommendation can best be made by one fully informed. Indeed, for land use plans, zoning ordinances and amendments, a planning commission may not give a recommendation without first holding a public hearing. See § 15.1-431. Although an application for a special exception is not specified in § 15.1-431, I believe one can fairly infer from the statutes the authority of the planning commission to hold an advertised hearing before making its recommendation on such an application. Accordingly, I conclude that the board may prescribe a procedure which results in applications for special exceptions being sent to the planning commission for consideration at an advertised hearing before being considered by the board.4

The question remains whether the board may specify different procedures for different categories of applications. Not being advised as to the manner in which the board proposes to apply the two hearing requirements, I cannot answer your inquiry definitively. However, I can state that the fact that the board specifies a more stringent procedure for one type application than for others in different classifications does not necessarily, in itself, vitiate the requirement. For instance, if the applicant is the county itself, or if the use is for the general public, as opposed to a private use, such a differentiation may not be constitutionally invidious. See 1976-1977 Report of the Attorney General at 193. Likewise, the Equal Protection Clause of the Constitution is not violated when citizens are placed in different categories, provided the classification rests upon some ground of difference having a fair and substantial relation to the object of the rule. Kahn v. Shevin, 416 U.S. 351 (1974); City of Fredericksburg v. Sanitary Grocery Co., 168 Va. 57, 190 S.E. 318 (1937). See, also, 1975-1976 Report of the Attorney General at 266.

In summary, I am of the opinion that the board of supervisors is empowered to adopt zoning requirements for a special use procedure which may apply differently to different circumstances or categories, so long as the
classification for such differences can be justified as bearing a fair relation to the object for the difference.

1See § 15.1-491 of the Code of Virginia, which provides, in pertinent part, as follows: "A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

(c) For the granting of special exceptions under suitable regulations and safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the right to issue such special exception or use permit." (Emphasis added.)

2I assume from your letter that the board of supervisors has reserved to itself the right to issue use permits. See emphasized language of § 15.1-491(c) quoted in fn. 1, supra.

3A "special exception" is the same thing as a conditional use permit, which is granted for a use specifically provided for in the zoning ordinance, subject to the satisfaction of conditions imposed by the ordinance. See Board of Supervisors of Fairfax County v. Southland Corp., 224 V.R.R. 450, 297 S.E.2d 718 (1982). See, also, 1976-1977 Report of the Attorney General at 332.

4I note that property owners may be concerned by the costs attendant to the hearing before the commission and the time which such a hearing may take. These are certainly items which the board should consider when it decides how best to balance the interests of its citizens in establishing the hearing procedure for special exception applications.

An additional factor bearing upon the board's decision in structuring the procedure is that the decision to grant a special exception is more in the nature of an administrative determination than a legislative one. The land has already been zoned and the board need only determine whether the conditions prescribed for the issuance of a special exception have been met.

COUNTY ATTORNEY. COMMONWEALTH'S ATTORNEYS. COUNTY ATTORNEY REQUIRED TO REPRESENT COUNTY BEFORE BOARD OF SUPERVISORS AND TO ADVISE BOARD WITH RESPECT TO IMPROPER CLAIMS UNDER § 15.1-550. COMMONWEALTH'S ATTORNEY RELIEVED OF THOSE DUTIES IN COUNTIES WHICH HAVE CREATED OFFICE OF COUNTY ATTORNEY.

December 27, 1982

The Honorable Joseph L. Howard, Jr.
County Attorney for the County of Washington

This is in reply to your recent request for my opinion concerning the relative responsibilities of the attorney for the Commonwealth and the county attorney under § 15.1-550 of the Code of Virginia, which relates to the procedure for
The attorney for the Commonwealth, or the county attorney in those counties which have created the office of county attorney, shall represent the county before the board and shall advise the board of any claim which in his opinion is illegal or not before the board in proper form, and upon proper proof, or which for any other reason ought not to be allowed. When any claim has been allowed by the board against the county which, in the opinion of such attorney, or any six freeholders of the county is improper as to form or proof or illegal, he shall seek the advice of the Attorney General as to legality or the State Auditor of Public Accounts as to matters of accounting, or such freeholders may appeal the decision of the board to the circuit court of the county. *** Whenever any claim allowed by the board is declared illegal by a court of competent jurisdiction, the attorney for the Commonwealth, or the county attorney in those counties which have created the office of county attorney, in the name of the county, shall institute proper proceedings in the circuit court of his county within two years from the entry of the order allowing the same, if such amount has already been paid. The attorney for the Commonwealth, or the county attorney in those counties which have created the office of county attorney, shall be available to the board and give his legal opinion when requested." (Emphasis added.)

Your question is whether the above quoted portion of § 15.1-550 provides for joint responsibility of the attorney for the Commonwealth and the county attorney to advise the board and represent the county in the matters indicated, or whether that responsibility is imposed solely on the county attorney in a county which has created a county attorney's office. You note that Washington County has established the office of county attorney on a full-time basis.

I am of the opinion that § 15.1-550 requires the county attorney to represent the county before the board and to advise the board with respect to improper claims, in those counties which have created the office of county attorney. Until 1980, the statute placed all of such responsibilities upon the attorney for the Commonwealth, at which time the language emphasized in the above quoted excerpts of § 15.1-550 was added by amendment. See Ch. 58, Acts of Assembly of 1980. The present language, which continues the use of the singular verb and refers to the county attorney and the attorney for the Commonwealth in the disjunctive, must be interpreted as allocating the described responsibilities to one or the other of those attorneys but not both. By the very terms of the language added in 1980, the attorney upon whom the responsibility rests is the county attorney in those counties which have created the office.
The above interpretation of § 15.1-550 is consistent with § 15.1-9.1:1, which provides that, in the event of the appointment of a county attorney, "the attorney for the Commonwealth of any such county shall be relieved of any duty imposed upon him by law in civil matters of advising the governing body... and in any other manner advising or representing the county... and all such duties shall be performed by the county attorney." (Emphasis added.) See, e.g., 1975-1976 Report of the Attorney General at 84.

1The word "or" is to be given its ordinary, literal and disjunctive meaning, and will be construed as "and" "only where from the context or other provisions of the statute, or from former laws relating to the same subject and indicating the policy of the State thereon, such clearly appears to have been the legislative intent." South East Public Service Corp. v. Commonwealth, 165 Va. 116, 122, 181 S.E. 448 (1935). A disjunctive term is "[o]ne which is placed between two contraries, by the affirming of one of which the other is taken away; it is usually expressed by the word 'or.'" Black's Law Dictionary 421 (5th ed. 1979).

2See, also, § 15.1-8.1, the language of which parallels that of § 15.1-9.1:1 in stating that the Commonwealth's attorney shall not be required to advise or represent the county in civil matters in certain counties including Washington County. See 1979-1980 Report of the Attorney General at 90.

COURTS. GENERAL DISTRICT COURT MAY ORDER FORFEITURE OF WEAPONS UNDER §§ 18.2-308 AND 18.2-310.

July 14, 1982

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

You have asked whether a general district court may confiscate and seize weapons pursuant to §§ 18.2-308 and 18.2-310 of the Code of Virginia.

Subject to certain limited exceptions, § 18.2-308 provides that any person carrying a concealed weapon shall be guilty of a Class 1 misdemeanor "and such weapon shall be forfeited to the Commonwealth...." If a charge under that section is tried in a general district court and the defendant is found guilty of the charge, it would be the duty of the general district court to order the weapon forfeited.

Section 18.2-310 relates to an entirely different crime and provides that certain weapons used in the commission of a crime "may, upon conviction of such person or persons so using the same, be forfeited to the Commonwealth by order of the court trying the case...." Under that section, if a
general district court convicts the accused of a violation of that section, it may order the weapon forfeited.

COURTS. REQUIREMENTS FOR APPOINTING FIDUCIARIES TO PROTECT PRISONER DEFENDANTS IN CIVIL ACTIONS.

October 13, 1982

The Honorable W. Jerry Roberts, Judge
General District Court for the City of Richmond

You have asked for an opinion addressing the apparent conflict between §§ 8.01-297, 53.1-222 and 53.1-223 of the Code of Virginia. These sections govern the procedures for the appointment of committees and guardians ad litem for prisoners who are parties in civil actions. Specifically, you have asked the following questions:

"(1) Must all actions against an incarcerated convict be instituted through a committee?

(2) Is the service of process upon and the appointment of a guardian ad litem for the convict defendant an alternative to question #1?

(3) If not an alternative, must a guardian ad litem be appointed for a convict defendant who is sued through a committee?

(4) Must all actions or suits to which a prisoner is a party at the time of his conviction be prosecuted or defended by a committee?

To what extent and by what authority can a trial judge provide for the appearance of the convict party?"

The answers to questions 1 and 4 are provided by the Virginia Supreme Court's ruling in Dunn v. Terry, 216 Va. 234, 217 S.E.2d 849 (1975), as interpreted in Cross v. Sundin, 222 Va. 37, 278 S.E.2d 805 (1981). The Court in these decisions interpreted the requirements of §§ 53-305 and 53-307 (now §§ 53.1-221, 53.1-222 and 53.1-223) as procedural and subject to waiver by a prisoner. It is, therefore, my opinion that the appointment of a committee to sue or be sued on behalf of a prisoner can be waived by a prisoner and, accordingly, is not mandatory under such circumstances.

With regard to questions 2 and 3, the Dunn decision rejected the argument that there is any legislative intent to equate committees for prisoners under § 53-305 and 53-307 with guardians ad litem for prisoners under § 8-88.1 (now § 8.01-9). The procedures for appointment and the duties of these fiduciaries are different. There is no statutory language which indicates that the statutes should be read alternatively. As shown by Dunn and Cross, it is the prisoner defendant's option to waive the appointment of a
committee, while the appointment of a guardian ad litem may be waived only by the Court.

In this regard, § 8.01-297 requires that, subject to § 8.01-9, a guardian ad litem must be appointed for any prisoner who has been convicted of a felony when he is named as a defendant in a civil action. Section 8.01-9(B) permits the court, in its discretion, to waive the appointment of a guardian ad litem if the defendant prisoner is represented by a licensed attorney.

I, therefore, am of the opinion that the appointment of a guardian ad litem is not an alternative to the appointment of a committee and that the court may waive appointing a guardian ad litem for a prisoner defendant for whom a committee has been appointed only in accordance with § 8.01-9(B).

Your final question is by what authority and to what extent may a trial judge provide for the appearance of a prisoner party in a civil suit. You correctly point out that § 8.01-410 applies only to prisoners as witnesses, not as parties. At common law, the traditional means by which a prisoner was brought before a court to give testimony was by the issuance of a writ of habeas corpus ad testificandum. In Virginia, the authority to issue this writ is contained in and limited by § 8.01-666. This section permits any circuit court to issue such writs, subject to the same statutory conditions and provisions, where applicable, governing the writ of habeas corpus ad subjiciendum (see § 8.01-654, et seq.). Because I can find no other specific statute governing your inquiry, I am of the opinion that § 8.01-666 authorizes a trial judge to order the appearance of a convict party in civil litigation.

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1 This writ was used to bring up a prisoner detained in a jail or prison to give evidence before the court.
2 Section 8.01-666 reads as follows: "When and by whom writs of habeas corpus ad testificandum granted. -- Writs of habeas corpus ad testificandum may be granted by any circuit court in the same manner and under the same conditions and provisions as are prescribed by this chapter as to granting the writ of habeas corpus ad subjiciendum so far as the same are applicable."
3 This is the most common form of habeas corpus writ, meaning simply that the body is to be produced in order to test the legality of his detention.
The Honorable W. Charles Poland  
Commonwealth's Attorney for the City of Waynesboro

You have inquired whether a court may take under advisement a plea of guilty in a felony case and place the accused on indefinite, unsupervised probation before entering a judgment of guilt. You point out that § 53-272 of the Code of Virginia was repealed in 1982. That section authorized suspension of execution of sentences, suspension of imposition of sentences, or the placing of a defendant on probation by trial courts after "a plea, a verdict or a judgment of guilty."

Section 19.2-303 was first enacted in 1975. In 1982 it was amended to include some of the provisions of § 53-272, effective on July 1, 1982. This amended section grants authority similar to § 53-272 to trial courts, but, importantly, only "[a]fter conviction." In other words, by the plain language of the statute, the court's authority to utilize the sentencing alternatives contained in § 19.2-303 does not arise until after a judgment of guilt has been entered. Where, as here, the words of the statute are unambiguous, their plain meaning is to be accepted. City of Portsmouth v. City of Chesapeake, 205 Va. 259, 136 S.E.2d 817 (1964). Accordingly, I am of the opinion that a court may not resort to the provisions of § 19.2-303 before a judgment of guilt is entered.

This conclusion is buttressed by the provisions of § 18.2-251, by which the General Assembly expressly provided that a defendant could be placed on probation upon a plea of guilty without entering a judgment of guilt under specified circumstances in certain controlled substance cases. In the absence of such a provision, it is clear that the plain language of § 19.2-303 must be followed.

The Honorable Robert F. Ward, Judge  
Pittsylvania Juvenile and Domestic Relations District Court

You have asked whether support payments collected by the Commonwealth's courts pursuant to § 20-88.27(a) of the Code of Virginia must be made payable to the court of the initiating state, or whether such payments may be made to whomever the court in the initiating state directs or the general law of such state provides.

Section 20-88.27 is part of the Revised Uniform Reciprocal Enforcement of Support Act, the purpose of which is to improve the enforcement of duties of support. See...
§ 20-88.12, et seq. Section 20-88.27(a) sets forth several of the duties of a court in Virginia when acting as a responding state and provides that such a court shall have the duty "[u]pon the receipt of a payment made by the defendant pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state...." (Emphasis added.)

Words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. See 1980-1981 Report of the Attorney General at 180. In addition, it is the 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 1980-1981 Report of the Attorney General at 210.

I am therefore of the opinion that when a court of Virginia is acting as a receiving state and receives a payment of support pursuant to § 20-88.27(a), the payment must be transmitted by the Virginia court only to the court in the initiating state. There is no authority to transmit the payment to any other party.

CRIMES. ABDUCTION OF CHILD BY PARENT. PROVISIONS OF § 18.2-47 MAY NOT BE USED TO PROSECUTE PARENT WHO HAS CUSTODY OF MINOR CHILD PURSUANT TO CIVIL COURT ORDER WHO REMOVES THAT CHILD FROM COMMONWEALTH EVEN WHEN ORDER PROVIDES FOR VISITATION BY NON-CUSTODIAL PARENT. ULTIMATE DECISION CONCERNING PROSECUTION RESTS WITH COMMONWEALTH’S ATTORNEY.

March 17, 1983

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You ask several questions relating to the interpretation of § 18.2-47 of the Code of Virginia which provides that:

"Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'... Abduction for which no punishment is otherwise prescribed shall be punished as a Class 5 felony; provided, however, that such offense, if committed by the parent of the person abducted and punishable as contempt of court in any proceeding then pending, shall be a Class 1 misdemeanor in addition to being punishable as contempt of court. Provided further, however, that such offense, if committed by the parent of the person abducted and punishable as contempt of court in any proceeding then pending and the person abducted is removed from the Commonwealth by the abducting parent,
shall be a Class 6 felony in addition to being punishable as contempt of court."

You first ask whether the provisions of § 18.2-47 can be invoked to prosecute a parent who has custody of a minor child pursuant to a civil order who nevertheless removes that child from the Commonwealth in violation of a court order providing for visitation by the non-custodial parent.

It is possible to conceive of situations where the provisions of § 18.2-47 could be used to prosecute the custodial parent under the very broad circumstances you described. You must be mindful, however, that the Commonwealth must prove each of the elements of the crime of abduction as specified in § 18.2-47 beyond a reasonable doubt, i.e.:

(1) the custodial parent has taken the child by force, intimidation or deception;

(2) there was no legal justification for the taking;

(3) the taking was done with the intent to deprive the child of his personal liberty or to withhold or conceal the child from the non-custodial parent in derogation of the court order granting visitation rights.

With the respect to each element, the prosecutor must evaluate the available evidence to determine whether sufficient evidence exists to obtain a conviction. Quite frequently, for example, a problem arises where there is no direct evidence to establish that the custodial parent had the requisite specific intent at the time of the taking, and the circumstantial evidence is insufficient to exclude other reasonable explanations for the child's removal. This is but one of the problems prosecutors face with these cases. I am, therefore, of the opinion that, although it is possible to invoke the provisions of § 18.2-47 to prosecute a parent under the circumstances you outlined, the ultimate decision with respect to prosecution must be left to the Commonwealth's attorney who is charged with the responsibility of evaluating and prosecuting criminal offenses.

You next ask can the provisions of § 18.2-47 be invoked to prosecute a parent, either custodial or non-custodial, who is a nonresident of the Commonwealth but subject to the jurisdiction of the Virginia courts in a divorce proceeding, and who violates the prohibitions of § 18.2-47. Any person who commits a crime within the Commonwealth of Virginia may be prosecuted and, if that person is not physically within the Commonwealth at the time prosecution is initiated, extradition proceedings may be initiated to return that person to the Commonwealth for prosecution. See §§ 19.2-108 and 19.2-109. It is, therefore, my opinion that a parent who, while in the Commonwealth, violates the provisions of
§ 18.2-47 may be prosecuted thereunder, notwithstanding his status as a resident or nonresident.

Finally, you ask whether the provisions of § 18.2-47 can be invoked if there is no proof that the abducting parent has left the Commonwealth. Although an abducting parent who leaves the Commonwealth is guilty of a felony, it is not necessary for a parent to leave the Commonwealth in order to commit the crime of abduction. Given the provisions of § 18.2-47, I am of the opinion that they may be invoked to prosecute an abducting parent regardless of whether that parent leaves the Commonwealth.

CRIMINAL LAW. APPLICATION OF IMITATION CONTROLLED SUBSTANCES LAW.

January 21, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether legal remedies are presently available to combat the sale of stimulant pills to young people. Both criminal and administrative remedies may be available depending on the particular facts of each case. I have developed different hypothetical situations and described available remedies for each.

Hypothetical A: A local store sells pills containing caffeine and ephedrine, as well as incense, smoking supplies and similar items. Some of the caffeine capsules are black and advertised as "Black Beauties." Other caffeine capsules are promoted as "BAM" and "Red Devils." None of the pills sold contain controlled substances as that term is defined under § 54-524.2(6) of the Code of Virginia.

Remedy: The situation described in Hypothetical A could trigger a criminal prosecution under Virginia laws dealing with imitation controlled substances. Section 18.2-247 defines an imitation controlled substance as a "pill, capsule or tablet which is not a controlled substance, which by overall dosage unit appearance, including color, shape, size, marking and packaging or by representations made, would cause the likelihood that such a pill, capsule, or tablet will be mistaken for a controlled substance."

Neither caffeine nor ephedrine is generally considered a controlled substance or an imitation controlled substance under State law. However, "Black Beauty," "BAM" and "Red Devils" are so-called "street names" for Biphetamine, Preludin, and Seconal, respectively. These drugs are Schedule II controlled substances. If the caffeine capsules look like and are given the same names as controlled substances, the likelihood arises that the caffeine capsules
will be mistaken for controlled substances. The caffeine capsules may, therefore, be considered imitation controlled substances if they are distributed in a manner described in this hypothetical.

Unless specifically authorized in the Drug Control Act, it is unlawful to manufacture, sell, give or distribute imitation controlled substances. Section 18.2-248. It is a Class I misdemeanor to advertise or promote the distribution of imitation controlled substances. Section 18.2-248.4.

Hypothetical B: A local store sells capsules containing caffeine and ephedrine using names which are not synonymous with street names for controlled substances. The store owner, who is not a licensed pharmacist, buys some of the pills from out-of-state and repackages the pills in Virginia. Other capsules he compounds himself. All of the pills are sold under the label High Pharmaceutical Corp. The store owner does not have a permit to conduct a pharmacy from the Virginia State Board of Pharmacy. Neither the store owner nor High Pharmaceutical Corp. has a permit to manufacture, package or make drugs in Virginia.

Remedy: The caffeine/ephedrine pills are considered drugs under Virginia law because they are substances other than food which are intended to affect body function. Section 54-524.2(b)(12)(c). Because the pills are considered drugs under Virginia law, both the store owner and High Pharmaceutical Corp. become subject to the Drug Control Act. Sections 54-524.1 through 54-524.109:9. On the basis of the facts described in Hypothetical B, the store owner and pharmaceutical corporation could be charged with violation of the following statutes, all of which are part of the Drug Control Act:

1. Section 54-524.31: failure to obtain a permit from the State Board of Pharmacy prior to conducting a pharmacy. The term pharmacy is defined in § 54-524.2(25) as an institution where drugs are compounded or offered for sale.

2. Section 54-524.36: failure to obtain a permit from the State Board of Pharmacy to manufacture, make, produce, package, repackage or relabel drugs.

3. Section 54-524.37: failure to manufacture, make, produce, package, repackage, relabel or prepare drugs in this State except under the personal and immediate supervision of a pharmacist or other person as may be approved by the State Board of Pharmacy.

4. Section 54-524.38: failure to display required permits in a conspicuous place.
5. Section 54-524.44: failure to obtain a permit as a wholesaler or distributor of drugs as that term is defined in § 54-524.2(32) from the State Board of Pharmacy.

6. Section 54-524.48: dispensing or compounding drugs in the Commonwealth in violation of the Drug Control Act and Board regulations. Section 54-524.2(10) defines the term dispense as delivery of a drug to the ultimate user.

7. Section 54-524.49: use of the word pharmaceutical by any place of business which is not a pharmacy as defined in the Drug Control Act. Section 54-524.2(25) defines the term pharmacy as an establishment in which the practice of pharmacy is conducted. The practice of pharmacy is defined as a personal health service requiring licensure.

8. Violation of Pharmacy Board Regulation 30: failure to comply with good manufacturing practices. In order to obtain a permit to repackage drugs in Virginia, one must comply with Regulation 30 of the State Board of Pharmacy. That regulation describes what constitutes good manufacturing practices in substantial detail. The regulation sets standards for personnel, sanitation, production control, sampling and testing of drug products.

Violation of the Drug Control Act may be pursued both administratively and criminally. Under § 54-524.33, the State Board of Pharmacy may seek an injunction to restrain any person or corporation from violating the provisions of the Drug Control Act or Board regulations. In addition, the Commonwealth's attorney can pursue violations of the Drug Control Act under § 18.2-260. If convicted, those violations constitute Class I misdemeanors. Under § 18.2-259, criminal penalties may be imposed in addition to, and not in lieu of, any civil or administrative penalty.

Hypothetical C: Widget Pharmaceutical Corp. has a permit from the State Board of Pharmacy to manufacture drugs. One of the drugs compounded by the company is No Sleep, a stimulant capsule containing caffeine and ephedrine. The capsule is packaged by the company and distributed to stores for retail sale. Widget Pharmaceutical is a duly licensed wholesaler and distributor.

Remedy: Widget Pharmaceutical appears to compound and distribute its product in compliance with the Drug Control Act. Pills containing caffeine and ephedrine which are lawfully made and packaged may be purchased and sold without prescription by a retailer possessing the appropriate permits. In the absence of other facts, there is no basis for administrative or criminal action against Widget Pharmaceutical.
In summary, it is lawful to manufacture and sell pills containing caffeine and ephedrine sulfate in Virginia if such manufacture and sale complies with the requirements of the Drug Control Act and the laws pertaining to imitation controlled substances. Failure to comply with the Drug Control Act and laws pertaining to imitation controlled substances may result in both administrative and criminal sanctions.

CRIMINAL LAW. DRIVING UNDER INFLUENCE. RECONCILING PROVISIONS OF §§ 46.1-421(b) AND 18.2-271.

May 20, 1983

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

You have asked how the provisions of § 46.1-421(b) of the Code of Virginia should be reconciled with the provisions of § 18.2-271, in the following situation:

"A Virginia resident was twice convicted of DUI [driving under the influence of alcohol] in the State of North Carolina, first in 1965, and again in 1967. In early 1982, he was arrested in Virginia and similarly charged. This matter was tried on August 1, 1982, and the Virginia resident was convicted, referred to the Alcohol Safety Action Program and granted a restricted license, conditioned on his successful completion of the program, all pursuant to Code § 18.2-271.1. Subsequently, this citizen completed the program to the satisfaction of the Court and the referral and treatment agencies.

The DMV [Division of Motor Vehicles], apparently acting in accordance with Code §46.1-421(b) and irrespective of the foregoing, proceeded to administratively revoke the individual's operator's license for a period of ten years."

In the foregoing instance, the court correctly treated the August 1, 1982, conviction as a first offense under § 18.2-271, because the conviction occurred more than ten years after the offender's prior DUI conviction. Having treated as a first offense the August 1, 1982 conviction, the court correctly imposed a license suspension period of six months.

The same August 1, 1982, DUI conviction is treated differently, however, for the purposes of an administrative revocation under § 46.1-421(b). Pertinent portions of that section read as follows:

"Notwithstanding any other provision of law, the Commissioner shall forthwith revoke and not thereafter reissue the operator's or chauffeur's license of any person upon receiving a record of a third conviction of
such person for a violation of the provisions of § 18.2-266 pertaining to driving while under the influence of drugs or intoxicants, or a federal law, or a law of any other state...similar to § 18.2-266, notwithstanding the length of time between violations...." (Emphasis added.)

The August 1 conviction is, therefore, treated as a third conviction under § 46.1-421(b), because the length of time between convictions is irrelevant for purposes of the mandatory administrative action required under that section. Under § 46.1-421(c), the minimum administrative revocation period for a third DUI conviction is five years.

By inserting the language "[n]otwithstanding any other provision of law" in § 46.1-421(b), the legislature apparently intended for the more severe provisions of that section to prevail over other, less restrictive laws. Revisions to § 18.2-271 by the 1983 session of the General Assembly further demonstrate the legislature's intention in this regard. See Ch. 504, Acts of Assembly of 1983. The last sentence in the amended version of § 18.2-271 states, "[u]pon a third conviction of a violation of § 18.2-266, such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall have his license revoked by the Division of Motor Vehicles as provided in § 46.1-421(b)." (New language emphasized.)

In light of these provisions, it is my opinion that the commissioner's action in revoking the license of the individual in the situation you have described was appropriate, and that the General Assembly intended that such an individual lose his license indefinitely pursuant to § 46.1-421(b).

1Pertinent portions of § 18.2-271 read as follows: "If such [DUI] conviction is for a second or other subsequent offense...(ii) within five to ten years of a first offense conviction under § 18.2-266 such person's license to operate a motor vehicle, engine or train shall be suspended for a period of two years from the date of the judgment of conviction."

CRIMINAL LAW. HEALTH. FAILURE TO REPORT ALLEGATION OF RAPE OR INCEST DOES NOT CONSTITUTE CONCEALING OR COMPOUNDING OFFENSE.

November 8, 1982

The Honorable James B. Kenley, M.D., Commissioner
Virginia State Department of Health

You have asked whether a local health director has a legal obligation to report an allegation of rape or incest
made by a competent adult female patient who seeks State funds for an abortion pursuant to § 32.1-92.1 of the Code of Virginia. In my opinion, the Code of Virginia does not presently impose such an obligation on a local health director.

Section 32.1-92.1 states, in part, that the Board of Health "shall fund abortions for women...in any case in which a pregnancy occurs as a result of rape or incest and which is reported to a law-enforcement or public health agency." (Emphasis added.) The statute does not require the report be made to both the public health and law-enforcement agencies, nor that either agency report the case to the other. In other words, § 32.1-92.1 does not impose reporting requirements as do provisions of the Code involving gunshot wounds, child abuse, and certain diseases. See §§ 54-276.10, 63.1-248.3 and 32.1-36.

I note further that a failure to report such allegations would not be a violation of § 18.2-462 which concerns concealing or compounding offenses. A person violates that statute only when he or she takes "money or reward or an engagement therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense...." Failure of a local health department official to report a rape of which he obtains knowledge pursuant to § 32.1-92.1, without more, would not bring the health director or other personnel within the purview of § 18.2-462.

In summary, no statute requires a local health director to report such allegations to local law-enforcement officials. Failure to report is not a violation of § 18.2-462.

1Thus, for example, if a minor were to report to the local health department that she had been raped or the victim of incest, the provisions of Title 63.1 require personnel within the Health Department to make further reports to other personnel. In the absence of comparable legislation applicable to a competent adult female, however, there is no legal requirement for such reporting although the General Assembly might deem it advisable to enact such legislation in the future.

CRIMINAL LAW. THEFT OF HORSE OF ANY VALUE MUST BE PROSECUTED UNDER § 18.2-97.

February 9, 1983

The Honorable Everett P. Shockley
Commonwealth's Attorney for Pulaski County
You have asked whether the theft of a horse may be prosecuted under § 18.2-95 of the Code of Virginia as well as under § 18.2-97.

Section 18.2-97 makes it a Class 5 felony, which is punishable for up to ten years, for a person to commit the larceny of a horse or certain other animals. Further, it is a Class 6 felony to commit a larceny of, for example, a sheep or goat valued at less than $200. Under § 18.2-95, a person is guilty of grand larceny and thus may be sentenced to as much as twenty years in the penitentiary if he commits larceny not from the person of another of "goods and chattels of the value of $200 or more...."

On its face, § 18.2-95, no less than § 18.2-97, would seem to apply to the theft of a horse having a value of at least $200. Thus, it normally could be argued that it is a matter of prosecutorial discretion as to which of the two statutes is involved. I believe, however, that the Supreme Court of Virginia's decision in Wolfe v. Commonwealth, 167 Va. 486, 189 S.E. 320 (1937), requires the conclusion that § 18.2-97 alone applies to the theft of a horse, regardless of its value. In Wolfe, the defendant was convicted under § 4440 of the Code of Virginia of 1930. This statute essentially consolidated the provisions of present §§ 18.2-95 and 18.2-97. The defendant in Wolfe was tried and convicted under the grand larceny portion of § 4440. On appeal, the Supreme Court ruled that he had been tried on the wrong charge. The Court stated in part:

"If the provisions of the statute should seem incongruous, still they have the force and effect of legislative enactment and persons affected have the right to rely upon their enforcement.

[1] In short the legislature has seen fit to make cattle-stealing a special crime with a special punishment and a person charged with the commission of this crime may not be forced to answer for any other.

[5] As to the specific crime with which we are concerned, the value of the property stolen is not the measure of the offense." 167 Va. at 489.

The Supreme Court has not overruled or in any way limited its holding in Wolfe. Certainly, the fact that the provisions previously found in two separate portions of § 4440 are now contained in two separate statutes is, if anything, support for the Wolfe result. I do not believe that the present situation can be reasonably distinguished from the situation presented in Wolfe.

It is, accordingly, my opinion that the theft of any horse must be prosecuted pursuant to § 18.2-97. While it might be argued that the theft of a highly valued horse
should subject the thief to a maximum penalty of more than ten years, this is a matter more appropriately addressed to the legislature.

1Cf. Mason v. Commonwealth, 217 Va. 321, 228 S.E.2d 683 (1976) (prosecution could choose between misdemeanor statute and felony statute, both of which applied to escape from city lockup).

CRIMINAL PROCEDURE. CERTIFICATE OF LABORATORY ANALYSIS ADMISSIBLE AS PRIMA FACIE EVIDENCE OF CHAIN OF CUSTODY WHERE EXAMINED SUBSTANCES WERE TRANSFERRED FROM ONE LABORATORY OF THE DIVISION OF CONSOLIDATED LABORATORY SERVICES TO ANOTHER LABORATORY WITHIN THAT DIVISION.

September 17, 1982

The Honorable William T. Burch
Commonwealth's Attorney for Loudoun County

You have asked for my opinion interpreting § 19.2-187.01 of the Code of Virginia concerning admissibility of reports of laboratory analysis as prima facie evidence of the chain of custody of the substance which was examined. Specifically, you have asked whether this statute applies when the material is transferred from one laboratory of the Division of Consolidated Laboratory Services to another within that Division for further testing before it is returned to the submitting agency.

Section 19.2-187.01 provides as follows:

"A report of analysis duly attested by the person performing such analysis or examination in any laboratory operated by the Division of Consolidated Laboratory Services shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination. Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it." (Emphasis added.)

The Supreme Court of Virginia has held that the term "[a]ny" is an indefinite word and includes 'all' unless restricted." County of Loudoun v. Parker, 205 Va. 357, 362, 136 S.E.2d 805, 808-809 (1964). I find no restrictive language in § 19.2-187.01, and thus I construe the phrase "any laboratory" to mean any and all laboratories. The subsequent words "such laboratory" refer back to this
Furthermore, the primary object in the interpretation of a statute is to give effect to the legislative intent. See Vollin v. Arlington County Electoral Board, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). The manifest intent of the General Assembly in § 19.2-187.01 was to avoid presentation of "chain of custody" testimony when no real issue existed in that regard. In order to protect the interests of an accused who believes there is a genuine question for litigation, § 19.2-187.1 expressly preserves his right to call as adverse witnesses at the expense of the Commonwealth those persons involved in the chain of custody.

Statutes under consideration must be given an interpretation, if possible, which will "suppress the mischief and advance the remedy." See Newton v. Employers Liability Assur. Corp., 107 F.2d 164 (4th Cir. 1939), cert. denied, 309 U.S. 698 (1940). Accordingly, it is my opinion that § 19.2-187.01 applies to a situation in which the material being examined has been transferred from one laboratory to another.

1The Court rejected an assertion that the phrase "any political subdivision in this State" referred only "to 'a' political subdivision but not to 'any and all' political subdivisions." Id.
2The adjective "such" is commonly defined to mean "of the same class, type, or sort" or "of the character...previously indicated or implied." See Webster's New Collegiate Dictionary 1155 (G. & C. Merriam 1979). Words should generally be given their ordinary meaning. See Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975).

CRIMINAL PROCEDURE. COUNTIES, CITIES AND TOWNS. WORKMEN'S COMPENSATION ACT. LIABILITY FOR TORTIOUS INJURIES TO OR BY PERSON CONVICTED OF CRIMINAL OFFENSE WHO IS ASSIGNED TO COMMUNITY SERVICE WORK AS CONDITION OF SUSPENDED SENTENCE UNDER § 19.2-303. CONVICTED OFFENDERS ARE NOT "EMPLOYEES" WITHIN MEANING OF WORKMEN'S COMPENSATION ACT.

December 14, 1982

The Honorable Daniel M. Hall
Commonwealth's Attorney for Washington County

This is in reply to your letter requesting my opinion as to the liability of cities, towns, counties and other community agencies for injuries to or by a person convicted of a criminal offense who has been assigned to perform community service work as a condition of a suspended sentence under § 19.2-303 of the Code of Virginia.1 You present hypothetical situations for consideration which assume, alternatively, that the offender is placed with a hospital under hospital staff supervision, with a governmental agency
engaged in performing a proprietary function, and with a town fire department, under alternative conditions of the offender receiving pay, working as an unpaid volunteer and being monitored in performance of his service by a probation officer.

Potential liability for injuries either to the offender assigned community service work or to third parties resulting from acts of the offender in the course of that work is determined in a particular case by the nature of the agency, the type of work being performed, the details of the work agreement and the supervisory arrangements. Thus, a county is not liable for tortious personal injuries resulting from the negligence of its officers, servants and employees, and it is immune from suit by either the offender or by third parties for injuries arising out of the offender's service work, or the supervision thereof, while he is in county employ. See Mann v. County Board of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957); Fry v. County of Albemarle, 86 Va. 195, 9 S.E. 1004 (1890); 1977-1978 Report of the Attorney General at 214. Similarly, a city or a town would be immune from suit by an offender assigned to it for negligence arising out of supervision of the offender's public service work and by third parties for the offender's negligent acts occurring in the performance of a governmental function. However, if the work being performed falls within a proprietary function, the city or town will not be immune from suit by third parties for the offender's tortious acts during his employment. See Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939); 1980-1981 Report of the Attorney General at 215; 1977-1978 Report of the Attorney General, supra.2

Applying the above principles to the hypothetical situations you propose, a water service authority or other government agency engaged in a purely proprietary function would not be immune from suit and would be treated the same way as a private corporation, such as the hospital, in terms of liability for the negligent acts of its officers, employees and servants, including an offender assigned to it for service work. The sovereign immunity principle would apply if the agency involved is a town fire department, in that the operation of a fire department is a governmental function. See City of Richmond, supra.

An offender assigned to community service work will be the employee of the agency which controls his actions. See 1977-1978 Report of the Attorney General, supra. (Juvenile working in public service job without remuneration pursuant to a probation order will become servant of agency that controls his actions -- borrowed servant rule.) The rule of respondeat superior for the negligence of an individual rests on the power of control over and direction of the individual's acts, and whether a person is to be regarded as the servant or employee of another for liability purposes, or an independent contractor, depends upon the facts of each case in light of well settled principles. Thus, in a
situation, as you suggest, wherein a probation officer retains some measure of supervisory power over the offender assigned to community service work with an agency, to determine liability it is necessary to determine who has the right of control over the offender at the time a negligent act takes place. See, e.g., Coker v. Gunter, 191 Va. 747, 63 S.E.2d 15 (1951); Southern Stevedoring Corp. v. Harris, 190 Va. 628, 58 S.E.2d 302 (1950); Griffith v. Electrolux Corp., 176 Va. 378, 1 S.E.2d 644 (1940); Hann v. Times-Dispatch Publishing Co., 166 Va. 102, 184 S.E. 183 (1936); Ideal Steam Laundry v. Williams, 153 Va. 176, 149 S.E. 479 (1929).

In your inquiry you also raise the question of the effect of payment of wages to the offender for the community service work he performs for an agency, as opposed to his performance of work as a nonpaid volunteer. You relate that distinction to coverage under the Virginia Workmen's Compensation Act, § 65.1-1, et seq., (the "Act"). If workmen's compensation coverage is applicable, the Act provides an employee's exclusive rights and remedies against the employing agency with regard to any injuries he may suffer in the course of his employment. See § 65.1-40.

A prior Opinion of this Office holds that a prisoner confined to a county jail who voluntarily works on county property in exchange for sentence credit, pursuant to a court order, is not an "employee" for purposes of workmen's compensation coverage because there is no "contract of hire" as provided in the definition of "employee" in § 65.1-4. See 1975-1976 Report of the Attorney General at 274. More recently, following the definition of "contract of hire" accepted by the Virginia Supreme Court as "an agreement in which an employee provides labor or personal services to an employer for wages or remuneration or other thing of value supplied by the employer," I expressed my opinion that a defendant who performs services for a non-profit or governmental entity pursuant to § 19.2-303 without remuneration or wage is not an "employee" and therefore is not entitled to workmen's compensation benefits for a work related injury. See Opinion to the Honorable John Alexander, dated November 16, 1982.

The statute does not appear to contemplate an employer-employee relationship between the offender and his assigned agency, as it states that he will perform "community service" under terms and conditions prescribed by the court, with no mention of remuneration or an employment contract.

To summarize, the potential tort liability for injuries arising from the community service work contemplated in § 19.2-303 depends upon type of agency, type of work, work agreement and extent of supervision. Assuming the presence of the necessary element of control, it is fair to conclude that (1) county governments would be immune; (2) municipal governments will likely be immune so long as the work is being performed in the exercise of a governmental function; (3) municipal governments would not be immune for tortious
conduct arising from supervision when the work is in the performance of a proprietary function of the municipality; (4) private corporations, such as hospital corporations, would not be immune; and (5) no liability exists under the Workmen's Compensation Act for work related injuries.

1Section 19.2-303 provides as follows, in the first paragraph: "After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation under such conditions as the court shall determine or may, as a condition of a suspended sentence, require the accused to perform community service under terms and conditions which shall be entered in writing by the court." (Emphasis added.)

2Note that a municipal corporation may be held liable under 42 U.S.C. § 1983 for the constitutional torts of its employees and agents, where the acts complained of implement or execute an official policy, ordinance, regulation or custom of the governmental entity, such that the policy "causes" the employee to violate another's constitutional rights. However, vicarious liability may not be imposed on the entity solely on the basis of an employer-employee relationship with the tortfeasor. See Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978); Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978).

3A water service authority is a "public body politic and corporate" (§ 15.1-1241) "exercising public and essential governmental functions..." (§ 15.1-1250). It has articles of incorporation (§ 15.1-1242) which its participating political subdivisions must file with the State Corporation Commission (§ 15.1-1245) and a certificate of incorporation or charter issued by the Commission (§ 15.1-1246). To the extent such an authority may be viewed as a private corporation, ordinary liability rules will apply. To the extent it may be viewed as a political subdivision of the State with attributes common to a municipal corporation (see Hampton Roads Sanitation District v. Smith, 193 Va. 371, 68 S.E.2d 497 (1952)), tort liability rules applicable to municipal corporations will apply and the agency will not be immune from liability for acts in performance of a proprietary function. See VEPCO v. Hampton Redevelopment and Housing Authority, 217 Va. 30, 225 S.E.2d 364 (1976). The operation of a waterworks and distribution of water is a proprietary function for tort liability purposes. See City of Richmond v. Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927). Thus, whatever characterization is chosen, the results are the same.

4Note that the Virginia Tort Claims Act, in § 8.01-195.3, excludes recovery for claims against the Commonwealth based on acts or omissions of courts and their members as well as any public agent executing a lawful order of a court.

CRIMINAL PROCEDURE. DEFENDANT RELEASED ON BOND AND FAILS TO APPEAR UNDER § 19.2-123(c), DISTRICT COURT JUDGE CAN REVOKE BOND AND ENTER ORDER FOR DEFENDANT TO BE TAKEN INTO CUSTODY AND BROUGHT BEFORE SAME JUDGE WHO ISSUED THE ORDER.

September 21, 1982

The Honorable J. R. Zepkin, Judge
General District Court

You have asked whether a general district court may revoke the bond and enter an order for the defendant to be taken into custody and brought before the same judge who issued the order in cases in which a criminal defendant has been released on bond and fails to appear.

Section 19.2-120 of the Code of Virginia provides that a person described therein shall be admitted to bail by a judicial officer unless there is probable cause to believe that he will not appear as directed or his liberty will constitute an unreasonable danger to himself or to the public. For purposes of § 19.2-120, a judicial officer by definition includes both the general district court judge and the magistrate. See § 19.2-119. Even though both are empowered to admit a person to bond if appropriate, I know of no authority that would prohibit the general district court judge who issued the order from specifying therein that the defendant be brought before him rather than another general district court judge or magistrate. I am, therefore, of the opinion that a general district court may revoke the bond and enter an order for the defendant to be taken into custody and brought before him when the defendant has been released on bond and has failed to appear.

You next ask whether the second sentence of § 19.2-123(c) applies to a release of an adult defendant for a case pending in either juvenile and domestic relations district court or general district court. The language of the statute states that it applies to any condition of release imposed under the provisions of the section. There is nothing in the language of the section to indicate a restriction to a particular type of court. I am of the opinion, therefore, that § 19.2-123(c) is applicable to adult defendants involved in cases pending in juvenile and domestic relations courts and general district courts.

You ask further what is a "capias" as that term is used in § 19.2-123(c). In particular, you inquire what does it command and what, if any, bond statutes would apply to its execution. Finally, you ask if the court may issue it with a direction that no bond be permitted or if the court may pre-set the bond.

The capias referred to in § 19.2-123(c) is as described under § 19.2-234, wherein the court commands an officer to arrest a person accused of an offense and deliver the person to the court. Despite the fact that the defendant has been
taken into custody for his failure to appear, I am of the opinion that under the provisions of § 19.2-120, the defendant is still entitled to a hearing by a judicial officer on the question of release on bail. The judicial officer would apply the standard terms and conditions for bail found in §§ 19.2-121 and 19.2-123. It should be noted that under § 19.2-123, one of the factors to be considered as a condition of release is the defendant's record of appearance at court proceedings and failure to appear at court proceedings.

In response to your final inquiry, whether the court could issue a capias with a direction that no bond be permitted or pre-set the bond, I must point out that in an earlier Opinion to the Honorable Donald H. Sandie, Chief Judge, Portsmouth General District Court, dated September 8, 1981, this Office concluded that under certain limited circumstances it was 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. The Opinion relied substantially upon Rule 3A:9(b)(1), Rules of the Supreme Court of Virginia, which authorized the court to fix the amount of bail. However, that portion of the Rule has now been deleted, thereby nullifying the basis for the Opinion. Further, the Supreme Court of Virginia, by deleting this authorization, has seemingly expressed its unwillingness to permit courts any additional latitude in pre-determining bail on a capias. Accordingly, I conclude that the general district court judge cannot issue a capias with a direction that no bond be permitted or pre-set the bond.

Section 19.2-123(c) reads as follows: "Nothing in this section shall be construed to prevent an officer taking a juvenile into custody from releasing that juvenile pursuant to § 16.1-247 of this Code. If any condition of release imposed under the provisions of this section is violated, the judicial officer may issue a capias or order to show cause why the bond should not be revoked."

Section 19.2-234 reads as follows: "An officer who, under a capias from a court, arrests a person accused of an offense not bailable or for which bail is not given shall deliver the accused to such court, if sitting, or to the jailer thereof, who shall receive and imprison him."

**CRIMINAL PROCEDURE. GENERAL DISTRICT COURT MAY PROPERLY GRANT MOTION TO NOLLE PROSEQUI EVEN THOUGH WARRANT HAS NOT BEEN EXECUTED.**

June 10, 1983

The Honorable Christopher W. Hutton
Commonwealth's Attorney for the City of Hampton
You have asked my opinion on the proper disposition of unserved felony warrants in cases which are no longer prosecutable due to lapse of time, lost evidence, unavailable witnesses or other factors. Specifically you ask whether a general district court may properly grant a prosecutor's motion to nolle prosequi an unexecuted felony warrant under the following circumstances:

(1) a police officer obtains a warrant but prior to serving it learns that the facts set forth as the probable cause for the issuance of the warrant are untrue;

(2) a police officer obtains a warrant but for years is unable to serve it because of an inability to locate the defendant; during the lapsed time, the death of the victim or unavailability of witnesses or the loss of the prosecution's evidence makes prosecution impossible;

(3) a merchant obtains a warrant but prior to service notifies the Commonwealth's attorney that the defendant has made restitution to him and he accordingly does not wish to have the case prosecuted.

Section 19.2-265.3 of the Code of Virginia permits a nolle prosequi to be entered "only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." This section does not limit the factual or legal settings under which the Commonwealth's attorney may request or the court may grant a motion to nolle prosequi a case. I am, therefore, of the opinion that a general district court judge may, after having found good cause, grant the motion to nolle prosequi under any of the circumstances you have outlined.

I note, however, that a law enforcement officer in receipt of a facially valid arrest warrant is required to serve the warrant forthwith. Under § 18.2-469, his failure to execute such process may be punishable as a Class 3 misdemeanor. Accordingly, this Opinion should not be read to condone unnecessary delay by police officers in serving process under any of the circumstances you pose.

In reply to your inquiry on the proper disposition of unserved warrants, I direct your attention to § 19.2-76.1. This statute in general provides for the court-ordered destruction of felony and misdemeanor warrants which have remained unexecuted for fifteen and five years, respectively. Because there is no other specific statutory authority governing the destruction of criminal warrants, § 19.2-76.1, where applicable, not § 19.2-265.3, must be followed in the event that a warrant is unexecuted for the aforementioned periods of time.
1982-1983 REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE. NO REQUIREMENT THAT NOTICE OF BAD CHECK BE SENT TO DRAWER BY "BONA FIDE EMPLOYEE" OF PAYEE RATHER THAN BY ANOTHER AGENT OF PAYEE.

April 4, 1983

The Honorable Walter A. Stosch
Member, House of Delegates

You have asked for my opinion whether the Virginia "Bad Check Law" (Art. 4, Ch. 6, Title 18.2 of the Code of Virginia) requires that notice to the drawer regarding the dishonor of his check shall be sent only by the payee or his "bona fide employee" rather than by some other agent of the payee.

Section 18.2-183 provides, in part, as follows:

"In any prosecution or action under the preceding sections, the making or drawing or uttering or delivery of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit shall be prima facie evidence of intent to defraud or of knowledge of insufficient funds in, or credit with, such bank, banking institution, trust company or other depository unless such maker or drawer, or someone for him, shall have paid the holder thereof the amount due thereon, together with interest, and protest fees (if any), within five days after receiving written notice that such check, draft, or order has not been paid to the holder thereof. Notice mailed by certified or registered mail, evidenced by return receipt, to the last known address of the maker or drawer shall be deemed sufficient and equivalent to notice having been received by the maker or drawer. If such check, draft or order shows on its face a printed or written address, home, office, or otherwise, of the maker or drawer, then the foregoing notice, when sent by certified or registered mail to such address, with or without return receipt requested, shall be deemed sufficient and equivalent to notice having been received by the maker or drawer, whether such notice shall be returned undelivered or not." (Emphasis added.)
The Supreme Court of Virginia has held that the manifest purpose of requiring notice to be sent in the aforesaid fashion is to have not only evidence of the required mailing to the defendant but also evidence that the notice was received by him or accepted at his last known address. Rinkov v. Commonwealth, 213 Va. 307, 310, 191 S.E.2d 731, 733 (1972). That purpose is served whether the notice is sent by a "bona fide employee" or another agent of the payee. Furthermore, I find no requirement that such notice must be sent by the payee himself or his "bona fide employee" as opposed to another agent of the payee.

Accordingly, your inquiry is answered in the negative.

CRIMINAL PROCEDURE. PERSON WHO VOLUNTARILY ABSENTS SELF FROM TRIAL MAY BE SENTENCED TO JAIL IF REPRESENTED BY COUNSEL OR IF COUNSEL IS WAIVED.

October 14, 1982

The Honorable James A. Cales, Jr., Judge
Portsmouth General District Court

You ask whether the general district court may impose a jail sentence upon a defendant who fails to appear for trial, after previously appearing and entering a plea, if he (1) has executed a valid waiver of his right to counsel, or (2) has counsel present at trial. You indicate that your question assumes the trial has been continued to a date certain with the concurrence of the accused.

A prior Opinion of this Office, relying on Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979), and §§ 19.2-160 and 19.2-237 of the Code of Virginia, ruled that a person who has knowingly and intelligently waived his right to counsel, or is assisted by counsel, may be sentenced to jail if he fails to appear at his trial. See 1980-1981 Report of the Attorney General at 147. Because a defendant has a constitutional right to be present at his criminal trial, however, the court must find upon available evidence that his absence was knowing and voluntary. See, e.g., State v. LaBelle, 118 Wash. App. 380, 568 P.2d 808 (1977); People v. Connolly, 111 Cal. Rptr. 409 (Cal. App. 1973). Prior to proceeding to trial, the court should conduct an inquiry into the absence of the accused along the lines suggested in People v. Connolly, supra. An order reciting the evidence and findings of the court should be entered and appended to the warrant to provide a record for review if the conviction is later challenged.

I, therefore, am of the opinion that a court may try an accused and impose a jail sentence in the circumstances presented, if the defendant has waived the right to counsel, or has counsel present, and the court finds that he has knowingly and voluntarily absented himself.
CRIMINAL PROCEDURE. SENTENCES. JAIL TERM SERVED ON CHARGES OF FAILURE TO APPEAR SHOULD NOT BE CREDITED TOWARD SENTENCE RECEIVED FOR ORIGINAL CHARGE FOR WHICH MISCHEMANT FAILED TO APPEAR.

July 14, 1982

The Honorable James H. Turner, III
Sheriff of the County of Henrico

You have asked whether jail time served on charges of failure to appear, § 46.1-178 of the Code of Virginia, should be credited toward the sentence received for subsequent conviction of the original charge (driving on a revoked license in violation of § 46.1-350) for which the misdemeanor had failed to appear.

Driving with a revoked license in violation of § 46.1-350 is an offense to which the summons procedures of § 46.1-178 apply. The offender is issued a summons and permitted to leave the scene without further detention, provided the offender agrees in writing to appear at a designated time and place to answer the charges. See § 46.1-178(a). Under these circumstances, the offender is not only subject to the penalties prescribed in § 46.1-350 for driving with a revoked license, but is also subject to the penalties prescribed in § 46.1-178.1 if he or she fails to appear as promised. According to this statutory scheme, the offenses of driving with a revoked license and failure to appear are separate and distinct offenses.

No provision is made in Virginia law for the crediting of pre-trial jail time served for one offense to a separate and distinct offense. Section 53.1-187 (formerly § 53-208) requires the deduction of all time spent in a correctional facility awaiting trial or pending appeal for the same offense, whether or not the sentencing court's final order provides for such credit. See Durkin v. Davis, 538 F.2d 1037, 1038 n.1 (4th Cir. 1976). This section does not apply, however, to a situation involving two distinct charges arising out of separate and distinct factual situations.

Although courts have required that time spent in jail because of the failure to make bond on one offense be credited to the sentence on another offense where the sentence could have commenced except for the inability to make bond,1 or when one of several consecutive sentences is declared void,2 these special circumstances are not applicable to the question presented here. It is my opinion, therefore, that credit should not be applied to the driving on a revoked license offense for time served on the failure to appear charge.

1In United States v. Gaines, 449 F.2d 143 (2nd Cir. 1971); Ange v. Paderick, 521 F.2d 1066 (4th Cir. 1975).
CRIMINAL PROCEDURE. WARRANT OR SUMMONS MAY BE RETRIEVED BY
DISTRICT COURT FROM CLERK OF CIRCUIT COURT IF CASE IS
REOPENED PURSUANT TO § 16.1-133.1.

July 8, 1982

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

You have asked my opinion concerning retrieval from the
circuit court of warrants and summonses in traffic or
criminal cases after they have been filed with the clerk of the
circuit court by the general district court in accordance
with § 19.2-345 of the Code of Virginia. I will respond to
your questions seriatim.

Your first inquiry is whether such a warrant or summons
can be retrieved by the general district court for the
purpose of providing a certified copy to a State agency or
other proper party. The answer to this inquiry is in the
negative. Under § 19.2-345 every district court, between the
first and tenth day of each month, must "make return [to the
circuit court] of the warrants and summonses in all criminal
and traffic cases finally disposed of by such court in the
preceding month." Once that return has been made, custody of
the document is vested in the circuit court. See § 17-44;1

The statutory scheme does not expressly provide for the purpose of making a certified copy
available to a prospective recipient. Accordingly, a
certified copy should be obtained by the requesting agency or
person directly from the clerk of the circuit court where
the warrant or summons has been filed.

Your second question is whether the warrant or summons
can be returned to the district court if the case is reopened
as authorized by § 16.1-133.1.2 Although this statute does
not expressly provide for retrieval of the document, it is my
opinion that it contemplates return of the record to the
district court for further proceedings. A statute must be
given a rational construction consistent with its purposes
and not one which will substantially defeat its objectives.

Mayor and Members of the City Council of the City of
Lexington v. Industrial Dev. Auth. of Rockbridge County, 227
Va. 855, 869, 275 S.E.2d 888, 890 (1981). That which is
necessary to make the general provisions of a statute
effectual is supplied by implication. Hogan v. Piggott, 56
S.E. 189, 194 (W.Va. 1906). See Anderson & Anderson
Only by retrieval of the document can the procedure contemplated by § 16.1-133.1 be fulfilled.

Next you ask whether the general district court, if it alters disposition of the charge after reopening the case pursuant to § 16.1-133.1, should enter the change on the warrant or summons and send an amended abstract to the Central Criminal Records Exchange ("CCRE"). In my opinion, the change should be so noted and reported to the CCRE under those circumstances. Section 19.2-390(b) requires the clerk of the district court to make a report of the disposition of a charge to the CCRE, and § 19.2-389(D) indicates that "up-to-date disposition data" shall be maintained at the CCRE. Similarly, § 19.2-346 provides that upon receipt of the warrants and summonses in the circuit court, the clerk of that court, when necessary, shall issue execution or other proper process for unpaid costs and fines; hence, it is necessary that the document accurately reflect the disposition of the case.

Your fourth question is whether the warrant or summons should be returned to the circuit court in accordance with § 19.2-345 after final disposition of the reopened case. Again, my answer is in the affirmative. As this Office has previously indicated, the purpose of requiring return of process to the circuit court is to record accurately each criminal case which has been disposed of during each month. See 1970-1971 Report of the Attorney General at 111.

Finally, you inquire if any further costs may be due the Commonwealth upon disposition of the reopened case. I find no statute which precludes assessment of such additional costs as may arise from reopening a particular case and, therefore, conclude that such costs may be imposed. An exception to the general rule exists, however, under § 14.1-123 which sets forth the authorized fees for services performed by the judges and clerks of district courts in criminal cases and establishes such fees on a "per case" basis. In my opinion, "reopening" a case does not justify additional fees for those services.\(^3\)

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\(^1\)Section 17-44 provides that "[a]ll papers lawfully returned to, or filed in, the [circuit court] clerk's office shall be preserved therein until legally delivered out."

\(^2\)Section 16.1-133.1 provides that "[w]ithin sixty days from the date of conviction of any person in a district court or juvenile and domestic relations district court for an offense not felonious, the case may be reopened upon the application of such person and for good cause shown. Such application shall be heard by the judge who presided at the trial in which the conviction was had, but if he be not in office, or be absent from the county or city or is otherwise unavailable to hear the application, it may be heard by his successor or by any other judge or substitute judge of such court."
For processing a case of a misdemeanor or a traffic violation..." and "[flor filing and indexing all papers connected with any criminal or traffic action in a district court..." specific fees are authorized. Sections 14.1-123(3a) and 14.1-123(6). (Emphasis added.)

CRIMINAL PROCEDURE. WITNESSES AND DEFENDANTS ARE REQUIRED TO BE PRESENT BEFORE A COURT UNLESS THAT COURT EXCUSES THEM.

July 14, 1982

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

You have advised that a problem has arisen in the local general district courts because defense attorneys or Commonwealth's attorneys, without consent of the court, advise previously bonded or recognized defendants or witnesses not to appear on the date scheduled for their appearance. Apparently the defense attorney anticipates appearing for the defendant or the Commonwealth's attorney will anticipate seeking to reschedule the trial or hearing date. In recognition of this problem, you ask four questions concerning actions general district courts may take in such situations when a defendant or witness fails to appear in court pursuant to the requirements of a summons or a warrant. Your questions are as follows:

1. May a general district court issue either a show cause contempt summons or, in the alternative, a warrant for failure to appear pursuant to the provisions of § 19.2-128 of the Code of Virginia in cases where (1) an adult has been charged with a felony or a misdemeanor and released pursuant to the provisions of §§ 19.2-73, 19.2-74, 19.2-122, 19.2-123, or 19.2-137, or (2) a witness has been directed to appear pursuant to the provisions of §§ 19.2-137 or 19.2-267, and in such instances the defendant or witness has failed to appear as required?

2. Is § 19.2-259, providing for continuances in felony cases, pertinent to the first inquiry?

3. Is a general district court required to treat differently appearances in felony cases as distinguished from misdemeanor cases?

4. Is a general district court required to treat differently appearances for pre-trial hearings or hearings prior to a preliminary hearing as distinguished from the actual trial or preliminary hearing of the case?

With regard to your first question, § 18.2-456 provides, inter alia, that courts and judges may issue attachments for contempt and punish summarily when any person, including an officer of the court, a juror or a witness, disobeys any lawful process or order of the court. Section 19.2-128
provides that any person released pursuant to the provisions of Ch. 9 of Title 19.2 which includes §§ 19.2-122, 19.2-123 and 19.2-137, or on a summons pursuant to §§ 19.2-73 and 19.2-74, who willfully fails to appear before any court or judicial officer as required, shall be guilty of a Class 6 felony, if he was charged with a felony offense, or a Class 1 misdemeanor, if he was charged with a misdemeanor offense.

Depending on the facts surrounding an unexcused absence, after proper service of lawful process of the court, and with the exception of the failure of a witness summoned in accordance with the provisions of § 19.2-267, I am of the opinion that the general district court may elect either to issue a show cause contempt summons or a warrant pursuant to the provisions of § 19.2-128. See § 19.2-129. The mere fact that the Commonwealth's attorney or defense attorney has advised a defendant or a witness not to appear does not excuse such absence. Lawful process or orders of the court always take precedence over contrary instructions of the Commonwealth's attorney or defense attorney. However, in deciding what action, if any, to take against a person who fails to appear, the court may wish to take into account as a mitigating factor that laymen may not fully comprehend their obligations and may mistakenly believe that instructions of the Commonwealth's attorney or defense attorney are on equal footing with lawful process or an order of the court or may be given with the approval of the court.2

With respect to your second question, I am of the opinion that the provisions of § 19.2-259 do not relieve a person charged with a felony from being present when he has been directed to be present by a judicial officer or other authorized individual. That section requires that a person tried for a felony shall be personally present during the trial. It also states that a motion for continuance, whether it be made before or after arraignment, shall not be deemed to be part of the trial. Simply because the statute does not require a defendant to be present when a motion for continuance is made, it does not follow that a defendant may absent himself from a court ordered appearance without the consent of the court. Indeed, the terms of the statute are flexible enough so that a court, if it so chose, could excuse a defendant and entertain a motion for continuance by the Commonwealth or the defense attorney. The statute does not, however, grant a defendant a dispensation from compliance with lawful process of the court.

In response to your third and fourth questions, I am aware of no authority which would require a general district court to treat differently appearances in felony cases as distinguished from appearances in misdemeanor cases,3 or appearances in pre-trial and pre-preliminary hearing matters from those for a preliminary hearing or the actual trial. I am, therefore, of the opinion that in any of the situations described above, an unexcused absence may be dealt with by the court as set forth above.
Because § 19.2-267 is not contained in Ch. 9 of Title 19.2, nor specifically mentioned in § 19.2-128, the provisions of § 19.2-128 are not applicable to process issued pursuant to § 19.2-267. The provisions of § 18.2-456(5) are applicable, however, to disobedience of process issued by the Commonwealth's attorney under the authority given him by § 19.2-267 and, therefore, under § 18.2-456 the court may issue attachments for contempt to punish such disobedience.

Under § 18.2-456(4) misbehavior of an officer of the court in his official capacity is grounds for a contempt citation. You may wish to notify your local bar association that contempt citations may be issued where court process is countermanded without the consent of the court.

Sections 16.1-69.40:1 and 16.1-69.40:2 do provide authority upon which to conclude that in cases of offenses which are or may be enumerated therein, a defendant may be excused from attending court if he complies with the provisions thereof.

DEFINITIONS. "ATTESTED COPIES." NO LEGAL DISTINCTION FROM "CERTIFIED COPIES."

June 15, 1983

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

This is in reply to your letter in which you ask me to distinguish "attested copies," "certified copies," and "authenticated" copies, as these terms are used in the Code of Virginia in matters relating to the duties of clerks of court. You have also asked whether a court order which is attested by a clerk with the seal affixed can be used as a certified order to be recorded in a law order, chancery order or will book.

When the words used in a statute are not expressly defined, it is a settled rule of statutory construction that they must be given their ordinary meaning. McCarron v. Commonwealth, 169 Va. 387, 394, 193 S.E. 509, 512 (1937); 1981-1982 Report of the Attorney General at 65. Thus, the terms "attest" and "certify," neither of which is defined by the Code, must be accorded the meanings that have evolved through custom and usage. Given the fact that "to attest" means, in one sense, to certify the verity of a copy of a public document formally by signature, and that "to certify" means to attest as being true, I am of the opinion that there is no legal distinction between the two. Black's Law Dictionary 117, 207 (5th ed. 1979). Therefore, when a clerk of court signs a document or copy thereof for purposes of verifying that the instrument is genuine, he has attested or certified it within the meaning of the Code. Additionally, I am of the opinion that it is not necessary that an official seal be affixed to either attested or certified copies unless
one is specifically required by statute for that particular document. There is, however, nothing improper or illegal with your practice of placing a seal on certified copies but not on attested ones.

"Authentication," on the other hand, is defined by Black's Law Dictionary, supra, at 121, as "[a]n attestation made by a proper officer by which he certifies that a record is in due form of law, and that the person who certifies it is the officer appointed so to do." (Emphasis added.) In practice, authenticated copies are signed by the clerk just as attested or certified copies are, and the clerk's signature and his authority to undertake the action in question are certified by an officer of the court. In light of the fact that Virginia requires a seal to be affixed to certain documents made in other states and countries, I am of the opinion that an official seal should likewise be affixed to judicial instruments and records that are to be sent to foreign jurisdictions.

With respect to your question concerning the recordation of a court order attested by a clerk of another county or city, there is no statute which specifically authorizes or prohibits the recordation of the order in a second locality. Faced with a similar situation involving a deed in Abrahams v. Ball, 122 Va. 197, 94 S.E. 799 (1918), the Virginia Supreme Court stated: "[N]o rule of law...prevents the valid subsequent recordation in other counties or cities of a deed once recorded in a given county or city." Id. at 203, 94 S.E. at 801. In light of this statement, I conclude that a copy of a court order can be entered in a law order, chancery order, or will book in another locale as long as it has been properly attested as genuine by the clerk of the court of the jurisdiction in which it was originally recorded.

1 See, also, Sawyer v. Lorenzen & Weise, 149 Iowa 87, 92, 127 N.W. 1091, 1093 (1910) (the words "certified" and "attested" are, in essence, synonymous in their meanings); Ennis v. Adkins, 274 Ky. 121, 126, 118 S.W.2d 175, 177 (1938) ("a copy attest' must be held to satisfy and mean the same as the synonymous term, 'a certified copy'); Winter v. Casco Bank & Trust Co., 396 A.2d 1020, 1022 (Me. 1979) ("to attest...means to certify to [the] accuracy [of the copy]'); Paduchik v. Mikoff, 112 N.E.2d 69, 75 (Ohio 1951) ("a certified copy...is the equivalent of an attested copy").

2 See, e.g., § 49-5 (establishing procedure for authentication of affidavits made by officers of other states and countries).

3 Note that authority is given to the Secretary of the Commonwealth to authenticate court records to be used in another state in the manner required under the laws of that state rather than the laws of Virginia. See § 2.1-69.
DEFINITIONS. "MERCHANT" FOR PURPOSES OF EXEMPTION FOUND IN § 54-831.

September 10, 1982

The Honorable J. G. Overstreet
County Attorney for Bedford County

You have asked whether a person classified as a garage keeper for purposes of a State license tax under § 58-378 of the Code of Virginia is a merchant and therefore exempt from a county regulation as a junk dealer under § 54-825, et seq. 2

Section 54-826 permits counties to regulate the conduct of junk dealers through the issuance of licenses. Section 54-826 is a regulatory, rather than a taxing, statute and, therefore, is not in pari materia with § 58-378 which defines a garage keeper for purposes of State license taxation. See Town of Farmville v. GCC Beverages, Inc., 218 Va. 773, 240 S.E.2d 530 (1978).

I do note that § 54-831 provides for a limited exception to the regulatory requirements of § 54-825. Section 54-831 provides:

"Nothing in this chapter shall be construed to prevent any regularly licensed merchant in the country [sic], or in towns having a population of 2,000 or less, from buying or trading for rags, old iron, or other articles or junk, unless there be a regular licensed junk dealer within three miles of his place of business, such merchant to be subject at all times to the same conditions of inspection as a regular junk dealer."

There is no statutory definition of the word "merchant" as used in the exception found in § 54-831. In the absence of a controlling statutory definition, nontechnical words are construed according to their common understanding or ordinary sense. Department of Taxation v. Orange-Madison Coop. Farm Service, 220 Va 655, 261 S.E.2d 532 (1980) and Gomes v. City of Richmond, 220 Va. 449, 258 S.E.2d 582 (1979). In construing the term "merchant" appearing in a city ordinance, the Supreme Court in Commonwealth v. Meyer, 180 Va. 466, 23 S.E.2d 353 (1942), adopted this principle of construction. Quoting from the definition of "merchant" as found in Century Dictionary the Court defined "merchant" as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit." 180 Va. at 472-473.

Adopting this definition of "merchant" for purposes of the exemption found in § 54-831, I am of the opinion that a person licensed as a garage keeper is not in his licensed business customarily engaged in the business of a merchant. Accordingly, the exception of § 58-831 would not be applicable to the situation in which you describe.
Thus, I am of the opinion that the mere licensing of a garage keeper under the State tax provisions of § 58-378 would not relieve the keeper from compliance with a county's regulatory requirements adopted pursuant to § 54-825.

1 Section 58-378 has been repealed by Ch. 633, Acts of Assembly of 1982, effective January 1, 1983.
2 Section 54-825 seeks to regulate the operation of junk dealers through local supervision, stating: "No keeper of a shop, for the purpose herein mentioned, or master of a vessel, or other person, shall, without a license authorized by law, purchase, sell, barter, or exchange any kind of secondhand articles, junk, rags, rag cullings, bones, bottles, puer, scrap, metals, metal drosses, steel, iron, old lead pipe, old bathroom fixtures, old rubber, old rubber articles, or other like commodities, except paper, and except furniture, clothes, shoes and stoves intended to be resold for use as such, and any person dealing in such commodities shall be deemed a junk dealer."

DEFINITIONS. "RECREATIONAL FACILITY" INCLUDES MUNICIPAL ARENAS OR AUDITORIUMS.

July 7, 1982

The Honorable Frederick H. Creekmore
Member, House of Delegates

This is in response to your letter inquiring whether the term "recreational facility" as used in § 15.1-291 of the Code of Virginia would apply to municipal arenas and auditoriums.

Section 15.1-291 provides in pertinent part that "[n]o city or town which shall operate any bathing beach, swimming pool, park, playground or other recreational facility shall be liable in any civil action..." It was originally enacted in 1940 in response to the Virginia Supreme Court's decision in Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939), which held that a city was liable for injuries caused by the wrongful acts of its servants in the operation of a swimming pool even though the city derived no pecuniary advantage from the activity.

The term "recreational facility" must be applied on a case-by-case basis in the context of the statute being construed. The term has been broadly defined as a facility "for amusement" or "for entertainment." In the absence of evidence of legislative intent to the contrary, words of a statute are to be given their ordinary meaning. Certainly, a recreation system may include buildings as well as land. See § 15.1-271. Accordingly, I am of the opinion that, if a municipal arena or auditorium is operated primarily for entertainment, amusement or other recreational purposes, it
would be deemed a "recreational facility" within the meaning of § 15.1-291.


2See, e.g., Hampton v. Shreveport, 247 La. 784, 174 So.2d 529, 539 (1965) (city operating water supply system not operating park or recreational facility within meaning of statute conferring tort immunity); Kleinke v. Ocean City, 163 N.J. Super. 424, 394 A.2d 1257, 1261 (1978) (beach is public recreational facility within meaning of tort claims act); Bourn v. Herring, 225 Ga. 67, 166 S.E.2d 89, 92 (1969) (picnic and lake area are lands used for recreational purposes within meaning of statute limiting landowner's liability); Johnson v. Cloninger, 213 Tenn. 71, 372 S.W.2d 281, 283 (1963) (operation of golf course is recreational purpose within meaning of statute authorizing municipalities to acquire property).

3In re City of Enid, 195 Okla. 365, 158 P.2d 348, 352 (1945) (tax statute); Beard v. Board of Education, 81 Utah 5, 16 P.2d 900, 905 (1932) (statutes providing for schoolhouses).


DISTRICT COURTS. SUIT FOR PERSONAL PROPERTY FILED IN GENERAL DISTRICT COURT SUBSEQUENT TO INSTITUTION OF DIVORCE PROCEEDINGS BETWEEN SAME PARTIES IN PROPER COURT OF RECORD SUBJECT TO DISMISSAL UPON PROPER MOTION.

September 14, 1982

The Honorable William R. Shelton, Chief Judge
Chesterfield General District Court

You have asked whether a general district court has jurisdiction to hear a suit for personal property (a sum of money) filed by person "B" against person "A" when a divorce suit involving "A" and "B" is pending in a proper court of record.

Section 20-107.3 of the Code of Virginia, which was enacted by the 1982 session of the General Assembly, provides in pertinent part that:

"A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, the court, upon motion of either party, shall determine the legal title as between the parties, and the ownership and value of all real and personal property of the parties and shall consider which of such property is separate property and which is marital property."
Prior to the enactment of § 20-107.3, the circuit court in divorce actions had jurisdiction only as to property rights created by the marriage in the real estate owned by the parties. Jackson v. Jackson, 211 Va. 718, 180 S.E.2d 500 (1971).

The circuit court is now empowered by § 20-107.3 to decide personal property claims of the parties in divorce cases. A subsequent action involving the same personal property in a general district court would be subject to dismissal under the general rules of abatement. Those rules provide that in order for the pendency of one suit to defeat a subsequent suit, it is necessary that in both suits the parties are the same, or at least represent the same interest; that the first suit is for the same matter as the second (though the second suit need not be for the whole matter embraced by the first); and that the whole effect of the second suit is attainable in the first. See McAllister v. Harman, 97 Va. 543, 34 S.E. 474 (1899); 1A M.J. Abatement, Survival and Revival §§ 4 and 5 (1980).

The jurisdiction of general district courts in civil actions is set forth in § 16.1-77. That section was not changed by the enactment of § 20-107.3, and there is no legislative indication that the jurisdiction of the district court is modified in claims or disputes over property.

I am, therefore, of the opinion that even though the general district court is not without jurisdiction in the hypothetical situation you have posed, the subsequent action for personal property filed by one of the parties in a pending divorce action against the other party is subject to dismissal upon proper motion.

DIVORCE. FOREIGN SERVICEMAN STATIONED AT U.S. MILITARY BASE PURSUANT TO NATO VISA NOT RESIDENT FOR PURPOSES OF MAINTAINING DIVORCE SUIT UNLESS HE CAN ESTABLISH THAT HE HAD BONA FIDE PERMANENT ABODE IN THIS STATE.

May 16, 1983

The Honorable Howard E. Copeland
Member, House of Delegates

You have asked whether a member of the Royal Air Force of the United Kingdom attached as an exchange officer to the U.S. Naval aircraft squadron located in Virginia Beach is entitled to bring a suit in the circuit court for divorce under § 20-97 of the Code of Virginia. You have advised that the exchange officer is in Virginia pursuant to a NATO visa and is entitled to the protection of the NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1793, T.I.A.S. 2846.
Section 20-97 sets forth the domicile and residence requirements to maintain a suit for divorce. It provides, in part, as follows:

"No suit...for divorce shall be maintainable, unless one of the parties is domiciled in, and is and has been an actual bona fide resident of this State for at least six months preceding the commencement of the suit...For the purposes of this section only, if a member of the armed forces of the United States has been stationed in this State and has lived with his or her spouse for a period of six months or more in this State next preceding a separation between such parties, and such service person or spouse continue to live in this State until and at the time a suit for divorce or legal separation is commenced, then such person and his or her spouse shall be presumed to be domiciled in and to have been a bona fide resident of this State during such period of time."

Words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. See 1980-1981 Report of the Attorney General at 180. In addition, it is the 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 1980-1981 Report of the Attorney General at 210. From the facts presented in your inquiry, the domicile and residential requirements of § 20-97 for a member of the armed forces would not be met by this exchange officer because that exemption is applicable only to a member of the armed forces of the United States.

Furthermore, in order to maintain a suit for divorce generally, § 20-97 requires that one of the parties must be domiciled in and be and have been an actual bona fide resident of this State for at least six months preceding the commencement of the suit. To be an actual bona fide resident of this State "means to have had in this State throughout that period an actual bona fide permanent abode, as contradistinguished from a sojourn or transitory abode, in this State or elsewhere." Hiles v. Hiles, 164 Va. 131, 137, 178 S.E. 913, 915 (1935). This statutory requirement cannot be met in this instance because Art. III of the NATO Status of Forces Agreement, provides, that while in this country, any foreign officer "shall not be considered as acquiring any right to permanent residence or domicile in territories of the receiving State."

Therefore, I am of the opinion that the domicile and residency requirements of § 20-97 have not been met by a member of the Royal Air Force of the United Kingdom who is in Virginia pursuant to a NATO visa and who is attached as an exchange officer to a U.S. Naval aircraft squadron in Virginia Beach.
You did not indicate whether the wife is domiciled in Virginia. The conclusion of this Opinion is based solely upon the husband's status.

DIVORCE. VIRGINIA COURT NOT AUTHORIZED TO CONVEY MILITARY RETIREMENT INCOME TITLED IN NAME OF ONE SPOUSE.

June 28, 1983

The Honorable Gladys B. Keating
Member, House of Delegates

You have requested a review of the Opinion addressed to the Honorable Harvey B. Morgan, Member, House of Delegates, dated February 25, 1983. That Opinion addressed the question of whether a circuit court in Virginia had authority to order the division and transfer of military retirement payments upon dissolution of a marriage and entry of a decree of divorce. The Opinion held that State law does not authorize a Virginia court to order the specific payment of a portion of retirement income or fund that is titled only in the name of one spouse.

You now inquire whether I had considered § 20-107.3(G) of the Code of Virginia when I rendered the previous Opinion. The answer to your inquiry is in the affirmative. Section 20-107.3(D) provides that upon decreeing the dissolution of a marriage or upon decreeing a divorce from the bond of matrimony, the court may grant a monetary award based upon the equities, rights and interest of each party in the marital property. Section 20-107.3(E) further provides that the court shall consider eleven factors in determining the amount of such an award and the method of payment. One of the factors that the court must consider is "[t]he present value of pension or retirement benefits, whether vested or nonvested...."

Section 20-107.3(G), however, places a limitation upon the court when considering such pension or retirement benefits. This section provides:

"No part of any monetary award based upon the value of pension or retirement benefits, whether vested or nonvested, shall become effective until the party against whom such award is made actually begins to receive such benefits. No such award shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made."

According to this provision, the portion of the monetary award based on pension or retirement benefits cannot exceed fifty percent of the cash benefits actually received by the pension member. Moreover, this portion of the award shall not become effective until the party against whom such an
award is made actually begins to receive the benefits. This provision, however, makes no mention of, nor does it authorize the court to order, the conveyance of a portion of a pension or retirement benefit that is titled in the name of only one party contrary to the specific provisions of §§ 20-107.3(C) or 20-107.3(D), hereinafter discussed. It only allows the court to consider the value of such benefits in the monetary award.

Section 20-107.3(C) specifically provides that "[t]he court shall have no authority to order the conveyance of separate property or marital property not titled in the names of both parties...." Section 20-107.3(D) further provides that the party against whom a monetary award is made may satisfy the award from the property of his choice subject to the approval of the court.

Consequently, the court may consider a maximum of fifty percent of the value of cash benefits actually received by the pension member in determining the monetary award. The court, however, cannot specifically designate the benefits as a source of payment or convey the benefits if they are titled in the name of one party. The person against whom the award is made has the discretion to satisfy the award from his retirement benefits or some other source of income.

You also suggest that the Morgan Opinion may conflict with the Uniform Services Former Spouse's Protection Act. As stated in the Morgan Opinion, 10 U.S.C.A. §§ 1408(a)(2)(A) and 1408(a)(2)(C) permit federal recognition of an order, issued in accordance with the laws of the State, which specifically provides for the payment of a percentage of retirement benefits to a spouse or former spouse or a member of the military. Inasmuch as Virginia law does not permit the conveyance of a percentage of retirement benefits, a Virginia court cannot comply with these provisions.

Finally, I can readily appreciate your concern, as patron of the legislative enactment of § 20-107.3, that the foregoing interpretation does not comport with the intended result. As you know, however, the function of this Office is to interpret the statute as written. Until such time as the General Assembly may again address this subject, I am constrained to reaffirm the conclusion as expressed in my Opinion to Delegate Morgan.

DIVORCE. VIRGINIA COURT NOT AUTHORIZED TO ORDER PAYMENT OF MILITARY RETIREMENT INCOME TITLED IN NAME OF ONE SPOUSE.

February 25, 1983

The Honorable Harvey B. Morgan
Member, House of Delegates

You have asked whether a circuit court in Virginia has authority to order the division and transfer of military
retirement payments upon the dissolution of a marriage and entry of a decree of divorce. As stated in your letter, federal law now recognizes, under certain circumstances, state court orders that divide military retirement payments between the parties in a divorce or dissolution proceeding. See 10 U.S.C.A. § 1408.

Title 10 U.S.C.A. § 1408(a)(2)(C) defines court orders which the military will recognize to include a state court order specifically providing for the payment of a percentage of retirement benefits to the spouse or former spouse of the member of the military. Title 10 U.S.C.A. § 1408(a)(2)(A) requires that such an order must be issued in accordance with the laws of the state.

Turning to State law, § 20-107.3 of the Code of Virginia provides in part:

"Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, the court, upon motion of either party, shall determine the legal title as between the parties, and the ownership and value of all real and personal property of the parties and shall consider which of such property is separate property and which is marital property."

In addition, upon decreeing the dissolution of the marriage and upon decreeing a divorce, the court, among other things, may further determine the proper maintenance and support of spouses. See § 20-107.1.

In determining property rights under § 20-107.3, the Virginia court must consider eleven factors. One of those factors is that the court must determine "[t]he present value of pension or retirement benefits, whether vested or nonvested...." Under § 20-107.1, the court must consider nine factors when determining the proper maintenance and support of a spouse. One of those factors is the income from "pension, profit sharing or retirement plans...." Neither §§ 20-107.1 nor 20-107.3 specifically provides a court with the authority to designate a portion of a retirement income as either maintenance, alimony or spousal property.

In Virginia, the rule has long been established that specific property cannot be allotted to a spouse as alimony in a divorce proceeding. Alimony is merely a personal judgment in favor of the spouse. Wilson v. Wilson, 195 Va. 1060, 81 S.E.2d 605 (1954).

Furthermore, in determining the property rights of the spouses, the General Assembly has provided in § 20-107.3(D) that the party against whom an order granting a monetary award is directed may satisfy the order from property of his choice subject to the approval of the court. The court has "no authority to order the conveyance of separate property or marital property not titled in the names of both parties...." Section 20-107.3(C). The court may partition marital
property only in those instances where such property is titled in the names of both parties. Id.

In light of the foregoing, it is my opinion that State law does not authorize a Virginia court to order the specific payment of a portion of a retirement income or fund that is only titled in the name of one spouse. Consequently, unless Virginia statutes are changed, such court cannot comply with the provisions of 10 U.S.C.A. §§ 1408(a)(2)(A) and 1408(a)(2)(C) which permit federal recognition of a state court specifically designating a percentage of the retirement pay to be directed to the other spouse.

**DOG LAWS. COUNTY ANIMAL WARDEN MAY NOT ENFORCE COUNTY ORDINANCE PROHIBITING DOGS FROM RUNNING AT LARGE WITHIN INCORPORATED TOWN.**

February 18, 1983

The Honorable Willard R. Finney
Member, House of Delegates

This is in reply to your recent letter in which you inquire whether the dog warden for Floyd County may enforce the county ordinance prohibiting dogs from running at large within the town limits of the Town of Floyd.

For county-wide purposes, towns are an integral part of a county, subject to the jurisdiction of county authorities. Nexsen v. Board of Supervisors of Elizabeth City County, 142 Va. 313, 128 S.E. 570 (1925). General ordinances of a county are deemed to apply county-wide unless there is some express or necessarily implied restriction against such application. For the reasons which follow, I am of the opinion that the Virginia Dog Laws of 1977, §§ 29-213.5 through 29-213.34 of the Code of Virginia, contain such an implied restriction.

As originally enacted in 1977, § 29-213.8 provided, in effect, that the governing body of each "local jurisdiction" shall appoint an animal warden. Section 29-213.17 provided that the governing bodies of the "counties, cities and towns of this State" are authorized, in their discretion, to prohibit the running at large of all or any category of dogs in all or any designated portion of such county, city or town. In an Opinion of this Office to the Honorable Earl E. Bell, Member, House of Delegates, dated September 13, 1977, my predecessor opined that the Virginia Dog Laws of 1977 required each town to appoint a dog warden and, further, that "[t]he dog laws enacted in one locality are not effective within the boundaries of another jurisdiction." See 1977-1978 Report of the Attorney General at 131, 134.

Subsequent to that Opinion, the General Assembly amended § 29-213.8 to delete reference to "local jurisdiction" and substituted therefor "county or city." The General Assembly did not, however, amend the provisions of § 29-213.17.
Consequently, § 29-213.17 continues to authorize towns to adopt ordinances prohibiting dogs running at large, albeit the towns are no longer required to appoint an animal warden to enforce such ordinances. This fact does not alter the conclusion reached by this Office in the Bell Opinion, supra, that the dog laws enacted in one locality are not effective within the boundaries of another jurisdiction.

In light of the foregoing, I conclude that the General Assembly, by necessary implication, has restricted the application of county ordinances prohibiting dogs from running at large to the unincorporated territory of the county, because town councils have been granted the authority to determine whether to adopt such ordinances for their respective jurisdictions. It follows that a county animal warden may not enforce a county ordinance prohibiting dogs from running at large within the territory of an incorporated town. Accordingly, I must answer your inquiry in the negative.1

1I call your attention to the provisions of the second paragraph of § 29-213.8 which permit the "governing body of any local jurisdiction in which an animal warden...[has] been appointed..." to contract with one or more additional local jurisdictions for the enforcement of the dog laws in such local jurisdictions by such animal warden. Thus, the Town of Floyd has the authority pursuant to §§ 29-213.17 and 29-213.8, first, to adopt ordinances prohibiting the running of dogs at large within the Town of Floyd and, second, to contract with the County of Floyd for the Floyd County animal warden to enforce the town ordinance within the town limits.

DOG LAWS. DOG WARDENS MAY CANVAS DOOR-TO-DOOR TO DETERMINE WHETHER DOG OWNERS ARE OBTAINING LICENSES.

July 21, 1982

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your letter of July 6, 1982, in which you asked my opinion on the following questions:

(1) Is it legal for an animal warden to perform a door-to-door canvass, within his jurisdiction to determine if dog owners are complying with § 29-213.9 of the Code of Virginia?

(2) If legal, and in fact the canvass is made, is the animal warden allowed to issue a summons on the spot if owners are in violation of § 29-213.9?

(3) Does a humane investigator duly appointed and sworn as prescribed by §§ 18.2-397 and 3.1-796.53 in a county have
authority to act in another county in a different judicial circuit?

(4) If the humane investigator is detained by the sheriff's department of the second county for performing his duties, is it the obligation of the Commonwealth to provide a legal defense for the investigator or would the Commonwealth be obligated to reimburse the humane investigator for his personal legal fees involved for his proper defense?

Section 29-213.8 requires each county and city to appoint an officer known as the animal warden. The animal warden is vested with the power to enforce the Virginia Dog Laws of 1977, §§ 29-213.5 through 29-213.29, and "all ordinances enacted pursuant to and all laws for the protection of domestic animals." Section 29-213.9 requires that all dogs over six months of age be licensed. It is thus the duty of the animal warden to see that all dogs are properly licensed. There is no constitutional or statutory prohibition which would prevent the animal warden from going door-to-door to inquire if dog owners have secured the required license. Your first question is, therefore, answered in the affirmative.

The power to arrest without a warrant or to issue a summons in lieu of a warrant is given only to special policemen, conservators of the peace, State police, sheriffs and their deputies, city and county police and game wardens. See §§ 15.1-153, 19.2-18, 19.2-81 and 29-32.1. Unless the animal warden has been appointed to one of these offices, he may not make an arrest or issue a summons. He must obtain the summons from a magistrate pursuant to § 19.2-73. Your second question is, therefore, answered in the negative unless, as stated, the animal warden has been appointed to an office having the power to issue summonses or to make arrests.

Section 18.2-397 provides for the appointment as humane investigators of officers and agents of duly incorporated societies for the prevention of cruelty to animals. These investigators are authorized to make arrests, after obtaining a warrant, only within the political subdivision in which the Commonwealth's attorney has recommended their appointment and the circuit court judge has made such an appointment. Section 18.2-402, however, provides that humane investigators "may lawfully take charge of any animal found abandoned, neglected, or cruelly treated...and shall forthwith petition any judge of a general district court in any city or county, wherein such animal is found, for a hearing...to determine whether the owner, if known, is able to adequately provide for such animal...." (Emphasis added.) By the terms of the statute, this particular power is not limited to the political subdivision or judicial circuit in which the appointment is made. Your third question is therefore answered in the negative as to the execution of arrest warrants and in the affirmative as to taking charge of
animals actually found to be abandoned, neglected or cruelly treated.

The final question concerns the obligation of the Commonwealth to provide a legal defense for such humane investigators when they are charged criminally for acts arising out of the performance of their duties. Section 18.2-398 provides with respect to humane investigators, "In no case shall the appointment of such officers or agents, or any services performed by them, entail any cost or expense upon such county or municipal corporation or upon the State." Your final question is, therefore, answered in the negative.

I assume for purposes of this Opinion that the door-to-door "canvass" to which you refer is a survey and does not include any investigation beyond asking the house occupant if he owns an unlicensed dog.

DOG LAWS. OWNER OF ANIMAL KILLED BY STRAY DOG IS ENTITLED TO COMPENSATION UNDER § 29-213.25 WHETHER OR NOT HE HAS PRIVATE INSURANCE.

May 18, 1983

The Honorable H. N. Osborne
Commonwealth's Attorney for Giles County

In your recent letter, you asked whether it is legal for the board of supervisors to compensate a Giles County resident whose calf was killed by a stray dog when he has already collected from his insurance company for the loss of the calf.

Section 29-213.25 of the Code of Virginia governs payment for livestock or poultry killed or injured by dogs. The owner is entitled to receive compensation at fair market value provided that (1) the claimant has furnished evidence within sixty days of the discovery of the quantity and value of the dead or injured animals, (2) the claimant has furnished the reason he believes that the death or injury was caused by a dog, (3) he has informed the animal warden or other officer within seventy-two hours of the discovery, and (4) the claimant has exhausted all legal remedies against the owner of the dog, if known. Counties, cities and towns may waive by ordinance the requirement for seventy-two hour notice and exhaustion of legal remedies. Nowhere is there any authority for counties, cities or towns to deny the livestock owner compensation simply because he has private insurance. It appears that the claim would be denied only if the claimant recovers from the owner of the dog.

The legislative policy on recovery from collateral sources is not consistent. For example, in compensating victims of crime, Ch. 21.1 of Title 19.2, §§ 19.2-368.1
through 19.2-368.18, expressly provides that the Industrial Commission shall, in determining medical expenses, consider collateral sources for payment. See § 19.2-368.11(B)(1). The act provides that no more than actual out-of-pocket loss be considered by the Industrial Commission. See § 19.2-368.11(B)(5). The Commonwealth is subrogated for any award made to the claimant's right of action. See § 19.2-368.15.

On the other hand, there are instances in the Code where the General Assembly has recognized that not only is the possibility of double recovery possible, but has forbidden private parties from contracting for subrogation rights which would prevent it. See § 38.1-381.2 where an automobile liability medical benefit insurer cannot retain the right to subrogate against third parties. See also, § 38.1-342.2 which prohibits health insurance policies in cases of personal injury from containing subrogation clauses for the recovery by the health insurance carrier from other insurers or the tort feasor.

Where a statute expressly lists the factors to be weighed in making a determination such as this, other factors, not articulated in the statute, may not be considered. Your question is, therefore, answered in the affirmative.

1Exhaustion means a judgment against the owner of the dog upon which an execution has been returned unsatisfied.

2If the General Assembly wishes to restrict the possibility of a double recovery, it could limit the recovery from the fund to those cases in which the claimant has exhausted all sources available for compensation for his loss.

ELDERLY. LONG-TERM CARE COUNCIL. CLIENT INFORMATION MAY BE SHARED BY COUNCIL MEMBERS IN SOME SITUATIONS.

June 30, 1983

The Honorable Wilda M. Ferguson, Commissioner
Virginia Department for the Aging

You have asked for assistance in the implementation of a program for the long-term care of the elderly by the Virginia Long-Term Care Council (the "Council"), and local long-term care coordination committees, §§ 2.1-373.4 through 2.1-373.8 of the Code of Virginia. You have asked several questions which relate to whether and how client-specific information may be exchanged among the various public human services agencies which comprise these committees. You also ask how the local committees can ensure that impaired elderly citizens understand their rights.
Section 2.1-373.4 declares that the public policy of the Commonwealth is to support the development of community-based resources to avoid inappropriate institutionalization of the impaired elderly. A Council consisting of the Commissioners of the Departments of Health, Social Services, Mental Health and Mental Retardation, Visually Handicapped, and Aging was created to develop and implement a broad range of statewide long-term care services. See §§ 2.1-373.4 and 2.1-373.5. The Virginia Office on Aging is to coordinate these activities and provide staff support. See §§ 2.1-373.4 and 2.1-373.6. Each county or city, or a combination thereof, is to establish a committee to coordinate local long-term care services in the locality or localities. A lead agency is to be designated and each committee is to submit to the Council a plan for a range of services for its locality assuring the cost effective utilization of public funds for these services. See § 2.1-373.7.

Your first inquiry is whether the human services agencies which make up the local committees can share client-specific information without violating State or federal laws and regulations. The member agencies are generally not prohibited from sharing personal client information with other agencies under the Virginia Privacy Protection Act, § 2.1-377, et seq., when the dissemination is needed to accomplish a proper purpose of the agency. See § 2.1-380(1); 1981-1982 Report of the Attorney General at 286. Accordingly, your general question as to whether client-specific information may be exchanged among the agencies in question is answered in the affirmative if the disclosure of such information furthers the legislative purpose.

Prior to the release of client-specific information, however, care should be taken to review the statutes and regulations which provide the legal framework for the respective programs to see if those laws and regulations preclude the sharing of such information. If they do permit such sharing, it must be done in the manner provided for by the relevant statutes or regulations. For example, substance abuse counselors must comply with the requirements of 42 C.F.R., Part 2, § 2.31-1, pertaining to the confidentiality of alcohol and drug abuse records. That regulation would require a worker to obtain an informed written consent from a client prior to the release of any substance abuse client information to the other committee members. In addition, local community mental health and mental retardation clinics are all required, pursuant to departmental Mental Health, Mental Retardation and Substance Abuse Program Standards Nos. 3.7, to develop written policies concerning the confidentiality of client records. Those standards require at a minimum that the client or his authorized representative consent in writing to the release of any information. The local policy must also specify and inform the client of the conditions under which client information may be released and must place a time limit on the duration of the consent.
The ombudsman for the Office on Aging also must comply with federal and State confidentiality requirements prior to the release of certain client-specific information it derives from reviewing complaints or making investigations. 45 C.F.R. §§ 1321.43(e)(1) and 1321.43(e)(2) and § 2.1-373.2 of the Code prohibit the release of the identity of any complainant or resident of a long-term care facility maintained in records of the ombudsman program absent consent of the complainant or resident, or the legal representative of either, or such disclosure is required by court order.

For handicapped individuals in vocational rehabilitation programs, 34 C.F.R. § 361.49(e) requires the informed written consent of those persons prior to the release of information to other agencies or organizations. Furthermore, medical or psychological information which the State agency believes to be harmful to the individual may be released when the receiving agency or organization assures that the information will be used only for the proper purpose for which it is being provided.

The medicaid regulations, 42 C.F.R. § 431.300, et seq., also require the prior consent of a client before any client-specific information can be released. The important point to emphasize is that while there is no general prohibition to the disclosure of client-specific information to member agencies in furtherance of legislative purpose, the specific information should be reviewed, with legal counsel if necessary, to adequately assess the legality of the disclosure.

Additionally, § 2.1-382(A)(2) of the Virginia Privacy Protection Act requires that an agency maintaining personal information shall "[g]ive notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing such information, however documented permission for dissemination in the hands of such other agency or organization will satisfy this requirement. Such notice may be given on applications or other data collection forms prepared by data subjects."

Your second inquiry asks what safeguards, practices or procedures must be followed by the committees to meet the requirements of any applicable State or federal laws or standards. Without your identifying a specific circumstance, or applicable law, I am unable to respond except in a general way. Obviously, where a law or regulation requires the informed written consent of an individual prior to the release of confidential information (as noted previously), that must be complied with. In addition, § 2.1-380 establishes a number of prerequisites which must be complied with by other various member agencies of a committee prior to such release.
Your third inquiry asks what steps must be taken by committees to ensure that private citizens included in their membership comply with applicable State or federal laws and regulations regarding confidentiality. Assuming that such individuals may be allowed access to client-specific information, they may be required to sign a statement agreeing to hold in confidence personal information they may receive as a member of a committee and to use that information only for the purpose for which it is being provided. I am advised that such a procedure is already followed for those localities which have established the child abuse/neglect multi-discipline teams provided for in § 63.1-248.6(F). Also, copies of any relevant legislation should be provided the citizens serving on the committees. There are, of course, additional steps which management can take to preserve the confidence of its information.

Your last inquiry seeks guidance regarding procedures that a committee can establish for elderly citizens suffering from a variety of physical and/or mental conditions which may affect their ability to understand their rights. If an elderly person does not "understand" his rights, the development of programs to help him understand those rights is a policy and program issue for the service agency. If an elderly person is incapable of exercising his rights and needs a substitute decision, there are a number of statutory provisions for the appointment of such a decision maker. These sections are found in Ch. 4 of Title 37.1. They vary in effect from declarations of legal incompetency and appointments of committees who have total personal and fiduciary guardianship under § 37.1-128.02 to limited declarations of incapacity and appointments of guardians for specific limited purposes under § 37.1-128.1 or specifically for the consent to medical treatment under § 37.1-134.2. As a management issue, care should be taken to sensitize personnel to the needs of our elder citizens and the possibility of their being unable to comprehend the benefits available to them.

1Section 2.1-380 states, in part, as follows: "Any agency maintaining an information system that includes personal information 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. Establish categories for maintaining personal information to operate in conjunction with confidentiality requirements and access controls;

5. Make no dissemination to another system without (i) specifying requirements for security and usage including limitations on access thereto, and (ii) receiving reasonable assurances that those requirements and limitations will be
observed, provided this paragraph shall not apply to a dissemination made by an agency to an agency in another state, district or territory of the United States where the personal information is requested by the agency of such other state, district or territory in connection with the application of the data subject therein for a service, privilege or right under the laws thereof;

6. Maintain a list of all persons or organizations having regular access to personal information in the information system;

7. Maintain for a period of three years or until such time as the personal information is purged, whichever is shorter, a complete and accurate record, including identity and purpose, of every access to any personal information in a system, including the identity of any persons or organizations not having regular access authority but excluding access by the personnel of the agency wherein data is put to service for the purpose for which it is obtained;

8. Take affirmative action to establish rules of conduct and inform each person involved in the design, development, operation, or maintenance of the system, or the collection or use of any personal information contained therein, about all the requirements of this chapter, the rules and procedures, including penalties for noncompliance, of the agency designed to assure compliance with such requirements;

9. Establish appropriate safeguards to secure the system from any reasonably foreseeable threat to its security...."

ELECTIONS. BOARD OF SUPERVISORS. DOES NOT HAVE AUTHORITY TO IMPOSE DISTRICT RESIDENCY REQUIREMENT UPON CANDIDATES TO BE ELECTED TO BOARD BY COUNTY-WIDE VOTE. GENERAL ASSEMBLY, BY APPROPRIATE ENABLING LEGISLATION, MAY CONSTITUTIONALLY AUTHORIZE IMPOSITION OF SUCH REQUIREMENT.

January 18, 1983

The Honorable William T. Wilson
Member, House of Delegates

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

"The Alleghany County Board of Supervisors wishes to provide for the election of each supervisor from a slate of candidates in each established election district with each slate of candidates to be voted on by all voters of the county. Each candidate would have to be a resident of the particular district from which he is a candidate for election."

You ask whether the board of supervisors has authority to take the proposed action pursuant to § 15.1-37.41 of the Code of Virginia.
The "election districts" proposed by the board of supervisors are different from the election districts contemplated in § 15.1-37.4. That statute is concerned with voting and representation in proportion to population, and in that sense the board's proposal would create one multi-member election district comprising the entire county, in which all candidates would be voted on by all voters from the county at large. The "election districts" referred to by the board are in fact "qualification districts," in that they would be used as a basis of a residence qualification for the candidates for county-wide election. See 1981-1982 Report of the Attorney General at 90. In my opinion, neither § 15.1-37.4 nor any other section in Ch. 1.1 of Title 15.1 provides authority for a county board of supervisors to impose such a qualification upon candidates for elective office. Accordingly, your question is answered in the negative.

You ask further whether State legislation to accomplish the board's purpose would be appropriate and what approaches might be possible towards that end. I am of the opinion that the General Assembly may authorize such action by local governing bodies. Article II, § 5 of the Constitution of Virginia (1971), provides in part as follows:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

(a) the General Assembly may impose more restrictive geographical residence requirements for election of its members, and may permit other governing bodies in the Commonwealth to impose more restrictive geographical residence requirements for election to such governing bodies, but no such requirements shall impair equal representation of the persons entitled to vote...." (Emphasis added.)

A copy of a memorandum submitted with your letter discusses the constitutionality of the Alleghany proposal. Similar plans have been upheld as facially constitutional, although, in a particular case, such a scheme might operate to dilute the voting strength of racial or political elements of the voting population and may not then survive constitutional attack upon a sufficient factual showing. See Dallas County v. Reese, 421 U.S. 477 (1975); Dusch v. Davis, 387 U.S. 112 (1967); Fortson v. Dorsey, 379 U.S. 433 (1965). It is, of course, exclusively for the General Assembly to determine the wisdom and propriety of such enabling legislation.
Section 15.1-37.4 provides as follows: "The governing body of every county, city, and town shall be elected by the qualified voters of such county, city, and town. If the members, or any of the members, of the governing body of a county, city, or town are elected by districts or wards, each such district or ward shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district or ward. The governing body of any county, city or town shall be composed of not less than three nor more than eleven members. Nothing in this section shall preclude the apportionment of more than one member of the governing body of any county, city, or town to a single district or ward. The governing body of any county may provide by ordinance for a combination of county-wide and less than county-wide election districts and such combination of election districts shall not be a change in the form of county government. The local electoral board and the State Board of Elections shall be notified of changes by the mailing of certified copies of the ordinance."

You also refer to § 15.1-37.8 which provides for a mandamus action to compel a county to reapportion the representation among its districts.

This view is consistent with the Dillon Rule of strict construction of the powers of local governments generally adhered to in Virginia and with interpretations of § 15.1-37.4 contained in prior Opinions of this Office. See 1981-1982 Report of the Attorney General at 102.

The General Assembly has provided for city-wide election of council members with district residence requirements for candidates, as proposed here, in the charters for the Cities of Waynesboro, Virginia Beach and Poquoson. See, respectively, Ch. 3, Acts of Assembly of 1948; Ch. 147, Acts of Assembly of 1962, as amended by Ch. 39, Acts of Assembly of 1966; Ch. 206, Acts of Assembly of 1970; Ch. 86, Acts of Assembly of 1971; and Ch. 634, Acts of Assembly of 1976, as amended by Ch. 477, Acts of Assembly of 1981.

In Dusch, supra, the Supreme Court considered the Virginia Beach city charter which had been amended by the General Assembly to permit the district residence requirement and the Court held that the city council residency requirements did not violate the United States Constitution.

ELECTIONS. CANDIDATES. STATE EMPLOYEES. STATE EMPLOYEE NOT REQUIRED TO RESIGN IN ORDER TO OFFER AS CANDIDATE FOR ELECTIVE OFFICE.

February 16, 1983

The Honorable W. Onico Barker
Member, Senate of Virginia

This is in reply to your recent request for my opinion whether State law requires that a person employed by the
Commonwealth resign his or her job in order to offer as a candidate for a constitutional office.

Although the General Assembly retains the power to prevent employees of the Commonwealth from being candidates for elective office,\(^1\) it has not enacted any statute to that effect of which I am aware. This Office previously has ruled that a person may be a candidate for an office which, if he is elected, would be incompatible with the office he presently holds, and that public employees may run for elective office provided that such activities do not violate personnel regulations of the agency involved or otherwise interfere with the person's ability to perform his regular duties in each instance.\(^2\) See, e.g., Reports of the Attorney General 1975-1976 at 35; 1972-1973 at 165, 167; 1971-1972 at 155, 158; 1970-1971 at 132; 1969-1970 at 117. See, also, 1981-1982 Report of the Attorney General at 156. I am of the opinion that the same considerations apply to your inquiry. Subject to the caveat noted in footnote 3, your question is answered in the negative.

\(^1\)Article II, \(\S\) 5 of the Constitution of Virginia (1971) provides, in pertinent part, as follows: "The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

**(c)** Nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."

\(^2\)If elected, it is entirely possible that the person would be required to resign his State employment prior to qualifying for the office to which he is elected.

\(^3\)Note, however, that federal Hatch Political Activity Act prohibitions may apply if the person's employment is in connection with an activity financed in whole or in part by federal loans or grants. See Opinion to the Honorable Robert S. Bloxom, Member, House of Delegates, dated February 2, 1983; 1974-1975 Report of the Attorney General at 155.

**ELECTIONS. COUNTIES. SCHOOLS. SCHOOL SYSTEM EMPLOYEE FUNDED BY FEDERAL GRANT MAY BE CANDIDATE FOR ELECTIVE OFFICE. EXEMPTION FROM HATCH ACT PROHIBITION.**

February 2, 1983

The Honorable Robert S. Bloxom
Member, House of Delegates
This is in reply to your recent letter inquiring whether a county school system employee, ninety percent of whose salary is paid from federal funds made available to the county through the State Department of Education, is permitted to run as a political party nominee for the office of clerk of court.

Your inquiry requires consideration of whether the individual in question is covered by the Hatch Political Activity Act (the "Act"). 5 U.S.C.A. § 1502(a)(3) provides that a state or local officer or employee, as defined by the Act, may not be a candidate for elective office.\(^1\) Section 1501(4) defines a state or local officer or employee as an individual employed by a state or local agency whose principal employment is in connection with an activity financed in whole or in part by loans or grants from the United States or a federal agency. However, § 1501(4)(B) specifically excludes from this definition, among others, "an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof." Although the individual you describe ordinarily would be covered by the Act and could not both continue his employment and run as a party nominee for elective office,\(^2\) the fact that he is a school administrator working for a local education system exempts him from the Act prohibition.

There is no State law comparable to the Act which prohibits local public employees from being candidates for local elective office. Accordingly, in answer to your question, the individual you describe may run as a political party nominee for clerk of court, provided that such activity does not violate any school board personnel regulations, nor otherwise render him unable to perform his public duties as a school system employee. See Reports of the Attorney General 1975-1976 at 35; 1972-1973 at 165, 167; 1970-1971 at 132; 1969-1970 at 117.

\(^1\)Note that § 1502(a)(3) does not prohibit state or local officers from being non-partisan candidates in non-partisan elections. See 5 U.S.C.A. § 1503.

\(^2\)Compare Opinion contained in the 1974-1975 Report of the Attorney General at 155, which held that an employee in a Commonwealth attorney's office, whose salary was paid by funds derived from a federal grant administered by the Council on Criminal Justice, was covered by the Act, and its provisions became applicable to him when he announced his intention to seek his party's nomination for an elective office. See also, Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F.2d 1346 (4th Cir.), cert. denied, 403 U.S. 936 (1971), affirming the lower court's holding that the Act applied to the executive director of a federally funded local parks authority, and that his running for reelection as a partisan
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member of the Virginia House of Delegates warranted his dismissal from park authority employment and the withholding of federal loans and grants to the authority for failure to remove him.

ELECTIONS. ELECTORAL BOARD. MEMBERS AND GENERAL REGISTRAR ARE COUNTY OFFICERS. COUNTY ATTORNEY OR COMMONWEALTH'S ATTORNEY REPRESENTS LOCAL ELECTION OFFICIALS IN LITIGATION.

May 9, 1983

The Honorable Susan H. Fitz-Hugh, Secretary
State Board of Elections

This is in reply to your letter concerning county election officials who have been named as defendants in a civil action filed in the United States District Court for the Western District of Virginia. The suit challenges the actions of members of the electoral boards and the general registrars in both Lee and Scott Counties in the appointments of the registrars for the new four-year terms of office which began April 1, 1983.

The question has arisen as to who will represent these officials in the court proceedings. The county attorney for Scott County declines to accept any responsibility for defending the general registrar and the members of the Scott County Electoral Board in the present litigation on the ground that they are State, rather than county, officers and employees. You ask my opinion on the following questions:

1. Is a county electoral board to be considered a state or a local board, and are electoral board members and the general registrar state officers or county officers?

2. Which attorney, if any, is responsible for representing and defending the above election officials in civil litigation?

There is no firm rule expressed in the cases by which one may, with confidence, determine in every situation that a particular public officer or employee is a State or local governmental official, and, in fact, each such determination tends to be controlled by the context in which the question is presented. Thus, many years ago police officers were held to be State and not municipal officers, although the locality selects and employs them and pays their salaries. See, e.g., Alexandria v. McClary, 167 Va. 199, 188 S.E.158 (1936); Burch v. Hardwicke, 71 Va. (30 Gratt.) 24, 34 (1878). Indeed, a member of the city council has been held to be not a municipal but a State officer. See Lambert v. Barrett, 115 Va. 136, 78 S.E. 586 (1913).

There are no cases of which I am aware in which a court has declared county election officials to be either State or local officers in a context analogous to the present one.
The Scott County attorney relies upon a workmen's compensation case decided by the Industrial Commission of Virginia to support his view that registrars and electoral board members are State rather than local officials. In that case, O'Conner v. Arlington County Electoral Board, 60 OIC 333 (1981), the Industrial Commission upheld an opinion finding that a part-time assistant county registrar was an employee of the State Board of Elections, for purposes of allocating responsibility for payment of medical expenses of the individual, who was injured at a polling place. Whatever may be the merits of that decision, it provides little guidance outside the confines of workmen's compensation law, and the degree of support which it lends to the Scott County attorney's position is questionable because in the opinion the Industrial Commission expressly states that its holding is not inconsistent with a prior Opinion of the Attorney General that a city general registrar is to be considered an employee of the municipality and therefore subject to the rules and regulations of the municipality, nor with Huffman v. City of Lynchburg (I.C. 548-559, 11/29/77), which held an election poll worker to be an employee of the City of Lynchburg. See O'Conner, supra, at 337.

Examination of the relevant constitutional and statutory provisions reveals the following. Article II, § 8 of the Constitution of Virginia (1971), states "[t]here shall be in each county and city an electoral board composed of three members, selected as provided by law..." and, further, "[e]ach electoral board shall appoint the officers and registrars of election for its county or city." (Emphasis added.) Similar language is used in the statutes prescribing the appointment, qualifications and duties of electoral board members and registrars, to the effect that those officials must be residents and voters of their particular counties and that their functions and powers are confined to their respective jurisdictions. See, e.g., §§ 24.1-29, 24.1-30, 24.1-32, 24.1-43, 24.1-45, 24.1-45.1, 24.1-46 of the Code of Virginia.

Prior Opinions of this Office, rendered by successive Attorneys General over a period of many years, hold these local election officials to be officers and employees of the county or city involved. See, e.g., Reports of the Attorney General 1981-1982 at 301; 1972-1973 at 325; 1970-1971 at 162; 1968-1969 at 54; 1967-1968 at 105; 1961-1962 at 208; 1960-1961 at 124; 1956-1959 at 236; 1957-1958 at 111. I find no reason to depart from this consistently held position here. Accordingly, in answer to your first question, I am of the opinion that a county electoral board must be considered a local board rather than a State board, and electoral board members and the general registrar are county officers.

With regard to your second question, there is no statute which singles out local election officials for purposes of specifying who shall represent them in litigation. Prior Opinions of this Office consistently have held that the Commonwealth's attorney, who has a general duty to represent

A county electoral board and county election officials certainly would be included within the broad language of § 15.1-9.1:1 which states that the county attorney shall perform the duties of advising and representing "all boards, departments, agencies, officials and employees, of the county." Accordingly, it is my opinion that the Scott County attorney is responsible for defending Scott County election officials in the present civil litigation. In Lee County, which has no county attorney and which has a population exceeding fifteen thousand, there is no attorney directly responsible for representing any of the county boards or officials. The board of supervisors may, in its discretion, allocate funds to employ either the Commonwealth's attorney or private counsel to defend the county electoral board and electoral officials in the present litigation. See Reports of the Attorney General 1979-1980 at 90, 93; 1974-1975 at 30; 1970-1971 at 64; 1968-1969 at 13, 20; 1964-1965 at 51.

It should be noted that the responsibilities of the Attorney General with respect to civil litigation are specified generally in §§ 2.1-120 and 2.1-121, and in § 16.1-69.39:1. None of those statutes mentions the local electoral board as an agency which the Attorney General is obligated to represent.

Accordingly, in conclusion, I am of the opinion that the obligation to represent the local election officials in Scott County is with the Scott County attorney and the obligation in Lee County is with an attorney to be funded by the Lee County Board of Supervisors. Of course, nothing prevents the Scott County attorney, with the approval of his board of supervisors, or the Lee County officials from retaining private attorneys to assist in representing the local electoral officials.

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1See Kilgore v. Fitz-Hugh, et al., No. 83-0090-B (W.D. Va. filed March 30, 1983). You have also been named a defendant in the lawsuit.
2In a letter dated April 20, 1983, the county attorney suggests that I adhere to the long-standing policy of this
Office not to render official Opinions on matters in litigation, apparently on the ground that his motion to dismiss the county from the federal suit mentions his belief that county election officials are in fact State officers and employees. His concern in this regard is not well-founded, in that the question of who must represent the county general registrar and the county electoral board in litigation is not an issue before the court.

3See, however, Coleman v. Sands, 87 Va. 689, 13 S.E. 148 (1897), in which, although the matter is not at issue, the Court clearly treats the general registrar as a municipal officer connected with local public administration; and, more recently, Hardy v. Board of Supervisors of Dinwiddie County, 387 F.Supp. 1252, 1255 (E.D.Va. 1975), in which the court in construing former § 28 U.S.C. § 2281, which related to convening a three-judge court to restrain enforcement of a state statute by restraining the action of "any officer of such State," finds as follows: "A second requirement of the three-judge court statute is that the defendant shall be an officer of the State. The Board of Supervisors of Dinwiddie County and the Electoral Board of Dinwiddie County are, without doubt, local officials and not officers of the State." (Emphasis added.)

4The opinion twice misstates the law in its holding, by saying that the State Board of Elections determines the number, terms and duties of assistant registrars. See O'Conner, supra, at 336, 337. Section 24.1-45 provides that the county or city electoral board shall determine the number, set the term, and the general registrar shall establish the duties of assistant registrars.

5This decision of the Industrial Commission was not appealed but was instead overruled for future cases by the 1982 amendment to § 24.1-32.


7Note that an Opinion in the 1949-1950 Report of the Attorney General at 69 expresses the view that electoral board members are State officers for purposes of former § 15-504, prohibiting paid officers of a county from entering into contracts with the county governing body. This Opinion was overruled by an Opinion found in the 1958-1959 Report of the Attorney General at 236. See 1961-1962 Report of the Attorney General at 208.

8Note, in contrast, § 15.1-66.4 which provides for appointment of counsel to defend constitutional officers in civil actions arising out of performance of their official duties.

9Note, however, that the Commonwealth's attorney now is relieved of this responsibility in any county whose population exceeds fifteen thousand, although the board of supervisors thereof may retain him to represent county interests, as well as in any county which has created a county attorney's office and appointed a county attorney. See §§ 15.1-8.1(A) and 15.1-9.1:1; Reports of the Attorney General 1979-1980 at 90; 1975-1976 at 84.

10The Scott County attorney resists this conclusion on the additional grounds that the electoral board and the general registrar are subject to supervision of their practices by
the State Board of Elections and "do not operate under the jurisdiction of the county [the board of supervisors]." This circumstance certainly is not determinative of the question, and in fact other local boards, such as the school board and the welfare board, are beyond the supervisory jurisdiction of the board of supervisors in terms of policy-making and operations and yet have been included among those local boards which a Commonwealth's attorney or county attorney is to represent, absent statutes to the contrary. See, e.g., Reports of the Attorney General 1979-1980 at 89; 1975-1976 at 80; 1973-1974 at 69; 1972-1973 at 87; 1971-1972 at 75, 341. See fn. 9, supra.

ELECTIONS. ELECTORAL BOARD. PUBLIC OFFICERS. COMPATIBILITY. PART-TIME GOVERNMENT EMPLOYEES MAY NOT BE APPOINTED TO OR SERVE ON ELECTORAL BOARDS. ACCEPTANCE OF SECOND INCOMPATIBLE OFFICE VACATES FIRST.

March 4, 1983

The Honorable Susan H. Fitz-Hugh, Secretary
State Board of Elections

This is in reply to your recent request for my opinion on the scope of the prohibition contained in Art. II, § 8 of the Constitution of Virginia (1971) and in § 24.1-33 of the Code of Virginia, as it relates to three part-time employment situations which you specify.

The pertinent language of Art. II, § 8, which is virtually identical to the text of § 24.1-33, reads as follows:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

You refer to prior Opinions of this Office which hold that government employees cannot be appointed to the election offices listed in Art. II, § 8, and you ask that this interpretation be clarified further, in answer to the following questions:

"1. An electoral board member is offered a part-time job with the General Assembly after his appointment. If, in fact, the electoral board member takes the position does he have to resign his electoral board position?

2. If an electoral board member is hired as a substitute teacher after his appointment to the board,
does that member have to resign his electoral board position?

3. If a person who has accepted a part-time position with a government is up for re-appointment, is he eligible?

Prior Opinions of this Office, rendered both before and after July 1, 1971, the effective date of the 1971 Constitution, consistently have interpreted the language of Art. II, § 8, and that of its predecessor, to mean that those persons who are in the government offices or employment therein listed are ineligible either to be appointed to or to serve in the election posts specified. The prohibition is against dual officeholding of what are declared to be incompatible offices. Those Opinions which emphasized a distinction between appointment to and service in election offices were confined to situations involving public employees who were validly appointed to election posts prior to the effective date of the 1971 Constitution and who therefore were held eligible to serve out their terms of office in positions which became incompatible with their public employment on July 1, 1971, although they were ineligible for reappointment. See 1971-1972 Report of the Attorney General at 171, 192; see, also, 1971-1972 Report of the Attorney General at 154, 186 (an individual may not, after July 1, 1971, be appointed or serve in a prohibited dual capacity, although an individual placed prior to July 1, 1971, in what is now a declared incompatible position, may continue to serve).

Most directly relevant to your inquiry is an Opinion to the Honorable Joan S. Mahan, dated September 24, 1974, in answer to the questions whether § 24.1-33 permits a person who is a notary public to be appointed as a registrar, member of an electoral board or officer of election, and, conversely, whether a person serving in any of these election posts may become a notary public. Because the position of notary public has been held to be an office of profit, the Opinion answers both of these questions in the negative. As to the second question, it holds that an individual validly appointed to any of the election offices may not subsequently place himself in a position declared by statute to be incompatible. Applying the same principle to the three situations in your inquiry, it is my opinion that in each instance the electoral board member's acceptance of part-time employment renders him ineligible either to continue serving on the electoral board or to be reappointed thereto.

In each of your first two questions you ask if the person must resign from the electoral board after accepting part-time employment. In my opinion such a step is legally unnecessary because the very acceptance of the part-time public employment in each instance causes the electoral board position to become vacant. See Shell v. Cousins, 77 Va. 328 (1883) (acceptance of second incompatible office vacates the first without the necessity of a court judgment); see, also,
You next ask who bears the responsibility for instigating removal of electoral board members who are ineligible to continue their service in the three situations described above, and whether the State Board of Elections has the responsibility to investigate all electoral board members to determine if they are in violation of Art. II, § 8. As noted with regard to the three situations you present, acceptance of the incompatible public employment vacates the electoral board position in each case without the necessity that anyone instigate court action for removal, and it then becomes incumbent upon the appointing authority, here the judges of circuit court pursuant to § 24.1-29, to fill each such vacancy which has occurred. See Shell, supra.

Because sole appointment authority is vested in the circuit court, it is the responsibility of the appointing judges to determine that each prospective appointee to the electoral board, including one who is being reappointed or appointed to fill a vacancy, is fully eligible to serve thereon. It must be presumed that the courts have properly exercised their responsibilities and that those presently in election posts are fully qualified to be there. Accordingly, I am of the opinion that the State Board of Elections does not have the responsibility to investigate all electoral board members to determine whether they are in violation of Art. II, § 8.

1See § 31 of the Constitution of Virginia (1902).
2See, e.g., Opinion to the Honorable Daniel W. Bird, Jr., Member, Senate of Virginia, dated November 12, 1982 (person prohibited from simultaneously serving as paid county school board chairman and county general registrar); Reports of the Attorney General 1981-1982 at 297 (commissioner of accounts is a public officer and may not serve at the same time as member of a county electoral board); 1975-1976 at 118 (part-time non-contract county employee prohibited from serving as election judge); 1972-1973 at 172 (part-time postal service employee prohibited from serving as officer of election); 1971-1972 at 237 (officer of the law prohibited from serving as registrar or officer of election); 1967-1968 at 95 (deputy sheriff or deputy treasurer may not serve as member of county electoral board); 1967-1968 at 96 (person may not simultaneously hold the two offices of board of supervisors member and member of county electoral board).

See, also, I A.E. Howard Commentaries on the Constitution of Virginia 428 (1974) (Art. II, § 8, prohibition relates to those persons disqualified from serving on electoral boards or as election officers).


The General Assembly since has amended the Code of Virginia to prohibit the collection of any fee by a notary who also is a member of an electoral board, a general registrar or an officer of election. See § 47.1-19(C). A subsequent Opinion of this Office holds that there no longer is a conflict between service as a notary public and service as an election official although the prohibition against an occupant of any office of profit serving as an election official continues. See 1980-1981 Report of the Attorney General at 269.

See, also, 1965-1966 Report of the Attorney General at 114 (electoral board member who accepts part-time work with United States government agency for compensation is no longer eligible to serve in any election post); 1960-1961 Report of the Attorney General at 251 (precinct registrar who accepts position of substitute clerk to postmaster no longer eligible to serve in registrar position).

Note, also, that a person who, by accepting a second incompatible position has vacated his electoral board membership, may not be restored to the electoral board simply by resigning the second position but instead would need to be reappointed by the appointing authority after terminating the incompatible position if he is to resume such membership. See Shell, supra.


ELECTIONS. ELECTORAL BOARD. REGISTRAR. STATUTORY CONSTRUCTION. NEWLY ORGANIZED COUNTY ELECTORAL BOARD TO APPOINT GENERAL REGISTRAR IN FIRST WEEK OF MARCH. AMBIGUOUS PHRASE "TO EXPIRE MARCH ONE" IN § 24.1-29 CONSTRUED IN CONTEXT WITH §§ 24.1-30, 24.1-43, 24.1-44 TO MEAN OUTGOING BOARD MEMBER'S TERM ENDS AT BEGINNING OF MARCH ONE.

March 24, 1983

The Honorable Susan H. Fitz-Hugh, Secretary
State Board of Elections

This is in reply to your recent inquiry concerning the appointment of a general registrar for Lee County. It appears from the documents enclosed with your letter that two members of the outgoing Lee County electoral board met on March 1, 1983, for the purpose of appointing the present registrar whose term expires March 31, 1983, as the successor registrar for the new term of office which commences for that position on April one. The members of the incoming electoral board subsequently met and appointed a different person as the new registrar. You ask which of the two appointees, each of whose appointments has been certified to your office, is to be considered as the duly appointed Lee County general registrar for the term beginning April 1, 1983.

Section 24.1-30 of the Code of Virginia provides in pertinent part as follows, with respect to electoral board members:
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Section 24.1-30 of the Code of Virginia provides in pertinent part as follows, with respect to electoral board members:

Section 24.1-30 of the Code of Virginia provides in pertinent part as follows, with respect to electoral board members:
"The electoral board of each city and county shall convene in regular session at such time during the first week in the month of February and in the month of March of each year as the board may prescribe, and at any other time upon the call of any member of the board, and at any special meeting the board shall have the same powers as at a regular meeting. At any session two members shall constitute a quorum." (Emphasis added.)

With respect to appointment of registrars, the pertinent portion of § 24.1-43 reads as follows:

"Each electoral board in the Commonwealth at its regular meeting in the first week in the month of March, 1983, and every four years thereafter, shall appoint a general registrar...." (Emphasis added.)

Section 24.1-44 provides as follows with regard to the registrar's term of office:

"The term of office of the general registrar shall begin on April 1, 1983, and every four years thereafter, and shall continue until a successor is duly appointed and qualified." (Emphasis added.)

Each member of an electoral board is appointed for a term of office of three years "to expire March one" in the year of expiration. Section 24.1-29. The dispositive legal question for consideration here is whether the two persons representing the outgoing Lee County electoral board, the term of one of whom expired March 1, 1983, were empowered to act as a board on March one and therefore validly appointed a registrar. Their contention, and that of their appointee, is that the outgoing board member's term did not expire until the end of the day on March 1, 1983, and therefore his presence with the other member at any time on that date created a quorum whose action to appoint a registrar was a valid action of the board. The opposite contention is that the outgoing member's term expired at the very beginning of March one, and thus, no quorum existed at the purported meeting and the appointment of a registrar at that meeting was invalid. That being the case, the appointment made by the newly organized board must be considered the valid one.

The phrase "to expire March one," standing alone, is ambiguous, in that it may mean the beginning or the end of that day. Resort must be had to accepted principles of statutory construction to determine its meaning in the context in which it is found. The Code of Virginia principles of construction concerning expressions of time do not appear to be applicable here, nor have I discovered a Virginia case, or any from another jurisdiction, which definitively interprets the words "to expire" in a context analogous to the present one. The phrase in question is part of a statute which necessarily must be read together with other statutes touching upon the composition and functions of electoral boards, relevant parts of which are quoted above,
particularly as they may relate to the required appointments of registrars. In so doing, a construction must be adopted, consistent with the statutory language used, which will achieve the object intended by the legislature.

An examination of the above referenced statutes reveals that, prior to the 1982 amendments thereto, each electoral board was directed to meet in the first week of February every four years to appoint a registrar whose term would begin on March one, and that the statutes were amended in 1982 to direct each electoral board to meet in the first week of March every four years to appoint a registrar whose term is to commence April one in each instance. See Ch. 290, Acts of Assembly of 1982 and the emphasized portions of the statutes quoted above. The provision of § 24.1-29 that electoral board members' terms are to expire March one, however, remains intact.

If one interprets § 24.1-29 to mean that a member whose term expires March one remains in office throughout that day, then the effect of the 1982 amendments is to create the possibility of two contesting registrar appointments made by actions of two overlapping electoral boards, the effective appointment presumably being that made by the board which wins the race to meet and act on March one. I cannot conclude that the legislature, in its latest enactments, intended to create such a state of ambiguity and the accompanying potential for conflict. It must be presumed, instead, that the General Assembly definitely intended either the outgoing board or the incoming board, certainly not both, to meet in the first week of March 1983, and appoint a registrar for the ensuing four years. Had it intended outgoing electoral boards to appoint registrars this year and hereafter no amendments would have been necessary, because the statutes formerly provided for the meeting to be held and the appointment made in the first week of February, well before the March one expiration of the term of an outgoing board member.

The more reasonable interpretation of the statutes is that the General Assembly, in the 1982 amendments, expressed its intention that the newly organized board appoint a general registrar at its meeting in the first week of March. In order to give effect to that intention, and to allay uncertainty in application of the statutes, the phrase "to expire March one" in § 24.1-29 necessarily must be construed to mean that an outgoing electoral board member's term comes to an end at the appearance of the first moment of that day, and any purported official board action taken thereafter which is dependent upon the presence and the vote of that member is void. Accordingly, in answer to your inquiry, it is my opinion that Phillip Lee Cheek, having been duly appointed by the newly organized Lee County electoral board at its meeting in the first week of March, is the Lee County registrar as of April 1, 1983.
The electoral board consists of three members appointed by circuit court, each for a three year term on a staggered term basis. See § 24.1-29. In every year the term of one member expires and an appointment is made to occupy the succeeding term of membership on the board. The result of the process, in effect, creates a new board, which must elect a chairman and a secretary and, in any year when the registrar's term of office expires, appoint a new registrar. See §§ 24.1-29, 24.1-30, 24.1-43. The "outgoing board" in this instance consisted of one member whose term expired this year and two members whose terms will expire, respectively, in 1984 and 1985. The "incoming board" consists of one member appointed to replace the former member whose term expired this year, plus the two members whose terms will expire in the subsequent two years.

It is worthy of note that the minutes of the meeting of this quorum on March one record only a nomination for registrar, with a second, and then a subsequent adjournment of the meeting without any final action on the nomination. In light of the conclusion reached below, it is unnecessary to address the issue of whether or not this meeting otherwise met the scheduling and notice requirements of § 24.1-30 for the regular session of the board to be held in the first week of March.


In light of the conclusion reached below, it is unnecessary to address the issue of whether or not this meeting otherwise met the scheduling and notice requirements of § 24.1-30 for the regular session of the board to be held in the first week of March.


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1982-1983 REPORT OF THE ATTORNEY GENERAL

ELECTIONS. ELECTORAL BOARD. REGISTRARS. COMMISSIONER IN CHANCERY MAY NOT AT SAME TIME SERVE ON LOCAL ELECTORAL BOARD, PURSUANT TO ART. II, § 8 OF CONSTITUTION AND § 24.1-33. PUBLIC SCHOOL EMPLOYEES MAY NOT SERVE AS VOLUNTEER ASSISTANT REGISTRARS WITHOUT COMPENSATION.

June 1, 1983

The Honorable Jesse J. Johnson, Jr.
Chairman, Suffolk Electoral Board

This is in reply to your letter in which you request my opinion on the following questions concerning local election officials:

"1) Can a member of an Electoral Board also serve as a Commissioner in Chancery for the Court within the locality where he serves on said Board?

2) May a person serve as an Assistant Registrar on a volunteer basis (receiving no compensation) and work on a substitute basis in a cafeteria in a public school located within the locality where the said person wishes to serve as an Assistant Registrar?

3) May a person serve as a volunteer Assistant Registrar (receiving no compensation) while being a teacher in a locality other than the locality wherein that person proposes to serve as an Assistant Registrar?"

The answers to your inquiries are governed by Art. II, § 8 of the Constitution of Virginia (1971) and § 24.1-33 of the Code of Virginia. The pertinent language of Art. II, § 8, which is virtually identical to the text of § 24.1-33, reads as follows:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

Prior Opinions of this Office consistently have interpreted the above quoted language to mean that those persons who are in the government offices or employment listed are ineligible either to be appointed to or to serve in the election posts specified. The prohibition is against dual officeholding of what are declared to be incompatible offices. See Opinion to the Honorable Susan H. Fitz-Hugh, Secretary, State Board of Elections, dated March 4, 1983, and the Opinions cited therein.

None of the positions about which you inquire is an elective office of profit or trust. Thus, it is necessary to
determine at the outset in each case whether the position involves either employment by a governmental body or the holding of a public "office or post of profit or emolument" as contemplated in Art. II, § 8.

With respect to your first inquiry, the material question is whether a commissioner in chancery occupies a public office of profit or emolument, for if he does, he may not at the same time serve as a member of an electoral board. The criteria for determining whether a position is a public office have been stated to be that the position is created by the Constitution or statutes, it is filled by election or appointment, with a designation or title, and duties concerning the public, which are assigned by law. Often, there also are prescribed a fixed term of service and an oath. See, e.g., 1981-1982 Report of the Attorney General at 305; 1977-1978 Report of the Attorney General at 322.

Chapter 23 of Title 8.01 authorizes the appointment of commissioners in chancery and prescribes their duties. Section 8.01-607 directs each circuit court to "appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court." Each commissioner is directed by statute to examine and report upon matters referred to him by any court, and the conduct of proceedings before him are prescribed in Ch. 231 and the Rules of Court. See § 8.01-609, et seq., and Rules 2:17 and 2:18. "A commissioner in chancery is an officer appointed by the chancellor to aid him in the proper and expeditious performance of his official duties." Raiford v. Raiford, 193 Va. 221, 226, 68 S.E.2d 888 (1952). "That the office of commissioner in chancery is one of the most important known in the administration of justice will be universally conceded. His duties are of a grave and responsible nature; he is the assistant to the chancellor." Id., citing Bowers v. Bowers, 70 Va. (29 Gratt.) 697 (1878). See, also, Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S.E. 751 (1909); 1974-1975 Report of the Attorney General at 219 (a commissioner in chancery is a quasi-judicial officer who is appointed by the court for the convenient dispatch of the court's business).

Clearly a commissioner in chancery is an officer of the circuit court in a capacity different from that of the ordinary attorney. Moreover, I conclude that the position meets the criteria for a public office and therefore must be considered a governmental office or post for purposes of Art. II, § 8 and § 24.1-33. The question now becomes whether it is an office or post of "profit or emolument."

Profit or emolument of office, for purposes of § 24.1-33, is a term broader than salary, and is generally defined as any pecuniary gain derived from an office above reimbursement for expenses. See 1981-1982 Report of the Attorney General at 301, 304 (fn. 9). Section 14.1-133 authorizes a commissioner in chancery to charge certain prescribed fees "for services rendered by virtue of his
office." (Emphasis added.) Although the funds to pay the fees may not come from a government treasury, that fact cannot be considered material in light of the broad language of both Art. II, § 8 and § 24.1-33, which makes no distinction in either instance as to the monetary source of the profit or emolument. Virginia statutory law provides the legal source of the fees attached to the office of commissioner in chancery, and, manifestly, a person would not be eligible to collect such fees in the absence of statute and without having been appointed to the office pursuant to statute. Indeed, it is unlikely that an attorney would accept appointment to, and carry out the duties of, the office of commissioner in chancery if this emolument were not available pursuant to law. I conclude that the office of commissioner in chancery is one of "profit or emolument" for purposes of Art. II, § 8 and § 24.1-33.3 In this respect it is indistinguishable from a commissioner of accounts,4 which position has been held to be a public office or post of profit or emolument for purposes of § 24.1-33. See 1981-1982 Report of the Attorney General at 297. Accordingly, in answer to your first question, I am of the opinion that a member of an electoral board may not also serve as a commissioner in chancery.

In regard to your other two inquiries, the first question for consideration in each case is whether the person who proposes to serve as an assistant registrar is, in his other position, an employee of the Commonwealth or of a county, city or town. Prior Opinions of this Office hold both a school cafeteria employee and a substitute teacher are employees of a locality and, therefore, are ineligible, by virtue of their employment in each case, to serve in an election post listed in § 24.1-33. See, respectively, 1970-1971 Report of the Attorney General at 154; 1978-1979 Report of the Attorney General at 97.5 The remaining question, then, is whether the prohibition applies as well to the employee's proposed service as an assistant registrar, in light of the fact that § 24.1-33 refers only to service as "a member of the electoral board or registrar or an officer of election." Section 24.1-45 provides for the appointment and compensation of assistant registrars and directs the general registrar to establish their duties. Section 24.1-45 reads as follows in that part pertinent to your inquiries:

"All assistant registrars shall be appointed by the general registrar and shall have the same limitations, qualifications and fulfill the same requirements as the general registrar except that an assistant registrar may be an officer of election." (Emphasis added.)

It is clear that a government employee who is ineligible by reason of his employment to serve as a general registrar is equally ineligible to serve as an assistant registrar, by virtue of § 24.1-45. A prior Opinion of this Office has so held. See 1971-1972 Report of the Attorney General at 170 (a
county librarian may not be appointed as a deputy registrar for the purpose of taking registrations at various libraries at such times as they are open). It is to be noted also that § 24.1-45 makes no distinction between paid and volunteer assistant registrars in imposing upon them the same limitations, qualifications and requirements as are imposed upon a general registrar. Accordingly, in answer to your second and third questions, a person may not serve as a volunteer assistant registrar and at the same time be employed either as a teacher or as a substitute school cafeteria worker. The fact that the teacher would be employed in a locality different from the locality in which she would serve as the assistant registrar is also immaterial. The proscription applies regardless of the locality in which the assistant registrar is employed.

In summary, I conclude that each of the three questions you pose must be answered in the negative. This conclusion is based upon the consistent interpretations of the constitutional and statutory provisions governing election officials. Until such time as those provisions are changed, I am constrained to follow the prior interpretations.

1In addition to the duties and procedures generally set out in Ch. 23 of Title 8.01 statutes throughout the Code of Virginia provide for proceedings to be had before commissioners in chancery. See, e.g., 16 M.J. Reference and Commissioners, § 1 (1979); § 62.1-110 (court may refer to commissioner in chancery matters concerning petitions to impound surface waters); § 8.01-348 (clerk may draw jury names from box in presence of commissioner, when judge is absent); § 58-1117.1 et seq. (references to commissioners in chancery for proceedings to sell land for delinquent taxes).

See, also, § 55-113 (acknowledgements of contracts for the sale of real property may be taken before a commissioner in chancery); § 49-4 (a commissioner in chancery may administer oaths and take affidavits); § 19.2-12 (every commissioner in chancery, while sitting as such commissioner, shall be a conservator of the peace).

2See Black's Law Dictionary, 470 (5th ed. 1979) for the following definition of "emolument": "The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office." (Emphasis added.)

3The office is one of profit or emolument regardless whether any profit or emolument actually accrues. See 1974-1975 Report of the Attorney General at 166.

4See § 26-24: "The fees of commissioners of accounts for the special duties hereinbefore imposed upon them shall be the same as are now allowed by law to commissioners in chancery."

5See, also, 1975-1976 Report of the Attorney General at 118, which holds a part-time noncontract employee (a
kindergarten aide) to be ineligible to serve as an officer of election. The observation is made therein that problems encountered with § 24.1-33 can be corrected only by constitutional amendment.

But cf. the Opinion in 1970-1971 Report of the Attorney General at 128, which holds that an assistant general registrar may also be employed part-time in the treasurer's office, because said employee did not hold an "office" as contemplated in §§ 15.1-50, 24.1-43, 24.1-44 and 24.1-45. That Opinion does not consider the impact of § 24.1-33, and, to the extent that it is inconsistent either with the Opinion in 1971-1972 Report of the Attorney General at 170 or with the views expressed herein, it is overruled.

ELECTIONS. ELECTORAL BOARD. REGISTRARS. STATUTORY CONSTRUCTION. NEWLY ORGANIZED COUNTY ELECTORAL BOARD TO APPOINT GENERAL REGISTRAR IN FIRST WEEK OF MARCH. AMBIGUOUS PHRASE "TO EXPIRE MARCH ONE" IN § 24.1-29 CONSTRUED IN CONTEXT WITH §§ 24.1-30 AND 24.1-43 TO MEAN OUTGOING BOARD MEMBER'S TERM ENDS AT BEGINNING OR MARCH ONE.

March 24, 1983

The Honorable Susan H. Fitz-Hugh, Secretary State Board of Elections

This is in reply to your recent inquiry concerning appointment of a general registrar for Scott County. It appears from the documents enclosed with your letter that two members of the outgoing electoral board met on March 1, 1983, to appoint a registrar for the term commencing April one. Thereafter, the members of the incoming board met and appointed a different person as the new registrar. Both such appointments having been certified to your office, you ask which person is to be considered as the duly appointed general registrar for Scott County as of April 1, 1983.

Electoral boards are required by statute to meet in the first week of March, 1983, and every four years thereafter, to appoint general registrars. See §§ 24.1-30 and 24.1-43. From the documents made available it is clear that the dispositive question presented here is whether the first meeting and appointment on March 1 are affected by the fact that the term of office of one of the two persons who made up the quorum of the board on that date also expired March one, pursuant to § 24.1-29. This requires consideration of whether the phrase "to expire March one" in § 24.1-29 means that this person's term came to an end at the very beginning of that day, or whether his term continued until the end of March one, allowing him to meet and act on behalf of the electoral board at any time on that date.

This very question was considered in an Opinion to you, dated March 24, 1983, concerning a similar situation in Lee County, in which I held that the language in § 24.1-29 is to be construed to mean that an outgoing electoral board
member's term expires at the beginning of March one, and any meeting or action of the board thereafter which depends for its effect upon the presence and vote of such former member must be considered void. Applying this holding to the facts presented here, the meeting of the two persons representing the outgoing board, and the purported appointment of a registrar, are without effect. Accordingly, it is my opinion that Glenda Clark Duncan is the Scott County registrar as of April 1, 1983, having been duly appointed by the Scott County electoral board at its organizational meeting on March 4, 1983.

1An electoral board is composed of three members appointed by circuit court to staggered terms of three years each, with a member's term expiring every year. See § 24.1-29 of the Code of Virginia. Thus, for purposes of this Opinion the "outgoing" board consisted of one person whose term expired March one plus two members whose terms expire in subsequent years, while the "incoming" board consists of these latter two members plus the member newly appointed to take the place of the person whose term expired.

ELECTIONS. REFERENDUM. SPECIAL ELECTION. ALCOHOLIC BEVERAGE CONTROL LAWS. LOCAL OPTION. LOCAL OPTION ELECTION UNDER ALCOHOLIC BEVERAGE CONTROL LAWS IS SPECIAL ELECTION. REFERENDUM MUST BE ORDERED AT LEAST SIXTY DAYS PRIOR TO DATE FOR ELECTION.

October 18, 1982

The Honorable V. A. Shriner, Secretary
Electoral Board of Richmond County

This is in response to your recent inquiry concerning petitions filed by citizens asking that a referendum be held on the question whether alcoholic beverages may be sold in Richmond County, pursuant to § 4-98.12 of the Code of Virginia. You have been advised by the State Board of Elections that such referendum must be ordered at least sixty days prior to the date of the proposed "special election," pursuant to § 24.1-165, but counsel for the petitioners urges that the sixty day provision for a special election does not apply when a court orders the referendum to be held on the same day as the regular general election. You request my opinion as to which position is correct.

Section 4-98.12 provides for the holding of local option elections on the question whether mixed alcoholic beverages may be sold, upon filing of a petition of ten percent of the registered voters with the circuit court and entry of a court order for an election "in accordance with § 24.1-165."
Section 24.1-165 states in pertinent part as follows:

"Notwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, the provisions of this section shall govern special elections...Whenever any question or proposition is to be submitted to the electors of any county, city or town, or any referendum is ordered, the election on such question, proposition or referendum whether it be at a regular or special election shall in every case be held pursuant to court order as provided herein. The court order calling a special election shall state the question to appear on the ballot and shall be entered and the election held within a reasonable period of time subsequent to the receipt of the request for such special election if such request is found to be in proper order. No such special election shall be held unless it shall have been ordered at least sixty days prior to the date for which it is called."

Although § 24.1-165 states that in every case the election on a question or proposition submitted to the electors shall be held pursuant to court order, the order must be consistent with the other provisions of the statute. Because the election pursuant to § 4-98.12 is one on a proposition submitted to the voters for adoption or rejection, it must be considered a "special election" under the election laws. According to the express, mandatory language of § 24.1-165, quoted above, such a special election may not be held unless the court orders it at least sixty days prior to the date for which it is called.

Thus, although the court may order the special election to be held on the same day as a regular general election, I am of the opinion that the referendum is nevertheless a special election and the sixty day rule applies.

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1 See the definition contained in § 24.1-1(5)(c), which provides, in part, as follows: "'Special election' means any election, other than a general or primary election, which is held pursuant to law to fill a vacancy in office or to submit to the qualified voters a measure or proposition for adoption or rejection, provided that a special election shall be held on a Tuesday and may also be held on the day of a general election." (Emphasis added.)

2 See § 24.1-1(5)(c), supra, also, 1981-1982 Report of the Attorney General at 85, 86, which states 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." (Emphasis in the original.)
ELECTIONS. REGISTRARS. ASSISTANT REGISTRARS. ASSISTANT REGISTRARS TO HAVE SAME QUALIFICATIONS AS REGISTRAR. NONRESIDENTS OF CITY MAY NOT REGISTER CITY RESIDENTS FOR PURPOSE OF VOTING.

March 7, 1983

The Honorable William P. Robinson, Jr.
Member, House of Delegates

This is in reply to your recent request for my opinion whether a satellite voter registration office, located in a private business in the City of Norfolk, may utilize employees of the private business who are not residents of or registered voters in the city to register Norfolk voters in a registration drive.

The responsibility and authority to register voters in a locality is entrusted to the general registrar and such assistant registrars as he may appoint pursuant to § 24.1-45. See §§ 24.1-46 through 24.1-49.1. Thus, in order to have the legal authority to register persons for the purpose of voting, the private business employees about whom you inquire must first be appointed as assistant registrars. Compare 1966-1967 Report of the Attorney General at 102. The pertinent portion of § 24.1-45 provides as follows with respect to the appointment and qualification of assistant registrars:

"All assistant registrars shall be appointed by the general registrar and shall have the same limitations, qualifications and fulfill the same requirements as the general registrar...."

Among the qualifications and requirements applicable to the general registrar, and thus also to assistant registrars, is that he must be a qualified voter of the jurisdiction for which he is appointed. See § 24.1-43. In order to be qualified to vote in a jurisdiction, one must have his residence there, and his business address is insufficient for that purpose unless it is also the place he intends to permanently reside. See Art. II, § 1 of the Constitution of Virginia (1971); 1978-1979 Report of the Attorney General at 95. Because, as you state, the persons in question are neither residents of nor registered voters in Norfolk, they are ineligible for appointment as assistants to Norfolk's general registrar. Accordingly, I must answer your inquiry in the negative.

1 I will assume for purposes of this inquiry that the private businesses involved have been determined properly to be "public places for registration" as contemplated in § 24.1-49 of the Code of Virginia, and no opinion is expressed herein on that subject. See Opinion to the
ELECTIONS. REGISTRATION. PLACES WHICH MAY BE DESIGNATED AS ADDITIONAL PLACES FOR REGISTRATION. MUST BE "PUBLIC PLACES."

August 20, 1982

The Honorable Warren G. Stambaugh
Member, House of Delegates

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

"I am writing to solicit your opinion in regard to Section 24.1-49 of the Code of Virginia, particularly as it relates to the definition of 'public places.'"

Section 24.1-49 provides that either the registrar or the electoral board "may set other times and places in public places for registration." Is the term 'public places' as used in this section limited to government buildings or facilities? If not, what are the minimum requirements which must be met before a particular location qualifies as a 'public place' under this section?"

Section 24.1-49 permits the general registrar or electoral board to "set other times and places in public places for registration." The section does not expressly state that the public places must be located in buildings or facilities. Unquestionably, it is possible to maintain a public office in a privately owned building, and to conduct registration of voters at places other than in buildings. Accordingly, I am of the opinion that the term "public places" as used in § 24.1-49 is not limited to government buildings or facilities.

In order for a particular location to qualify as a "public place" within the contemplation of § 24.1-49, it will be necessary for the registrar to determine whether the place chosen for registration is open and accessible to the general public. In a prior Opinion found in the 1971-1972 Report of the Attorney General at 190, 191, this Office opined that the
place where a registrar sits must be open and accessible to the general public and "cannot be closed only to a special group or class of individuals."

The phrase "public place" is a relative term and what is "public" for one purpose may not be "public" for another.\(^1\) For instance, in *Lloyd Corp. v. Tanner*, \(^2\) the United States Supreme Court held that a shopping center may be open to the public for shopping, but not for distributing handbills.

It is generally held that the purpose of voter registration statutes is to provide the fullest opportunity to voters to register while taking reasonable measures to prevent fraudulent voting.\(^3\) Therefore, "public place" should be broadly construed so as to promote ready access to the public for the registration of voters.

Although I do not believe it is feasible to attempt to enunciate "minimum requirements" which must be met before a particular location qualifies as a public place within the contemplation of § 24.1-49, I suggest that the registrar be guided by the foregoing guidelines to determine if the place chosen is open to the general public and will provide ready access to any member of the general public who may be qualified to register as a voter.\(^4\)

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\(^1\) Gulas v. City of Birmingham, 39 Ala. App. 86, 94 So.2d 767 (1957).


\(^3\) Edwards v. Flint City Clerk, 9 Mich. App. 367, 156 N.W.2d 153 (1968); Welch v. Williams, 96 Cal. 365, 31 P. 222 (1892).

\(^4\) I draw your attention to the requirement under the Voting Rights Act of 1965 for preclearance by the Department of Justice in the event the registrar exercises the authority to establish additional times and places for registration.

ESTATES. INSOLVENT DECEDENT. FUNERAL EXPENSES. NOT TO EXCEED $500; TAKES PRIORITY IN DISTRIBUTION OF AVAILABLE ASSETS.

December 16, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

You have requested my opinion on the permissible amount and manner in which the burial expenses of an intestate decedent may be paid in cases in which (1) there is no surviving consort or next of kin, (2) the sole asset of the decedent is a bank account of approximately $900 and (3) the expenses in connection with the final illness and burial exceed the amount in the bank. You are particularly interested in knowing if the voluntary payment of funeral
expenses could be made by the bank pursuant to § 6.1-71 of the Code of Virginia.

I am of the opinion that the procedure permitted for voluntary release of bank funds under § 6.1-71 is not available under the circumstances in this case. That section reads as follows:

"When the balance in any bank or trust company to the credit of a deceased person, upon whose estate there shall have been no qualification, shall not exceed five thousand dollars, it shall be lawful for such bank or trust company, after sixty days from the death of such person, to pay such balance to his or her spouse, and if none, to his or her next of kin, whose receipt therefor shall be a full discharge and acquittance to such bank or trust company to all persons whomsoever on account of such deposit; provided, such sum, not exceeding the amount given priority by § 64.1-157, after thirty days from the death of such person, at the request of the consort, or if no consort, then the next of kin, may be paid to the undertaker or mortuary handling the funeral of such decedent and a receipt of the payee shall be a full and final release of the payor."

Direct payment of funeral expenses under this section is dependent upon a request by the surviving consort or next of kin. Inasmuch as there is no such consort or next of kin in the case which you describe, the bank may not pay the funeral expenses directly and, at the same time, insulate itself against potential liability for an incorrect distribution of the account.

I am of the opinion that distribution of the personal estate of the decedent under these circumstances is governed by § 64.1-157. Funeral expenses, not to exceed five hundred dollars, take priority in the distribution of available assets in the hands of the personal representative when the assets of the decedent are not sufficient for the satisfaction of all demands against him. The precise amount to be allowed, not to exceed $500, will be whatever is reasonable under the circumstances. Scott Funeral Home, Inc. v. First National Bank of Danville, Administrator, etc., 211 Va. 128, 176 S.E.2d 335 (1970).

To summarize, I am of the opinion that the permissible burial expenses under the circumstances outlined by you may be paid only after appropriate administration, or escheat, of the estate, and the amount shall be fixed at whatever is reasonable under the circumstances, not to exceed the $500 maximum fixed by statute.

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1Section 64.1-157 reads in pertinent part as follows: "When the assets of the decedent in the hands of his personal representative, after the payment of the allowances provided
in article 5.1 (§ 64.1-151.1 et seq.) of chapter 6 of Title 64.1, funeral expenses not to exceed five hundred dollars, and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied:

First. To debts due the United States;
Second. To claims of physicians, not exceeding seventy-five dollars, for services rendered during the last illness of the decedent; and accounts of druggists, not exceeding the same amount, for articles furnished during the same period; and claims of professional nurses or any other person rendering service as a nurse to the decedent at his request or the request of some member of his immediate family, not exceeding the same amount, for services rendered during the same period; and claims of hospitals and sanitariums, not exceeding two hundred dollars, for articles furnished and services rendered during the same period...."

ESTATES. INTESTATE SUCCESSION. REAL ESTATE AND PERSONAL PROPERTY PASS TO SURVIVING SPOUSE FIRST, UNLESS DECEDENT IS SURVIVED BY CHILDREN WHO ARE NOT CHILDREN OF SURVIVING SPOUSE.

August 13, 1982

The Honorable Evelyn M. Hailey
Member, Senate of Virginia

This is in response to your inquiry concerning the operation of § 64.1-11 of the Code of Virginia, as amended by Ch. 304, Acts of Assembly of 1982. You are specifically interested in whether the amendments pertaining to descent and distribution of an intestate's estate will preclude a surviving spouse/step-parent receiving one-third (1/3) of the deceased spouse's personalty in the event the decedent has surviving children, or their descendents, who are not the children of the surviving spouse.

Chapter 304, amending and re-enacting §§ 64.1-1 and 64.1-11 reads in pertinent part as follows:

"§ 64.1-1. Course of descents generally. -- When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, in the following course:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendents, one or more of whom are not children or their descendents of the surviving spouse, in which case such estate shall pass to the intestate's children and their descendents subject to the provisions of § 64.1-19.

Second. If there be no child, nor the descendent of any child surviving spouse, then the whole shall go
1982-1983 REPORT OF THE ATTORNEY GENERAL

§ 64.1-11. Distribution of personal estate. -- When any person shall die intestate as to his personal estate or any part thereof, the surplus (subject to the provisions of article Article 5.1 (§ 64.1-151.1 et seq.) of chapter Chapter 6 of Title 64.1) after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which real estate is directed to descend. Except that if the intestate was married, the surviving spouse shall be entitled to one-third of such surplus, if the intestate left surviving children or their descendants, if no such children or their descendants survive, the surviving spouse shall be entitled to the whole of such surplus."

(Added words underscored and deleted words struck through.)

The amended portion of § 64.1-1 switches surviving spouses and children in succession classes 1 and 2, placing spouses in the first class and children in the second. The real estate now passes first to the surviving spouse if all the intestate's children are also the children of the surviving spouse. If one or more surviving child (or the child's descendants) are not the children of the surviving spouse i.e., stepchildren, the estate passes first to the intestate's children and their descendants, subject to the provisions of § 64.1-19 (the dower and curtesy statute). Stated differently, the surviving children, or their descendants, of the intestate continue taking first (as they did prior to the 1982 amendment) in those cases in which the surviving children are not also the children of the surviving spouse.

The amendment to § 64.1-11 retained the existing scheme for passing the residue of the personal estate of an intestate decedent as if it were real estate. Real estate passes as directed in § 64.1-1. As pointed out hereinabove, if the real estate passes first to the children, or their descendants, of the intestate, they take subject to the one-third (1/3) interest reserved to the surviving spouse as provided in § 64.1-19. By virtue of § 64.1-11, the personal property would also pass in the same manner.

In the event the surviving children, or their descendants, take in the first class, as provided in § 64.1-1, the surviving spouse's interest in the personal property would be the same as it is in the real property; namely, the equivalent of the statutory dower or curtesy interest provided in § 64.1-19. I am of the opinion that the 1982 amendment results in a stepparent receiving the same share which existed in the distribution of the personal estate for all surviving spouses prior to the 1982 amendment to § 64.1-11.
FEES. CONSTABLES. FEES FOR HIGH CONSTABLES OF CITY OF PORTSMOUTH ESTABLISHED BY § 14.1-105.

June 28, 1983

The Honorable S. Lee Morris, Chief Judge
Portsmouth General District Court

This is in reply to your letter of June 2, 1983, in which you ask whether the high constable of the City of Portsmouth will be entitled to charge for services in the general district court the same fees as the sheriff is entitled to charge for similar services in the circuit court.

This inquiry is prompted by my Opinion to you under date of May 20, 1983, in which I concluded that by virtue of the amendment to § 14.1-105.1 of the Code of Virginia, by Ch. 583, Acts of Assembly of 1983, that section will no longer apply to the City of Portsmouth. I further concluded that § 6.07 of the city charter governs the fees for the high constable after July 1, 1983. That section provides that the high constable shall have the powers and duties in relation to the municipal court as are now or may be hereafter granted by general law to sheriffs. It also provides that the fees to be charged by the high constable will be those prescribed by law for sheriffs.

As you point out, the statute prescribing fees for sheriffs in civil cases expressly restricts the fees to services provided by such officers in the circuit courts. See § 14.1-105. The question now presented is whether the high constable is precluded from charging fees or if he may charge the fees for services in the general district court as are fixed for sheriffs for services in the circuit court.

The General Assembly is presumed to have been aware of special acts (charters) providing for city high constables and the manner in which they establish fee schedules at the time of amending §§ 14.1-105 and 14.1-105.1. The 1971 charter provision for the City of Portsmouth providing that the high constable "shall receive such fees as are now or may hereafter be prescribed by law for sheriffs" was not affected by the subsequent amendment to § 14.1-105 which limits allowable fees for sheriffs only for services provided by sheriffs in the circuit courts.

In my opinion, the General Assembly, by amending § 14.1-105.1, did not intend to abolish the office of high constable in any city. To the contrary, the statute recognizes the existence of high constables in cities with populations both above and below populations of 265,000.

As of July 1, 1983, in those cities above 265,000, the fees for high constables are established by local ordinance. They are no longer tied to fees charged by sheriffs for similar services. In cities below 265,000, however,
§ 14.1-105.1, as worded, does not prohibit the charging of fees by such high constables where local charter provisions grant authority to charge the fees which are allowable for sheriffs for similar services. In Portsmouth, a city with a population below 265,000, the city charter, as noted above, expressly provides that the fees to be charged by the high constable will be those charged by sheriffs.

Accordingly, based upon my review of §§ 14.1-105, 14.1-105.1 and the Portsmouth City Charter, I am of the opinion that the high constable for the City of Portsmouth may continue charging for service in the general district courts the same fees as are allowable for sheriffs for similar service in the circuit courts.

Fees. § 14.1-105.1, as amended by 1983 General Assembly, sets method of establishing and disposing of fees of high constables for cities within population limits only.

May 20, 1983

The Honorable S. Lee Morris, Chief Judge
Portsmouth General District Court

You have asked whether service of process by the high constable of the City of Portsmouth will be valid subsequent to July 1, 1983, and whether § 14.1-105 of the Code of Virginia will govern the fees for such service.

Section 14.1-105.1 sets out the means for establishing the fees to be collected by the high constable and provides for disposition of the fees to the city treasury for use in the general operation of city government. Prior to July 1, 1983, this section applied to all cities having the office of high constable. By Ch. 583, Acts of Assembly of 1983, the General Assembly amended this section so that as of July 1, 1983, it will apply only to cities having a population in excess of 265,000 as reported in the United States Census of 1980. Consequently, § 14.1-105.1 will no longer apply to the City of Portsmouth, because the population of Portsmouth according to the United Census of 1980 is 104,577.

Section 6.07 of the city charter, Ch. 471, Acts of Assembly of 1970, creates the office of high constable and provides for its powers and duties. Subsection (b) of that section provides that the constable shall receive fees "as are now or may hereafter be prescribed by law for [sheriffs]." Section 14.1-105 is the general law which prescribes the fees for sheriffs.

It is my opinion that § 14.1-105.1 only concerns the means or methods by which fees for the services of the high constable are to be established and the disposition of such fees. It does not affect the creation of, appointment to, or duties of the office. These attributes of office are governed by the city charter. The validity of service of
process by the high constable is unaffected by § 14.1-105.1. Because the general law relating to establishment and disposition of fees will no longer be applicable to the City of Portsmouth after July 1, 1983, § 6.07 of the city charter governs the establishment and disposition of fees for the high constable of Portsmouth. Under that charter provision the fees to be charged by the high constable will be those "prescribed by law for sheriffs." These fees are set out in § 14.1-105. I, therefore, answer both your questions in the affirmative.

FEES. IN CASE OF MULTIPLE INDICTMENTS FEE MAY BE ASSESSED UNDER § 14.1-112(15) FOR EACH INDICTMENT, UNLESS ALL CHARGES WERE PROPERLY INCLUDABLE IN SINGLE INDICTMENT.

November 30, 1982

The Honorable L. Wayne Harper, Clerk
Circuit Court of Rockingham County

You have asked for my opinion on whether a defendant convicted on twenty separate felony indictments can be assessed a fee under § 14.1-112(15) of the Code of Virginia for each indictment. That section provides in pertinent part as follows:

"Upon conviction in felony cases the clerk shall charge the defendant twenty dollars in each case, and if not paid by the defendant, or in cases of acquittal, the clerk shall charge the Commonwealth a fee of ten dollars in lieu of all other fees payable by the Commonwealth, the same to be paid out of the treasury of the Commonwealth, when properly certified by the clerk for payment...."

In a closely analogous situation this Office has previously ruled that a clerk would be entitled to a fee (for filing and indexing all papers) on each warrant against the defendant. See 1957-1958 Report of the Attorney General at 133. Similarly, this Office has opined that a separate fee may be paid to court-appointed counsel for each indictment brought against the indigent defendant. See 1969-1970 Report of the Attorney General at 17. Furthermore, § 14.1-92 suggests that as a general rule a fee may be assessed on a "per indictment" basis. This statute specifies one instance in which multiple fees are not authorized. It provides in pertinent part as follows:

"Whenever more than one indictment shall be made against the same person or persons, at any term of a court for offenses growing out of the same transaction, when all of such offenses could have been properly included in a single indictment, no payment shall be made out of the State treasury to the clerk for services rendered in connection with the trial on, or other disposition of, any of such indictments in excess of one."
I infer from this language that as a general rule a fee may be charged for each indictment.

Accordingly, it is my opinion that a fee may be assessed under § 14.1-112(15) for each indictment, unless all charges were properly includable in a single indictment.

FEES. LOCAL WETLANDS BOARD MAY CHARGE SECOND FEE FOR PROCESSING MODIFIED PERMIT APPLICATION WHERE JUSTIFIED BY COST OF PROCESSING SUCH MODIFIED APPLICATION.

September 28, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked two questions concerning the processing of an application before a local wetlands board. You first ask whether an applicant for a permit from a local wetlands board must pay a second application fee for processing a modified application following the local board's denial of the first permit application, which denial was with leave to resubmit in modified form. The applicant appealed the ruling to the Marine Resources Commission, which, in turn, remanded the application to the local board for a review on the merits of the modified application.

The Wetlands Act, § 62.1-13.1, et seq., of the Code of Virginia, provides generally that all non-exempt development of wetlands requires a prior permit from either a local wetlands board or the Marine Resources Commission. Section 62.1-13.5 provides the only form of Wetlands Zoning Ordinance allowed. Section 4(c) of that form deals with fees as follows:

"A nonrefundable processing fee to cover the cost of processing the application, set by the applicable governing body with due regard for the services to be rendered, including the time, skill, and administrator's expense involved, shall accompany each application."

Section 9(b) provides that if the local board denies the application, it shall do so "with leave to the applicant to resubmit the application in modified form."

The statute authorizes the applicable governing body to set a fee to cover the cost of processing the application including the time, skill and administrator's expense involved. I am of the opinion that, if the amended application is equivalent to a new application which must be processed, the local wetlands board can determine that the cost involved in processing such amended application justifies the imposition of an additional fee.

You also ask whether consideration of the modified proposal must be readvertised. Sections 6 and 7 of the
Wetlands Zoning Ordinance, as provided in § 62.1-13.5, require a hearing on each application after newspaper publication and mailed notification to certain designated persons. Any person may be heard at the hearing. This provision is clearly intended to allow anyone interested to be heard, and to provide them with notice of their opportunity to be heard.

Because the modified application in the case referred to in your letter proposes to use pilings rather than fill, I assume that it is equivalent to a new application for purposes of advertising the hearing. The public has not had the statutorily required opportunity to be heard on the new proposal. See 1978-1979 Report of the Attorney General at 326. I am, therefore, of the opinion that a hearing on a modified application, which substantially differs from the original, must be advertised as required by the Wetlands Zoning Ordinance, as provided in § 62.1-13.5 (§ 6).

FLAGS. COUNTY MAY DESIGN AND DISPLAY FLAG USING COUNTY SEAL.

January 11, 1983

The Honorable Charles G. Flinn
County Attorney for Arlington County

This is in reply to your recent letter requesting my opinion whether Arlington County has the authority to design and display a county flag.

I am aware of no prohibition against the displaying of a flag which is selected by the governing body as the "county" flag. On the other hand, in Virginia, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.1 You suggest the flag might be designed to include a likeness of the county seal authorized by § 15.1-506 of the Code of Virginia. Although there is no express provision that a county seal may be displayed in the form of a flag, the authority to have a seal could fairly and reasonably be extended to allow a county to display its seal in a manner which it deems appropriate.

Accordingly, I am of the opinion that a county may design and display a county flag using the design of the county seal if the governing body desires to do so.

1Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975). The rule 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. See, also, Art. VII, § 3 of the Constitution of Virginia (1971).
GAMBLING: CRIBBAGE TOURNAMENT WHERE CONTESTANTS COMPETE FOR ANOTHER'S ENTRY FEE IS ILLEGAL GAMBLING.

May 6, 1983

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

You have asked whether a proposed Tidewater Invitational Cribbage Tournament would violate Virginia's gambling laws or whether it falls within an exception to those statutes. You advise that the contestants in the tournament pay an entrance fee of $26.00 of which fifteen percent is used to cover tournament expenses and the remainder is returned to the winning players as prizes.

Section 18.2-325 of the Code of Virginia provides, in pertinent part, that:

"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...dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling."

Section 18.2-333, however, exempts certain activities as follows:

"Nothing in this article shall be construed to prevent any contest of speed or skill between men, animals, fowl or vehicles, where participants may receive prizes or different percentages of a purse, stake or premium dependent upon whether they win or lose or dependent upon their position or score at the end of such contest."

This Office has repeatedly held that an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together. See, e.g., Reports of the Attorney General 1977-1978 at 238 and 241; 1972-1973 at 258; 1969-1970 at 167; 1962-1963 at 119. Under the facts you presented, participants are eligible to win a portion of the money paid as an entrance fee. Thus, the element of prize is present.

With respect to the element of consideration, eligibility to participate in the tournament and obtain a money prize is dependent on the participant's initially giving something of value, i.e., the entrance fee. Thus, I am of the view that the element of consideration is present. See 1981-1982 Report of the Attorney General at 174.

The final point of analysis is whether the element of chance is present. To be successful at cribbage, a player
normally must exhibit a certain degree of skill in both his knowledge of the game and the manner in which he plays his cards. Nevertheless, it is apparent that the outcome of the game largely depends on the luck of the draw. Accordingly, I conclude that the element of chance is present.

Moreover, even if the element of chance were not present, it is evident here that the payment of an entrance fee is, in large measure, simply a way for each participant to offer a fee for the chance to win the fee of another even though a part of the fee covers administrative costs. This conduct is also proscribed by § 18.2-325. See 1977-1978 Report of the Attorney General at 165.

For the foregoing reasons, I am of the opinion that the proposed tournament would be in violation of Virginia's gambling statutes.

GAME AND INLAND FISHERIES. DAMAGE STAMP PROGRAM. CLAIMS FOR DAMAGE TO LIVESTOCK CAUSED BY PARASITIC DISEASE TRANSMITTED BY DEER NOT COVERED BY PROGRAM.

April 28, 1983

The Honorable John M. Lohr
Commonwealth's Attorney for Highland County

You have asked whether damage to livestock caused by parasites transmitted by deer qualifies for compensation under a local damage stamp ordinance adopted pursuant to the Damage Stamp Laws, § 29-92.1, et seq., of the Code of Virginia. You state that white-tailed deer are a normal host for a parasite worm, which if ingested by livestock, may cause a neurological disease. Your letter reads in part:

"The parasite is then transmitted by the deer's faeces to snails and slugs which act as intermediate hosts. The snails and slugs are then eaten by livestock which then occasionally contract the disease. My inquiry reveals that the meningeal worm can only complete its life cycle in a member of the cervi[ne] family, or occasionally livestock. The parasite seems to have no effect upon deer."

Section 29-92.11 establishes a damage stamp program for the purpose of providing a source of funds to be used to compensate persons who have suffered damage to crops, fruit trees, livestock or farm equipment as a result of injury or damage thereto caused by deer, bear or big game hunters. There is no other statutory limitation upon the types of damage covered. Heretofore, all known applications for compensation under the Damage Stamp Laws have covered damage caused by the direct physical activities of deer, bear or hunters. I am not aware that any disease-related damage claims have been filed or paid in the past.
There is no statutory basis upon which disease-related damage may categorically be excluded from the purview of this statute. However, I am of the opinion that the damage contemplated is damage to livestock caused by the physical actions of the animals or hunters, not the remote or speculative damage that occurs simply by virtue of the presence of the animals or hunters. As evidenced by the inclusion of the statement of intent of the General Assembly in § 29-92.1, the loss or damage should be a result of such activities. Accordingly, I am of the opinion that damage to livestock caused by a parasite transmitted by deer does not qualify for compensation under the program adopted pursuant to § 29-92.1.

1Section 29-92.1 reads as follows: "There is hereby established a damage stamp program to provide for an available source of funds to be used for the purpose of compensating persons who suffer damage to crops, fruit trees, livestock, or farm equipment as the result of injury or damages thereto caused by deer or bear or by big game hunters during the course of hunting seasons. It is the intent of the General Assembly that persons suffering loss or damage as the result of such activities should be realistically compensated for damages which occurred to their property as the result of such activity. A local governing body shall encourage to the maximum extent possible the utilization of the damage stamp fund for payment of claims in keeping with the purposes of this article." (Emphasis added.)

GAME AND INLAND FISHERIES. DAMAGE STAMP PROGRAM. COUNTIES MAY NOT REQUIRE PURCHASE BY THOSE WHO HUNT ONLY THEIR OWN LAND. MAY NOT CATEGORICALLY DENY CLAIMS OF NON-LANDOWNERS BUT MAY LEGISLATEVOLY PROVIDE FOR DISALLOWANCE OF CLAIMS BASED UPON NEGLIGENCE OF CLAIMANT.

January 25, 1983

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You have submitted three inquires regarding amendments or enforcement policies which Rockbridge County wishes to adopt with respect to its damage stamp ordinance enacted pursuant to § 29-92.1, et seq., of the Code of Virginia. I will discuss those in the order presented.

You first inquire whether the county may require a landowner to purchase a damage stamp if he hunts only on his own land. The administration of a damage stamp program includes the sale of stamps to those hunting bear or deer, which stamps are to be affixed to the reverse side of the hunting license of the person purchasing the stamp. See § 29-92.3. However, § 29-52 exempts a landowner from the need for a license to hunt on his own land. Moreover, it is
significant that the purpose of a damage stamp program is to provide a fund for payment of damages done both by big game and by big game hunters. It is unlikely that the legislature intended to permit a property owner to recover for damages which his property incurred while he was hunting on his property. It is my opinion, therefore, that the General Assembly did not intend to allow localities to require the purchase of damage stamps by those who hunt only on their own land and are exempt from having to purchase hunting licenses.¹

You next inquire whether the county may amend its ordinance to limit damage claims to those by a landowner, thereby excluding claims by tenants or renters. There is nothing in the damage stamp laws which would permit such a distinction. To the contrary, § 29-92.5 allows any person suffering damage, as defined in the damage stamp law, to file a claim. There is no indication that the General Assembly intended to limit compensation for damage to crops, fruit trees, livestock or farm equipment only to such damage as may be suffered on premises actually owned by the claimant. The owner of the property actually injured or damaged (the crops, fruit trees, livestock or farm equipment), no matter who he may be, is the appropriate claimant. It is my opinion, therefore, that no limit can be placed upon payments to property owners based upon their status as landowners.

You further inquire whether the county may prohibit payments to beekeepers who have negligently placed their hives in such a location as to invite damage by bears. There is nothing in the damage stamp laws which allows local ordinances to exclude categories of otherwise qualified claims.² On the other hand, there is nothing in the statutes to indicate that the fund is to reimburse property owners for damages resulting from their own negligence or lack of care.

It is clear the General Assembly intended to allow all claims for appropriate types of damage to be filed. Once filed, if a claim is denied or if there is no agreement as to the appropriate amount of damages, if any, the claimant may seek a judicial remedy under § 29-92.5. Evidence of negligence on the part of the claimant would be relevant in any such litigation. It is my opinion, therefore, that the county may provide by ordinance that claims may be denied when the damages are the result of the property owner's negligence.

¹Supportive of this conclusion is the requirement that a claimant must proceed civilly against a hunter who causes damage before being paid by the fund. See § 29-92.6. Obviously, a hunter causing damage to his own land would not proceed against himself in a court of law.

²I assume for purposes of this Opinion that beehives are farm equipment. Bees themselves are not farm animals or

GAME AND INLAND FISHERIES. DAMAGE STAMP PROGRAM. GRASS USED FOR GRAZING PURPOSES IS NOT "CROP" AND DAMAGE TO IT BY GAME OR HUNTERS IS NOT COMPENSABLE UNDER § 29-92.1, ET SEQ.

November 8, 1982

The Honorable John M. Lohr
Commonwealth's Attorney for Highland County

You asked whether grass used to graze livestock is a "crop" as that term is used in § 29-92.1, et seq., of the Code of Virginia. That statute, a part of Art. 4, Ch. 5 of Title 29, was adopted in 1981 to establish uniform standards for damage stamp programs.

The program generates funds to compensate those suffering damage or injury caused by big game or by big game hunters to "crops, fruit trees, livestock or farm equipment." The phrase "crops, fruit trees, livestock or farm equipment" had previously been used in earlier special legislation and the 1981 legislation continued use of the same phrase without change.

An Opinion of this Office construing the earlier legislation concluded that the term "crops" should be defined to include "all products of the soil that are grown, raised and gathered annually during a single season." (Emphasis added.) 1976-1977 Report of the Attorney General at 90. Under that definition, the Opinion concluded that evergreen shrubs raised in a nursery for resale were not "crops."

I see no reason to depart from the reasoning of that Opinion. It is my understanding that the grass described in your letter is not harvested or gathered but used only for grazing. I conclude, therefore, that grass grown for grazing purposes and which is not harvested or gathered annually is not a "crop" under the damage stamp laws.

1Section 29-92.1 reads in pertinent part: "There is hereby established a damage stamp program to provide for an available source of funds to be used for the purpose of compensating persons who suffer damage to crops, fruit trees, livestock, or farm equipment as the result of injury or damages thereto caused by deer or bear or by big game hunters during the course of hunting seasons."

August 13, 1982

The Honorable John M. Lohr
Commonwealth's Attorney for Highland County

You asked whether damage done by turkey hunters during the spring season may be paid out of a county damage stamp fund established pursuant to § 29-92.1, et seq., of the Code of Virginia.

The foregoing statute (designated as Art. 4, Ch. 5 of Title 29) was adopted in 1981 to replace prior local legislation on damage stamps. It authorizes localities to establish funds from which to pay damages done by big game hunters and by deer and bear. The revenue contained in such funds is raised through the sale, pursuant to § 29-92.3, of stamps for hunting bear and deer only. Hunting turkeys and other game does not therefore require such a county stamp, despite the fact that a State big game license is required to hunt turkeys, as well as bear and deer, pursuant to § 29-122.

In a prior Opinion, this Office ruled that the local legislation on damage stamps in effect in 1970 did not authorize payment of claims done by hunters during turkey season. 1969-1970 Report of the Attorney General at 132. The foregoing 1981 recodification of the damage stamp laws made no substantive change which would dictate a different result.

For the foregoing reasons and because turkey hunters do not contribute to damage stamp funds, it is my opinion that damage done by such hunters may not be paid out of those funds.

1 While "big game" is not defined specifically in this article of the Code, § 29-92.1 which is the legislative statement of intent, contains no reference to turkeys.

GAME AND INLAND FISHERIES. LAW ENFORCEMENT OFFICERS. CRIMINAL PROCEDURE. ALL LAW ENFORCEMENT OFFICERS HAVE DUTY TO ENFORCE TRESPASS LAWS ON POSTED PROPERTY.

July 6, 1982

The Honorable Vivian E. Watts
Member, House of Delegates

You have asked whether it is the duty of a law enforcement officer to enforce laws against trespass on posted lands in the absence of a complaint from the owner of the land. You have asked further whether a specific statute regarding trespass by hunters and fishermen is to be enforced differently from other trespass laws and, finally, you ask
whether enforcement responsibilities vary depending upon the type of law enforcement officer involved.

Trespass upon posted lands is punishable as a Class I misdemeanor pursuant to § 18.2-119 of the Code of Virginia. An officer has the duty to arrest a person who commits a misdemeanor in his presence, even without a warrant. Norfolk & Western Railway Co. v. Haun, 167 Va. 157, 164, 187 S.E. 481, 484 (1936); Yeatts v. Minton, 211 Va. 402, 177 S.E.2d. 646 (1970). A warrantless arrest is valid where the officer has probable cause to believe a misdemeanor has been committed in his presence. Yeatts, supra. Clearly, therefore, if an officer observes a trespass to posted property or has probable cause to believe such trespass is occurring in his presence, he has a duty to arrest the suspected violator even in the absence of a complaint from the owner of the land. A warrant must be secured before an arrest can be made if the offense is not committed in the officer's presence.

In practice, of course, because of the scarcity of law enforcement personnel and their inability to devote substantial time to searching for trespassers, violators are typically arrested upon a warrant obtained as a result of a complaint.

As to your second question, I can find no reason to reach a different conclusion with respect to enforcement of the statutes forbidding trespass to posted lands by hunters, fishermen and trappers. See §§ 18.2-132 and 18.2-134.

As noted above, all law enforcement officers having general police powers have a duty to enforce trespass statutes. As of July 1, 1982, full-time sworn game wardens employed by the Commission of Game and Inland Fisheries and special game wardens in certain situations have such powers pursuant to the 1982 amendment to § 29-32. For specific evidence of legislative intent as to enforcement, see § 18.2-136.1 (game wardens, sheriffs and all other law officers to enforce § 18.2-132, etc.), § 15.1-138 (local police) and § 52-8 (State police). Your last question is therefore answered in the negative.

GARNISHMENTS. COMMISSIONS FOR COLLECTION. WHEN PAYMENT CAN BE MADE DIRECTLY TO JUDGMENT CREDITOR.

August 13, 1982

The Honorable William R. Shelton, Judge
Chesterfield General District Court

In your recent letter you inquired whether it is permissible under Virginia law for a garnishee to make his check payable directly to the judgment creditor without paying the commissions set forth in the Code to the officer who served the garnishment.
The answer to your question will vary, depending upon when and to whom the garnishee delivers payment. Section 8.01-520 of the Code of Virginia provides that a garnishee who tenders his payment prior to the return date of the summons may make such payment to the officer serving the garnishment or to the clerk who issued the summons.

Under § 8.01-499, an officer who receives such payment is entitled to deduct a commission, as well as expenses and costs. See 1979-1980 Opinion of the Attorney General at 176. Consequently, if a garnishee makes payment to the officer serving the summons, the payment cannot be made payable to the judgment creditor because the officer will be unable to deduct his commission of five per centum or expenses before turning it over to the clerk as required by § 8.01-499.

If, however, a garnishee takes the option to make payment to the clerk, as permitted in § 8.01-520 (prior to the return day of the summons), it would be permissible for a garnishee to deliver to the clerk a check payable directly to the judgment creditor without paying any commission to the officer serving the summons. This result is required because there is no provision for the officer to receive a commission if he does not make the collection. 1970-1971 Report of the Attorney General at 200.

Once a judgment is rendered, § 8.01-516 allows payment to the court or any officer whom the court may designate. I am advised that your jurisdiction has elected to designate the sheriff as the officer who receives payment or makes a collection of judgments against garnishees pursuant to § 8.01-516; hence, any payment to him may not be made payable directly to the judgment creditor, because the sheriff is entitled to a commission and expenses. In absence of such a policy, if payment is made to the court, the sheriff is not entitled to a commission and the check may be made payable to the judgment creditor. 1971-1972 Report of the Attorney General at 209.

GARNISHMENTS. COURT HAS NO OBLIGATION SUA SPONTE.

July 6, 1982

The Honorable Charles M. Stone, Judge
Henry County General District Court

You have inquired whether, when a garnishee fails to respond to a garnishment summons, the court is obligated to take further action, sua sponte, to determine the garnishee’s liability.

Section 8.01-519 of the Code of Virginia provides that if a garnishee fails to answer the summons "the proceedings shall be according to §§ 8.01-564...mutatis mutandis...." Section 8.01-564, relating to attachment, provides:
"If the [garnishment] be served on a defendant who the petition alleges is indebted to, or has in his possession effects of, the principal defendant, and he fail to appear, the court may either compel him to appear, or hear proof of any debt owing by him, or of effects in his hands belonging to a principal defendant in such [garnishment], and make such orders in relation thereto as if what is so proved had appeared on his examination."

In my opinion § 8.01-564 does not require the court, sua sponte, to compel the garnishee to appear or to hear proof of his liability. The statute is not mandatory; it provides that the court "may" take these steps. Only at the request of the plaintiff is the court required to take appropriate steps to determine the garnishee's liability.

GARNISHMENTS. EXECUTION FOR SUPPORT ARREARAGES VALID ONLY AFTER NOTICE AND OPPORTUNITY FOR HEARING.

June 7, 1983

The Honorable James E. Hoofnagle, Clerk
Circuit Court of Fairfax County

You advise that a garnishment naming the United States as the co-defendant has been requested by the filing of an arrearage affidavit, based on a final divorce decree which incorporated an agreement between the parties but did not specify an amount of money to be paid for child support and alimony. No judgment based on the decree was docketed in the judgment lien records. You ask (1) whether a writ of fieri facias may be issued on the final decree of divorce requiring continuing support payments; (2) would a judgment have to be docketed at this time; or (3) whether a further order is necessary.

In a garnishment proceeding against the United States to enforce a support decree, § 20-78.1 of the Code of Virginia provides that the original decree constitutes a final judgment for any sums in arrears. It further provides that execution shall issue on the suggestion of arrearage and motion of the party to whom the sums are allegedly due, "without further notice to the party...charged." Section 20-78.1 therefore contemplates that, without more, a writ of fieri facias and a summons in garnishment shall issue in accordance with §§ 8.01-466 and 8.01-511. This is not affected by the fact that the decree is not entered on the judgment lien docket, as the purpose of docketing is to establish liens on real estate. See § 8.01-458.

Even though the statute does not require notice and hearing, in my opinion, § 20-78.1 is subject to attack as being unconstitutional insofar as it permits garnishment of a person's wages without an adjudication that he is in arrears after notice and opportunity for him to be heard.
Griffin v. Griffin, 327 U.S. 220 (1946), was an action by a former wife to enforce a support decree under New York law. The original decree was entered in 1926. In 1936, after notice to the former husband and a contested hearing, the trial court entered an order finding the former husband to be in arrears. In 1938, on the ex parte motion of the former wife, the trial court entered another order finding the former husband to be in arrears between 1936 and 1938, and incorporating the still unpaid 1936 arrearages. As permitted by New York law, the 1938 order was entered without notice to the former husband.

On appeal, the Supreme Court of the United States held that to the extent the trial court had held the former husband to be in arrears between 1936 and 1938 without notice, its order violated the due process clause of the Fourteenth Amendment. The Court found that the 1938 order undertook substantially to affect the former husband's rights in ways which the 1926 and 1936 decrees did not. Id. at 229. It held that his right under New York law to seek relief after the execution did not cure the constitutional defect. Id. at 231-232.

I, therefore, answer your first question in the negative. In my opinion, Griffin is controlling here, and execution may not issue except on adjudication of the arrearage after reasonable notice and opportunity to be heard by the former husband. My view is strengthened by the legislative requirement in § 15.1-279(I) that juvenile and domestic relations district courts may enter arrearage orders only after notice and opportunity to be heard by the person alleged to be in arrears.

In response to your inquiry whether the divorce decree previously entered may now be docketed or if another order is required, in my opinion it may be docketed, but only in accordance with § 8.01-460.1 Thus, the decree may be docketed where the court so orders, or where the court, after reasonable notice to the party charged, enters an order adjudicating him to be delinquent. In either case, another court order would be required. Liens so created arise only when actually docketed. Section 8.01-460 was enacted in 1977; in my opinion, the section now applies regardless of whether the divorce decree was originally entered before or after 1977.

1Section 8.01-460 provides: "A decree, order or judgment for support and maintenance of a spouse or of infant children of the parties payable in future installments shall be a lien upon such real estate of the obligor as the court shall, from time to time, designate by order or decree. An order after reasonable notice to the obligor adjudicating that the obligor is delinquent, shall be a lien on the obligor's real estate. Liens under this section shall arise when duly docketed in the manner prescribed for the docketing of other
judgments for money provided, however, that no such decree, order or judgment for support and maintenance shall be docketed unless so ordered by the court in such decree, order or judgment. On petition by any interested person and after reasonable notice to the obligee, the court in which the obligor was adjudicated delinquent may order the release or other modification of such lien."

GRIEVANCE PROCEDURE. LOCALITY'S PROCEDURE CONTAINS REASONABLE TIME LIMITATIONS AND OTHERWISE COMPLIES WITH MINIMUM PROVISIONS OF STATE GRIEVANCE PROCEDURE, MAY PROPERLY BE APPROVED AS COMPLYING WITH § 15.1-7.1.

February 2, 1983

The Honorable Bernard S. Cohen
Member, House of Delegates

You have requested my opinion on a matter concerning local grievance procedures which have been approved by the State Department of Personnel and Training and adopted pursuant to § 15.1-7.1 of the Code of Virginia. Specifically, you have stated that there are instances where grievants wait as long as twelve to eighteen months for a hearing under local grievance procedures. You ask whether a procedure which results in such a delay satisfies the requirement of § 15.1-7.1 that such procedures afford an "immediate and fair method for the resolutions of disputes...." (Emphasis added.)

Section 15.1-7.1 required the governing body of every county, city and town which has more than fifteen employees to establish by June 30, 1974, a "grievance procedure for its employees to afford an immediate and fair method for the resolution of disputes...." That section further states that:

"Every such grievance procedure shall conform to like procedures established pursuant to § 2.1-114.5:1 and shall be submitted to the Director of the Department of Personnel and Training...for approval...."

In addition, § 15.1-7.2(A) provides in part that:

"Governing bodies required to establish a grievance procedure under § 15.1-7.1 shall, no later than January one, nineteen hundred seventy-nine, amend such grievance procedures to fully and closely comply with the definition of a grievance and the minimum provisions of the State grievance procedure as described in § 2.1-114.5:1...."

Pursuant to § 2.1-114.5:1(D)(4), the State grievance procedure is required to "prescribe reasonable time limitations for the grievant to submit an initial complaint
and to appeal each decision through the steps of grievance resolution."

Taken together, these requirements indicate that in order to properly receive approval from the Department of Personnel and Training, a locality's grievance procedure must specify reasonable time limitations for advancing a grievance to each step, including the panel hearing. So long as the procedure contains such reasonable time limitations and otherwise complies with the minimum provisions of the State grievance procedure, the locality's procedure may properly be approved by the Director of the Department of Personnel and Training as complying with the requirements of § 15.1-7.1.

If compliance with the local procedure necessarily results in a twelve to eighteen month delay in reaching the panel hearing stage, then it would appear that the procedure may not meet the requirements of § 15.1-7.1. If instances occur, however, under properly approved procedures where grievants wait as long as twelve to eighteen months for a hearing, then substantial questions may arise concerning the locality's proper implementation of the procedure. I find no indication in § 15.1-7.1, however, that the Department of Personnel and Training has the authority to supervise the local governments in the implementation of their procedures. Accordingly, the resolution of such questions pertaining to implementation must remain at the local level.

The grievant is not without a remedy, however. He has a number of means by which he can bring to question whether he has received "immediate and fair treatment" of his grievance. For example, he could seek to use the mandamus process to ask the courts to enforce the local provisions or he could explore the possibility of an original action in court on the basis that the local process has failed. In addition, he could approach the governing body and ask it for relief.

HANDICAPPED. STATUTORY EXCLUSION IN COVERAGE OF INTERSTATE COMPACT ON PLACEMENT OF CHILDREN FOR INSTITUTION "PRIMARILY EDUCATIONAL IN CHARACTER" CAN BE LIMITED TO INSTITUTIONS ESSENTIALLY LIKE BOARDING SCHOOLS.

February 9, 1983

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

You have asked for my opinion on several questions concerning the Interstate Compact on the Placement of Children (hereinafter "ICPC"). §§ 63.1-219.1 through 63.1-219.5 of the Code of Virginia. Your questions relate to the applicability of the ICPC to children receiving special education in out-of-state facilities.

The ICPC consists of ten articles which describe, in part, the persons and agencies to whom the compact is
applicable, the method of placement for a child out-of-state, and the compact's limitations. See, generally, § 63.1-219.2. The purpose of the ICPC is, in part, to ensure that a child requiring placement out-of-state will receive the maximum opportunity to be placed in a suitable environment, that the authorities in the state of placement will have the opportunity to ascertain the circumstances of the proposed placement, and that authorities of the state from which the placement is to be made will receive complete information to evaluate a potential placement. See § 63.1-219.2, Art. I.

The definition of "placement," as found in Art. II(d), excludes placement in an "institution primarily educational in character..." from the scope of ICPC. Article VII provides that a compact officer to be designated from each of the member jurisdictions will promulgate rules and regulations to carry out the terms and provisions of the compact. Pursuant to that authority, the compact officers enacted a regulation in April 1982, which defined "institution primarily educational in character" and which had the effect of restricting the placement exclusion to facilities similar to a boarding school.

With the foregoing background, I shall answer your questions in the order in which they were asked.

1. "Did the Interstate Compact Officers exceed their authority in promulgating a regulation defining an institution 'primarily educational in character' as essentially a boarding school?"

Administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them by statutes vesting power in them. Pump and Well Company v. Taylor, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959). Rules and regulations must be reasonably directed to the accomplishment of the purposes of the statute under which they are made, or be reasonably adapted to secure the end in view. Therefore, the regulations must be supported by good reasons. Commonwealth v. Anheuser-Busch, Inc., 181 Va. 678, 681, 26 S.E.2d 94, 95 (1943).

Because Art. VII of the ICPC allows the compact officers to promulgate regulations to carry out the terms and provisions of the ICPC, I am of the opinion that the promulgation of a regulation which defined the "institution primarily educational in character" exclusion was within the authority conferred upon them by statute. Furthermore, I am unable to conclude that the definition is an unreasonable interpretation of the exclusion. To the contrary, it helps to achieve the goals of the ICPC, as defined in Art. I and as described above.

2. "If the Interstate Compact Officers did not exceed their authority in promulgating this regulation, then does the term 'primarily educational in character,' as defined in this regulation, exclude the special
education facilities, because of the many related services provided to handicapped children in these facilities?"

The term "primarily educational in character" does not by its terms automatically exclude placements in special education facilities from the requirements of the ICPC. Therefore, if a facility was offering services beyond those listed in subpart (3) of the definition, placement in that facility must be in compliance with the ICPC. This is required even if the facility is one which serves children in need of "special education."

3. "Does the Board of Education have the authority to require the school divisions to process out-of-state placements of handicapped children through the Interstate Compact on Placement of Children, if 'primarily educational in character' does exclude special education facilities?"

My opinion, as previously stated, is that special education facilities are not necessarily excluded from the ICPC. Moreover, it is the responsibility of the State Board of Education to ensure that the local school divisions are involved in providing special education programs.

The State Board of Education is charged by the General Assembly with the responsibility of generally supervising the schools in the Commonwealth. See § 22.1-8. In the provision of special education for handicapped children, it has the responsibility to:

"prepare and supervise the implementation by each school division of a program of special education designed to educate and train handicapped children between the ages defined in § 22.1-213 and may prepare and place in operation such program for such individuals of other ages. The program developed by the Board of Education shall be designed to ensure that all handicapped children have available to them a free and appropriate education, including special education designed to meet the reasonable educational needs of such children. The school boards of the several school divisions, the Commission for the Visually Handicapped, the Virginia Council for the Deaf and other State and local agencies which can or may be able to assist in providing educational and related services shall assist and cooperate with the Board of Education in the development of such program." See § 22.1-214(A).

The board is specifically authorized by the General Assembly to:

"supervise educational programs for handicapped children by other public agencies and to assure that placements of handicapped children by other public agencies are in an appropriate program consistent with the
individualized education program." See § 22.1-214(F).
(Emphasis added.)

Based on the above-cited statutes, the requirements of the ICPC, and my responses to your first two questions, I am of the opinion that the State Board of Education has the authority to require the school divisions to process out-of-state placements of handicapped children through the ICPC where such processing is necessary to determine whether the ICPC is applicable. If it is determined that the placement falls within the definition of an institution "primarily educational in character," the ICPC would not then be applicable.

4. "Are the school divisions required under present law to process out-of-state placements of handicapped children in private residential facilities through the Interstate Compact on the Placement of Children?"

The definition of a facility "primarily educational in character" does not distinguish between private and public residential facilities. I am, therefore, of the opinion that the ICPC is applicable to out-of-state placements in private residential facilities as well as public facilities unless those facilities are excluded because they meet the definition of "primarily educational in character."

1Article II(d) reads as follows: "'Placement' means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility."

2"Primarily educational institution" means an institution which operates one or more programs that can be offered in satisfaction of compulsory school attendance laws, in which the primary purpose of accepting children is to meet their educational needs; and which: (1) does not accept responsibility for children during the entire year; (2) does not provide or hold itself out as providing child care constituting nurture sufficient to substitute for parental supervision and control or foster care; (3) does not provide any other services to children, except for those customarily regarded as extracurricular or cocurricular school activities, pupil support services, and those services necessary to make it possible for the children to be maintained on a residential basis in the aforementioned school program or programs.
HEALTH DEPARTMENT. REGULATORY BOARDS. BOARD OF MEDICINE. PHYSICIANS AND SURGEONS MAY NOT SELL DRUGS, EYEGlasses, MEDICAL APPLIANCES OR DEVICES TO PERSONS NOT HIS OWN PATIENTS OR TO HIS PATIENTS FOR HIS OWN CONVENIENCE OR TO SUPPLEMENT INCOME.

August 20, 1982

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether a physician licensed by the Commonwealth of Virginia and practicing in this State may dispense and charge therefor as a part of his medical practice drugs, eyeglasses, hearing aids, or similar items.

Section 54-317 of the Code of Virginia provides in pertinent part:

"Any practitioner of medicine, osteopathy, chiropractic, podiatry, physical therapy or clinical psychology or any physical therapy assistant shall be considered guilty of unprofessional conduct if he:

***

(12) Being a practitioner of the healing arts who may lawfully dispense, administer, or prescribe, medicines or drugs, and not being the holder of a certificate of registration to practice pharmacy, engages in selling medicine, drugs, eyeglasses, or medical appliances or devices to persons who are not his own patients, or sells such articles to his own patients either for his own convenience, or for the purpose of supplementing his income; provided, however, that the dispensing of contact lenses by a practitioner to his patients shall not be deemed to be for the practitioner's own convenience or for the purpose of supplementing his income...."

Section 54-317(12) applies to all practitioners of the healing arts who may prescribe drugs and who do not hold a certificate of registration to practice pharmacy. Under the terms of this statute, a medical doctor shall be considered guilty of unprofessional conduct if he sells drugs, eyeglasses (except contact lenses), medical appliances or devices to persons who are not his own patients. The statute further precludes a physician from selling such items to his patients for his own convenience or for the purpose of supplementing his income.

If the Board of Health finds that a practitioner has violated the provisions of § 54-317, then it is empowered by § 54-316 to suspend or revoke the practitioner's license.

HIGHWAYS. SECONDARY SYSTEM. ROAD ADDITIONS PURSUANT TO COUNTY REQUEST UNDER § 33.1-229.
January 17, 1983

The Honorable C. Dean Foster
County Attorney for Scott County

You have asked for my opinion concerning the responsibility of the Virginia Department of Highways and Transportation (the "Department") to Scott County (the "County") and to a landowner under the following circumstances.

The Scott County Board of Supervisors, by resolution, requested the Department, pursuant to § 33.1-229 of the Code of Virginia, to extend Route 866 a distance of 0.2 mile. The resolution guaranteed "an unrestricted right of way of 40 feet" over the length of this proposed extension and referenced a conveying deed by deed book and page number. The Department subsequently approved the request contained in the resolution. The Department widened the existing roadway onto a particular landowner's property, and also removed the landowner's fence to make way for the road. After the work was undertaken by the Department, it was determined that the right-of-way through the property of that abutting landowner had not been acquired by the County nor did that landowner's name or signature appear on the referenced conveying deed. The landowner now is seeking compensation for his land and fence.

In addition to other details included on the papers you submitted, I have reviewed letters from the Department's representatives, landowner's counsel, the report of the road viewers, the resolution of the county board of supervisors commissioning the road viewers, and your earlier letter of September 15, 1982, to the Department's Resident Engineer in Jonesville.

The issues at this point appear to be the following: Whether the Department can require the County to guarantee the right-of-way in a public road as a condition to accepting the roadway into the secondary system of State highways? Whether the board's reference to a deed conveying right-of-way to the Department limits the board's guarantee to such right-of-way as may be conveyed by the referenced deed? Whether approval by the Department of a county board of supervisor's resolution to add a road to the secondary system of State highways constitutes approval by the commissioner of the Department for the subsequent expenditure of funds under § 33.1-229 to acquire the right-of-way for such road? And finally, whether the Department might be liable to a landowner in inverse condemnation where the Department entered the landowner's property and built a road under the mistaken belief that the county board of supervisors had acquired right-of-way for such construction?

Similar questions have been answered by the Attorney General in the past. In the 1958-1959 Report of the Attorney General at 146, the question was presented whether the
Department may require recordation of deeds conveying right-of-way as a condition precedent to processing a county's request that such road be added to the secondary system of State highways. The Attorney General stated:

"Inasmuch as Section 33-141 of the Code [currently § 33.1-229] leaves to the discretion of the State Highway Commissioner the determination as to whether any expenditure will be made by the State upon such new roads, I am of the opinion that any reasonable requirement that the right of way be secured by the board of supervisors as a condition precedent to the acceptance of the new road into the Secondary System of State Highways would be within the power of the State Highway Commission."

The same opinion was expressed in the 1945-1946 Report of the Attorney General at 139.

Section 33.1-229, under which the County requested the road in question to be taken into the secondary system, provides in pertinent part that the local road authorities shall continue to have the power to alter or change roads in the secondary system of State highways provided that no expenditure by the State shall be required except as may be approved by the commissioner.

The deputy commissioner of the Department approved the resolution of the county board of supervisors. But at that time neither the board nor the Department was aware that no right-of-way had been acquired through the property of one adjoining landowner. That approval, therefore, cannot be construed as commissioner approval of expenditures under § 33.1-229. Any conflict between the State and County would be controlled by that section.

Because work was performed by the Department forces, the State may be a proper defendant in an inverse condemnation action brought by the landowner. Obviously, the evidence adduced at such hearing would be determinative of what value, if any, should be placed on such take. The County, however, at the demand of the Department under the authority of § 33.1-229, has provided a guarantee to the Department by resolution of October 7, 1981, of an unrestricted right-of-way 40 feet wide for the extension of the road in question. The purpose of noting the recorded deed in the resolution is not to limit the guarantee but to satisfy the Department requirement that the right-of-way be conveyed by recorded deed. See 1958-1959 Report of the Attorney General at 146.

In light of the foregoing, I concur in previous Opinions by the Attorney General that § 33.1-229 establishes that the Department has authority to demand a guarantee of right-of-way, and the County an obligation to provide and honor such guarantee. Ultimate responsibility for providing
The right-of-way for the road and compensating the landowner for any invasion of his property rests with the County.

HIGHWAYS. SECONDARY SYSTEM. TOWNS. RESPONSIBILITY FOR ESTABLISHMENT AND MAINTENANCE OF SIDEWALKS.

August 3, 1982

The Honorable W. Curtis Coleburn, III
Commonwealth's Attorney for the County of Nottoway

You have asked whether § 15.1-896 of the Code of Virginia removes a town's authority, under § 15.1-889, to establish and maintain sidewalks along town streets, when such sidewalks are located within the street right-of-way, and the town streets have been included in the State's secondary system. You further inquire, if the above question is answered affirmatively, whether § 33.1-69 requires the State Department of Highways and Transportation (the "Department") to maintain such sidewalks.

Section 15.1-889 provides, in pertinent part, that municipal corporations, which would include incorporated towns as defined in § 15.1-837, may make, improve and convert to bicycle paths, sidewalks and walkways upon streets. However, § 15.1-896 states that nothing in Ch. 18 of Title 15.1, delineating the powers of cities and towns, shall have application to any highways, road, street or other public way which constitutes a part of any of the State highway systems.

In my opinion, your first question must be answered affirmatively. Because of § 15.1-896, a town does not have the power to establish or maintain sidewalks within the right-of-way of town streets that have been accepted into the secondary system of State highways for maintenance. See 1974-1975 Report of the Attorney General at 205. This reasoning, of course, would not pertain to town streets not accepted into the secondary system, or to sidewalks that were installed outside of the right-of-way either before or after the acceptance of the streets for maintenance. Nor would this reasoning prevent the Department from issuing a permit to the town to establish and maintain a sidewalk. The purpose of § 15.1-896 was to leave intact the authority of the Department with respect to the highway right-of-way.

Section 33.1-69 provides that the secondary system of State highways shall be vested in the Department. Further, the maintenance and improvement of such system shall be by the State under the supervision of the State Highway and Transportation Commissioner (the "Commissioner"). Accordingly, it is my opinion that under § 33.1-69 the Department is vested with the power to maintain sidewalks that are part of the secondary system of State highways. However, that power is not required to be exercised and its exercise is left to the sound discretion of the Department.
"[T]he legislature has delegated broad powers to the highway officials of this state and has vested them with wide discretion in the discharge of their duties with respect to the construction, improvement, and maintenance of highways...." Ord v. Fugate, 207 Va. 752, 759, 152 S.E.2d 54, 58 (1967). Thus, the Commissioner could designate which part of the right-of-way is being accepted for maintenance or on which part of the right-of-way maintenance might be discontinued, or make conditions for acceptance. Likewise, the Commissioner is not required by law to agree to maintain such sidewalks. He may decline to accept sidewalks for maintenance, and if he does agree to maintain them, the level of maintenance is within his discretion as well, given the needs of and resources available to carry out his statutory duties.

HIGHWAYS. SUBDIVISIONS. SUBDIVISION ORDINANCE MAY PERMIT PRIVATE STREETS IN SUBDIVISION WHICH ARE PRIVATE WAYS AS TO ADJOINING LANDOWNERS OUTSIDE OF SUBDIVISION.

December 7, 1982

The Honorable J. G. Overstreet
County Attorney for Bedford County

This is in reply to your inquiry concerning provisions in the Bedford County Subdivision Ordinance which permit private streets and alleys in subdivisions and which require that subdivision street plans provide for continuation of existing streets on adjoining properties so that unnecessary hardship is not caused to adjoining property owners who plat and seek convenient access to their own land. You state that private streets located within certain subdivisions have been platted to extend to lands of adjacent property owners and that those adjacent property owners ask whether they have a legal right to use such private streets. In this context, you ask the following questions:

"1. Does the Bedford County Board of Supervisors have the authority to permit private streets within a subdivision in its Subdivision Ordinance?

2. If the answer to question No. 1 is no, then are the streets now platted according to the terms of the Ordinance public or private?

3. If the answer to question No. 1 is yes, then do adjacent property owners have a right to the use of the private streets in view of the facts above stated?"

You refer to § 15.1-478 of the Code of Virginia concerning recordation of a subdivision plat, which states, in its first paragraph, as follows:
"The recordation of such plat shall operate to transfer, in fee simple, to the respective counties and municipalities in which the land lies such portion of the premises platted as is on such plat set apart for streets, alleys or other public use and to transfer to such county or municipality any easement indicated on such plat to create a public right of passage over the same; but nothing contained in this article shall affect any right of a subdivider of land herefore validly reserved." (Emphasis added.)

A prior Opinion of this Office discusses the above quoted section in the context of a question whether a governing body may amend its subdivision ordinance to allow creation of subdivisions with only private streets, the maintenance of which would be a private responsibility in perpetuity. The Opinion holds that title to streets and alleys which are set forth on a subdivision plat and clearly marked as not being for a public use would not pass to the locality pursuant to § 15.1-478, and approval of such a plat would create a subdivision with only private streets. Under those circumstances, it was not a necessity to amend the ordinance to allow for such a subdivision. See 1968-1969 Report of the Attorney General at 119.1 I concur in that Opinion and, accordingly, your first question is answered in the affirmative.

In light of the above, your second question requires no answer.

In your third question you inquire as to the rights of "adjacent property owners" to use a subdivision's private streets. In the context of your fact situation, you refer to persons who live adjacent to but outside of the subdivision in question. In my opinion, such persons would have the same rights as the general public to use the private streets within the subdivision. The rights would not be greater than those of the general public. A dedication of streets to public use by way of a recorded subdivision plat, which dedication has been accepted by the locality, creates public ways with the right of the public to travel thereon. Streets reserved on the plat for private use are private ways intended for the use and benefit of particular persons. See City of Norfolk v. Meredith, 204 Va. 485, 132 S.E.2d 437 (1963); Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957). Thus, in answer to your third question, owners of property outside of a subdivision containing private streets, along with other members of the public at large, have such rights to the use of those streets as the subdivider or owners permit.

See, also, Reports of the Attorney General 1980-1981 at 334; 1977-1978 at 178; and 1973-1974 at 177, wherein, in each instance, the existence of private streets in a subdivision
August 13, 1982

The Honorable Robert E. Harris
Member, House of Delegates

This is in reply to your letter received August 5, 1982, in which you refer to the Opinion of this Office addressed to the Honorable David T. Stitt, County Attorney of Fairfax County and you request my review of additional information concerning the Fairfax County Planning Commission's zoning approval of a new public housing project, to be constructed by Fairfax County Redevelopment and Housing Authority on land it has purchased. You request my opinion of whether the Fairfax County Board of Supervisors has authorized or approved this additional housing as contemplated in § 36-19.2 of the Code of Virginia.

Section 36-19.2 provides that a housing authority shall not contract for construction of additional housing nor acquire land for or materials to construct ancillary facilities for any additional housing "unless and until such additional housing shall have been authorized or approved by the governing body of the county...." In my letter of May 13, 1982, to the Honorable David T. Stitt, County Attorney for Fairfax County, I concluded that this prior approval by the governing body is mandatory and that, while it may be expressed contemporaneously with zoning and planning reviews for a particular project, the two sets of requirements are separate, and the question of whether or not to approve additional housing must come properly before the governing body for its action.

With your letter you supplied copies of the October 9, 1980, public hearing minutes and verbatim transcript of the deliberations of the planning commission prior to its approval of the project pursuant to § 15.1-456, as well as a transcript of the county board's subsequent review and ratification of the planning commission's decision. You ask, first, whether a proceeding before a planning commission under § 15.1-456, in which a local housing authority's proposed housing project is tested for conformance with the local comprehensive plan, satisfies the requirement of § 36-19.2 that the "purchase issue" be properly before the governing body. Section 36-19.2 specifies that its required approval or authorization of additional housing to be constructed by a local housing authority is that of the local governing body. Thus, a separate proceeding before a separate body such as the planning commission cannot of
itself be used to comply with § 36-19.2, because the question will not have been submitted to the governing body for its decision. Accordingly, your first question is answered in the negative.

In your remaining questions you ask whether a zoning proceeding before the planning commission, which is subsequently reviewed by the county board, directly satisfies the need for governing body approval of the "purchase issue," or, if it is used as a substitute for a specific determination under § 36-19.2, what notices and hearing procedures are necessary to insure that "all appropriate parties" have an opportunity to become involved. You ask specifically whether the facts presented in the information you supplied, about the planning commission and county board proceedings in relation to the O'Day Drive project, support a finding that the local governing body has properly considered and approved housing authority land purchases for additional housing, since the "purchase issue" was not separately identified as such, either in the notices to project neighbors and other "appropriate parties," or at the public hearing, or to the county board when it reviewed the planning commission's action.

I think it useful to clarify the points made in my letter to Mr. Stitt, since certain of its phrasing might have misled you. In that Opinion I concluded, from examination of the text of § 36-19.2, that "an authority must obtain approval or authorization from the governing body before acquiring land for additional housing." In answer to the question of whether such approval or authorization might be inferred from certain other actions of the county board relating to planning and zoning reviews, I pointed out that the concerns addressed in the zoning law are separate from the necessity of a housing authority to obtain the approval for additional housing and that, in order to comply with § 36-19.2, this "purchase issue" must properly come before the governing body, with the opportunity for involvement of "all appropriate parties" when the issue is considered. Those statements were not meant to impose upon the statute procedural requirements which the legislature has not seen fit to place there.

It appears from your letter that you may have accepted my reference to the additional housing approval requirement of § 36-19.2 as the "purchase issue" to be evidence of a conclusion that the statute demands governing body approval of each housing authority contract and land purchase associated with a particular housing project. This is not the case. A housing authority is a political subdivision of the Commonwealth with separate corporate existence, empowered to make and execute contracts and to purchase land and personalty in its own right for a variety of public and associated proprietary purposes.1 The limitation placed upon the powers enumerated in § 36-19 by § 36-19.2 is that before an authority exercises its powers for the particular purpose of constructing any additional low income public housing, the
local governing body must first have expressed its judgment that additional housing is necessary in the community. Section 36-19.2 provides that an authority shall not make contracts or purchases related to construction of additional housing "unless and until such additional housing shall have been authorized or approved by the governing body of the county...." (Emphasis added.) Section 36-19.2 notably does not say unless and until such contracts or such purchases shall have been authorized or approved by the governing body.

I reiterate the point made earlier that proceedings under the zoning statutes are separate matters from the § 36-19.2 requirement that the governing body authorize or approve "additional housing." The prescribed procedural steps of posting public notice, notifying adjacent landowners and conducting public hearings which apply in certain zoning matters, and those which appertain to other actions taken under the housing authorities law, all of which steps undoubtedly are designed to protect the rights of the public or of certain third parties most directly affected by particular transactions, have no application to the authorization contemplated in § 36-19.2. The only appropriate parties necessarily involved with that statute by its terms are the members of the local governing body and the local housing authority. In § 36-19.2 the legislature has reserved to the local governing body the exclusive right to decide if additional public housing will be allowed in the community. It is within the county board's discretion to decide to avail others of notice and opportunity to be heard before such authorization for additional housing is granted or withheld, but its decision in that regard would have no effect on procedural compliance with § 36-19.2.

Similarly, since the manner in which the governing body is to express its authorization or approval of additional housing is unspecified in § 36-19.2, the board is free to choose any reasonable means of doing so, within the mode of legislative procedure prescribed by statute and in accordance with its own rules of conducting business. The form of its action in expressing approval is secondary to the substance.

Turning to the facts of the present case, concerning the O'Day Drive project, it is apparent to me from a review of all the documents supplied that the Fairfax County Board of Supervisors has had the question properly before it and has authorized additional public housing in the community, to be constructed by Fairfax County Redevelopment and Housing Authority. The board's action in adopting a resolution on March 3, 1980, approving the Housing Authority's application to the Department of Housing and Urban Development for a reservation of funds to construct 125 units of new public housing, from which reservation the 44 units presently in controversy are to be funded, of itself constitutes the local governing body's authorization under § 36-19.2 for the Housing Authority to build up to 125 units of additional housing in one or more projects. Since March 5, 1980, the
board has involved itself in the development of the first 44 unit project within the reservation when called upon to do so and has consistently affirmed its support. At the time of its review and ratification of the planning commission's approval of the Housing Authority's § 15.1-456 application, the board certainly knew that the principal object of the application was to attain comprehensive plan review approval to purchase land and construct at least 44 units of additional housing, as did everyone who attended the public hearing and observed the planning commission's deliberations on the matter. From my review of the record I cannot say that in all of the board's actions in support of advancing the O'Day project towards construction it nevertheless did not intend thereby to authorize additional public housing units in the community. It is difficult to conceive of any additional step which might be taken to add greater substance to the assent already given by the board. The statute certainly demands no more. Accordingly, I am of the opinion that, insofar as the § 36-19.2 requirement to obtain governing body approval or authorization of additional housing is concerned, the Housing Authority's actions to purchase land and contract for construction of public housing units in the O'Day Drive Project are valid.

1See §§ 36-19, 36-19.5, 36-23, 36-24, 36-26, 36-49, 36-49.1, 36-49.2, 36-50, 36-52.1, 36-52.2.
2See § 15.1-431.
3See, e.g., §§ 36-49.1, 36-51.
4Section 36-4, providing for the creation of housing authorities, was amended in 1952 to provide for an election of the qualified voters of a locality, held in accordance with the concurrently enacted § 36-4.1, to determine whether or not there is a need for an authority to function in the locality, before it would be activated and enabled to transact business. See Ch. 427, Acts of Assembly of 1952. Prior to the 1952 amendment the governing body could determine such need on its own motion. In the same Act § 36-19.2 was enacted in its present form, effectively reserving to the local governing body the right to determine the need for additional housing.
6See § 15.1-540.

HOUSING AUTHORITIES. EMINENT DOMAIN. HOUSING AUTHORITY MAY CONDEMN PRIVATE PROPERTY TO TRANSFER TO KNOWN PRIVATE DEVELOPER. TRANSFER MAY BE AT LESS THAN COST.

March 7, 1983

The Honorable G. Steven Agee
Member, House of Delegates
You have asked whether a city's redevelopment and housing authority may exercise its power of eminent domain to acquire property and then turn that property over to an already approved private developer. More specifically, the city already has a designated redevelopment area, a portion of which is or is about to be designated a conservation area with a specific conservation plan. The city is a grantee of certain federal block grant funds for the purpose of redevelopment in the designated area. In advance of the exercise of eminent domain power, the city has named as a subgrantee a developer which is a non-stock, non-profit corporation.

In the event the authority may exercise the power of eminent domain under the foregoing facts, you further inquire as to what "value" or "fair value" the property should be made available to the predetermined developer. In this regard, you asked whether a transfer of ownership can be made to the developer for less than that value which is paid under a condemnation award or settlement.

Before addressing your specific questions, it is important to note that "statutes conferring the power of eminent domain are strictly construed and every reasonable doubt is to be resolved adversely to the right. The power can only be exercised for the purpose, to the extent, and in the manner provided by law." Bristol Redev. and Housing Authority v. Denton, 198 Va. 171, 178, 93 S.E.2d 288, 293 (1956).

Redevelopment and housing authorities in jurisdictions that have prepared and adopted a redevelopment plan pursuant to § 36-49 of the Code of Virginia or a "conservation plan" pursuant to § 36-49.1, have been given certain general powers under those sections to carry out their missions. The prime purpose is to eliminate and prevent the spread of blight and provide for sound development of formerly blighted areas. See §§ 36-48 and 36-49.

Sections 36-49 and 36-49.1 provide power to an authority to "acquire" property to carry out certain missions. Sections 36-49(5) and 36-49.1(4) specifically provide that property so acquired may be made available to a private enterprise or public agency through sale, lease or retention by the authority itself so long as it promotes the mission of the authority. The foregoing sections, however, do not speak to those circumstances where property is acquired by eminent domain.

Section 36-27, which provides an authority with the power to exercise eminent domain, permits exercise of the power where "necessary for the purposes of such authority under this chapter...." The chapter referred to includes, inter alia, §§ 36-49 and 36-49.1. Section 36-48.1 provides that redevelopment and conservation, as set out in § 36-48, is "necessary for the public welfare and is a public purpose...." In light of the foregoing, it is clear that the
General Assembly intended that an authority should have the power to exercise eminent domain wherever it was necessary to carry out the purposes of redevelopment or conservation as outlined in Ch. 1 of Title 36. Consequently, it is my opinion that, although §§ 36-49 and 36-49.1 speak generally of property acquired and do not specifically discuss property acquired through eminent domain, these two sections must be read in pari materia with §§ 36-27, 36-50 and 36-51. By so doing, it is evident that an authority may make property acquired through eminent domain proceedings available to a private enterprise or public agency through sale, lease or retention by the authority itself so long as it promotes the mission of the authority established by Ch. 1 of Title 36.

The constitutionality of a provision to allow condemnation by an authority and then ultimately placing the land into the hands of private parties has been upheld in certain specific instances by the Supreme Court of Virginia. See Rudder v. Wise County Redevelopment and Housing Authority, 219 Va. 592, 249 S.E.2d 177 (1978), appeal dismissed, 441 U.S. 939 (1979), reh'g denied, 444 U.S. 888. In that case, the Court held that the disposition of the land was incidental and subordinate to the primary purpose for which it was acquired. The Court held in that case that the primary purpose was to eliminate a blighted or deteriorated area. This holding confirms previous decisions by the Court. See, e.g., Hunter v. Redevelopment Authority, 195 Va. 326, 78 S.E.2d 893 (1953) and Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940). Accordingly, it is my opinion that the aforementioned action of an authority is constitutional so long as it is carrying out its mandate to redevelop or conserve as set out in Ch. 1 of Title 36.

In answer to your second question concerning the proper value to seek when conveying such property to the aforementioned private enterprise, § 36-53 provides:

"Such land may be made available at its fair value, which represents the value (whether expressed in terms of rental or capital price) at which the authority determines such land should be made available in order that it may be developed, conserved or redeveloped for the purposes specified in such plan." (Emphasis added.)

It is my opinion, that under § 36-53, the determination of "fair value" is a matter left to the sound discretion of an authority. When making that determination, it may consider, inter alia, not only the cash consideration from a lease or capital price standpoint, but may also consider other facts, such as the fact that a private enterprise or other public agency is going to promote the aims of the authority by developing, redeveloping or conserving an area. These factors are a consideration that also may be valued by an authority. Accordingly, it is my opinion that the price awarded or settled upon in an eminent domain proceeding need
not be the sole factor considered by an authority in arriving at a "fair value."\(^4\)

\(^1\)In addition, except where circumscribed by §§ 36-49.2, 36-50 and 36-50.1, the authorities also enjoy general powers under Art. 3, Ch. 1 of Title 36, §§ 36-19, 36-19.2 and 36-27. None of the foregoing sections, however, grant an authority the power to exercise eminent domain. That authority is found in §§ 36-27, 36-50 and 36-51.

\(^2\)The fact that the developer is selected in advance does not militate against the authority's power to carry out the plan, so long as it is clear that the selection is the action of the authority and the principal purpose is to clear the blighted area.

\(^3\)When an authority exercises eminent domain it pays just compensation, meaning the \textit{fair market value} of the land taken or damaged or both. \textit{Fruit Growers v. City of Alexandria}, 216 Va. 602, 221 S.E.2d 157 (1976).

\(^4\)As a caveat, I suggest the city first assure itself that such disposal will not violate the terms of the grant of federal funds.

\textbf{HOUSING AUTHORITIES. LICENSES. BROKER'S LICENSE. HOUSING AUTHORITY NOT REQUIRED TO OBTAIN BROKER'S LICENSE TO CONTINUE LEASING AND MANAGEMENT OF PRIVATELY OWNED HOUSING FOR LOW AND MODERATE INCOME PERSONS.}

August 31, 1982

The Honorable Alan A. Diamonstein
Member, House of Delegates

This is in reply to your letter of August 9, 1982, requesting an Opinion as to the applicability of the real estate licensing statutes to a local housing authority in its leasing and managing of certain housing projects for low and moderate income persons. In a letter to you dated August 4, 1982, the Executive Director of the Suffolk Redevelopment and Housing Authority (the "Authority") indicates that the Authority currently manages a federally subsidized housing project pursuant to § 8 of the United States Housing Act of 1937.\(^1\) The housing units are privately owned and leased to low and moderate income tenants, with the Authority providing management services for a specified fee under a management agreement complying with federal regulations\(^2\) and approved by the United States Department of Housing and Urban Development. The questions thus presented are (1) whether the Authority must become licensed as a real estate broker in order to continue to provide those services; or (2) whether the statutes pertaining to housing authorities supersede those pertaining to the licensing of real estate brokers.

A housing authority is a political subdivision of the Commonwealth,\(^3\) created for the public use and purpose of
providing suitable safe and sanitary dwelling accommodations for persons of low income. In order to achieve that purpose it is granted broad powers in § 36-19 including the following:

"[A]ll the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter, including the following....

 ***

(d) In connection with any housing project: to lease or rent any dwelling, houses, accommodations, lands, buildings, structures or facilities embraced in any housing project and (subject to the limitations contained in this chapter) to establish and revise the rents or charges therefor...."

Chapter 18, Title 54 of the Code regulates the real estate business. Section 54-749 of that chapter makes it unlawful for any person, partnership, association or corporation to act as a real estate broker without first obtaining a license from the Virginia Real Estate Commission. Insofar as it is applicable here, "real estate broker" is defined as "any person, partnership, association or corporation who, for a compensation or a valuable consideration...leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation." Chapter 18 is applicable to private entities involved in the real estate business, with the clear legislative intent of protecting the public at large from the "fraud, misrepresentation and imposition of dishonest and incompetent persons." By its terms it applies to "persons," "partnerships," "associations," "corporations" and like entities of a private nature, among which ordinarily are not included municipal corporations or other public bodies. I, therefore, conclude that the licensing requirements have no application to political subdivisions of the Commonwealth, such as housing authorities, engaged in assisting a particular segment of the population pursuant to a legislatively declared public purpose. I reach this conclusion because the legislature has not clearly included such public bodies within Ch. 18 even in a general sense and because the legislature specifically has authorized such bodies to carry on activities which, without the public purpose declaration, would otherwise be considered private. Accordingly, I am of the opinion that Suffolk Redevelopment and Housing Authority is not required to obtain a real estate broker's license in order to continue its management services as described.

2See 24 C.F.R. § 880.601.
3See § 36-19 of the Code of Virginia.
4See § 36-2; Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940).
"Housing project" is defined in § 36-3 as "any work or undertaking...to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income...."

Section 54-730.

See § 54-1.20, which makes an act in violation of § 54-749 a Class 3 misdemeanor.


See also, § 54-1.17.

§§ 54-730, 54-731, 54-731.1, 54-732, 54-734, 54-749.

See § 36-19; Mumpower v. Housing Authority, supra.

HOUSING AUTHORITIES. POWER TO ACQUIRE LAND AND HOLD FOR RESALE.

August 23, 1982

The Honorable Robert E. Harris
Member, House of Delegates

Your letter of August 12, 1982, was received subsequent to the preparation of my Opinion to you on August 13th. In your second letter you posed another question not asked in your earlier letter regarding the powers of local housing authorities.

You ask if § 36-19.2 of the Code of Virginia enumerates any power under which a local housing authority can purchase land not approved for additional housing, or within an approved redevelopment area, and improve the land and hold it for resale on the private real estate market.

Section 36-19.2 is not a grant of powers, but a limitation on the powers conferred upon redevelopment and housing authorities. (My earlier Opinion dealt with that limitation.) The grant of powers contained in § 36-19 includes the power to acquire and dispose of real property. The exercise of such power, as is true with respect to all other powers conferred therein, is conditioned upon it being necessary or convenient to carry out and effectuate the purposes and provisions of Ch. 1, Title 36. Accordingly, I am of the opinion that an authority is empowered to purchase land within an approved redevelopment area, improve the land and thereafter dispose of it if the authority determines that such land is no longer necessary or convenient to carry out the purposes enunciated in § 36-2 for the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income.

Section 36-2 reads as follows: "(1) It is hereby declared that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist
and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of grave concern to the Commonwealth.

(2) The necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

**HOUSING AUTHORITIES. THOSE THAT HAVE FORFEITED ALLOCATIONS DUE TO FAILURE TO COMPLY WITH FILING DEADLINES IN EXECUTIVE ORDER 54(81) MAY BE ASSIGNED BALANCE OF ALLOCATIONS REMAINING PRIOR TO AUGUST 1, AFTER HOUSING AUTHORITIES THAT HAVE COMPLIED WITH ORDER'S DEADLINES HAVE RECEIVED ANY FURTHER ALLOCATIONS REQUESTED.**

July 27, 1982

Mr. O. Gene Dishner, Director
Department of Housing and Community Development

You inquire whether a housing authority that has failed to meet its filing deadlines set forth in §§ 4(a) and 4(b) of Executive Order 54(81) (hereinafter "Order" or "Executive Order") relating to the allocation of the State ceiling under the Mortgage Subsidy Bond Tax Act of 1980, 26 U.S.C. § 103A, et seq., and has therefore forfeited its "Initial Allocation" and has been declared ineligible to receive a "Further Allocation" on June 1, or September 1, may receive an assignment of bonding authority under the provisions of § 4(d) of the Order.

The Executive Order mentions four specific terms which must be defined in order to understand the allocation scheme.

1. **Initial Allocation** - the original allocation which is a specific percentage of the 11% of the State ceiling allocated to the local housing authorities listed in § 3 of the Executive Order.

2. **Forfeited Allocation** - the amount of any unutilized portion of a local housing authority's Initial Allocation or an allocation which is forfeited due to the failure of a local housing authority which has received an Initial Allocation to meet the filing deadlines set forth in § 4(a) of the Order.

3. **Further Allocation** - an allocation to local housing authorities made on June 1 or September 1 from forfeited allocations. Housing authorities which have received an Initial Allocation and have met the filing deadline set forth in § 4(a) of the Order or local housing authorities which did not receive an Initial Allocation but which have submitted a request in writing to the Director of the Department of Housing and Community Development according to the filing
deadline set forth in § 4(b) of the Order are eligible for further allocations from the forfeited allocations.

4. Assignment - a grant of allocations to local housing authorities from the balance of any forfeited allocations not reallocated to housing authorities who have met the filing deadlines in §§ 4(a) and 4(b) of the Order. If any funds remain after further allocations have been made from the forfeited allocations, local housing authorities which have not complied with the filing deadlines in § 4(a) and 4(b) shall be assigned allocations by the Director in the order of the date of filing of their applications for such assignments.

Executive Order 54(81) was issued by Governor Dalton pursuant to the Mortgage Subsidy Bond Tax Act of 1980 (the "Act"), 26 U.S.C. § 103A, et seq. This Act allows the Governor of any State to proclaim a formula for allocating the State ceiling on tax exempt obligations to provide mortgages on single family owner occupied residences. The Executive Order determines the Initial Allocation divided between the Virginia Housing Development Authority and local housing authorities throughout the Commonwealth. The Order provides for a reporting system whereby local housing authorities must account for the use or nonuse of their State ceiling allocations.

Section 4(a) of the Executive Order requires all housing authorities which have received Initial Allocations to file on or before May 15 a notice to the Director stating the amount of any unutilized portion of their respective Initial Allocation and the amount of such portion, if any, to be forfeited as of the date of such notice (the "Forfeited Allocation"). Section 4(b) requires that requests for Further Allocations also be received on or before May 15. Section 7 of the Order indicates that failure of any housing authority to report information or file notices as required by §§ 4, 5 and 6 of the Order and within the time limitations specified shall result in the forfeiture of the balance of any unutilized portion of any allocation made to the housing authority in that calendar year. Failure to meet the deadlines set forth in §§ 4, 5 and 6 of the Order also makes the housing authorities ineligible to receive a Further Allocation, if applicable, on June 1 or September 1 in such calendar year.

Section 4(d) of the Executive Order provides that if all requests for Further Allocations have been fulfilled and a balance of Forfeited Allocations remains, then the Director shall assign the balance of any Forfeited Allocations to housing authorities in the order of the date of the filing of applications by such authorities in the amount requested by those authorities. If, after the assignment process described in § 4(d), a balance of any Forfeited Allocations remains for which applications for assignments have not been filed prior to August 1, then that balance shall be held for reallocation on September 1 in accordance with the provisions
of § 5 of the Order. Section 5 repeats the process set forth in § 4 of the Order with the exception that the notice for Further Allocations to be made on September 1 must be filed with the Director on or before August 15.

I am of the opinion that § 4(d) of the Executive Order is meant to apply to those housing authorities which have failed to comply with the deadlines established in §§ 4(a) and 4(b). Once the housing authorities which are in compliance with the deadlines have received Further Allocations which they have requested in a timely fashion, the remaining allocations, if any, shall be assigned to housing authorities which have failed to meet the applicable filing deadlines in the order of the date of filing of applications therefor with the Director. Thus, a housing authority that fails to meet the applicable filing deadlines set forth in the Order faces the risk of receiving no allocation in the calendar year in which such failure is made unless the housing authorities who have met the applicable filing deadlines do not request and receive the balance of the Forfeited Allocations in their Further Allocations provided by the Director.

Section 7 of the Order expressly prohibits those who have failed to comply with the deadlines from receiving Further Allocations. This section makes no mention of a prohibition of assigned allocations. A lawfully issued Executive Order has the force of law. Consequently, it is subject to the same rules of construction applied to a statute. "Where a statute enumerates the things upon which it operates or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned." 17 M.J. Statutes § 45 (1979). Accordingly, § 4(d) requires the Director to assign the balance of any forfeited allocations not reallocated to housing authorities even if they have failed to comply with the filing deadlines set forth in §§ 4(a) and 4(b) of the Executive Order.

HUMAN RIGHTS COMMISSION. COUNTIES. MAY BY ORDINANCE AUTHORIZE LOCAL COMMISSION TO INVESTIGATE COMPLAINTS OF DISCRIMINATION AGAINST HANDICAPPED. MAY NOT DECLARE PARTICULAR ACTS TO BE UNLAWFUL.

October 13, 1982

The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates

This is in reply to your letter in which you ask my opinion of the validity of certain amendments to the Human Rights Ordinance of the County of Fairfax. Prior to the amendments in question the ordinance was directed at preventing discrimination based on race, color, religion, sex, national origin, marital status or age. It was amended to include coverage of "handicapped persons and persons who use adaptive devices."
Section 11-1-1 of the Fairfax County Code (1980) states, among other things, that "in order to secure and promote the health, safety and general welfare of the residents of this County, it is declared to be the policy of the County to ensure that all persons be afforded equal opportunity to participate, on the basis of personal merit, in the social, cultural, economic and other phases of community life free from any discrimination, and to that end the governing body adopts this Chapter of the Code of the County of Fairfax, Virginia...." Section 11-1-3 declares as unlawful certain discriminatory practices in housing, employment, access to and use of public accommodations, the availability of credit or credit related services, the provision of educational services, and retaliatory actions against those asserting their rights under the chapter. A human rights commission is created and given investigatory and related powers concerning complaints of alleged violations under the chapter, and violators are made subject to certain sanctions and enforcement proceedings.

Virginia follows the Dillon Rule of strict construction concerning the legislative powers of local governing bodies. Under that rule, boards of supervisors have only those powers which are granted expressly by statute, or which exist by necessary implication, and any doubt as to the existence of a power must be resolved against the existence of a power. Tabler v. Board of Supervisors of Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980); Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977). There is no statute of which I am aware which expressly or impliedly authorizes a county to enact an ordinance which makes it a crime for a person to engage in discriminatory acts based upon a person's handicap or use of adaptive devices.

The county is empowered, however, to establish a local commission on human rights, with duties to promote "policies to ensure" (emphasis added) equal opportunity and "to serve as an agency for receiving, investigating and assisting in the voluntary resolution of complaints from citizens of the county regarding discriminatory practices and, with the approval of the board of supervisors, to seek, through appropriate enforcement authorities, prevention of or relief from such practices...." The General Assembly has declared the rights of the physically disabled to access and use of public accommodations, to employment and to housing accommodations, the interference with which is a Class 1 misdemeanor, and is subject to an injunction.

Because acts interfering with or denying those rights can be characterized as discriminatory in nature, I am of the opinion that the board of supervisors may, by ordinance, authorize the human rights commission to receive, investigate and attempt to voluntarily resolve complaints of such interference or denial filed by persons protected by the above cited statutes and, with board approval, to seek prevention of and relief from such practices through appropriate enforcement authorities. Thus, under State
law, I believe that the county's human rights commission may investigate, and seek voluntary resolution or refer for enforcement to appropriate authorities the complaints of handicapped persons that their State declared rights have been denied.

To the extent that the amendments either enlarge upon the definitions of the protected class of persons as presently defined by State statute, or declare particular acts to be unlawful under local ordinance and thereby provide separate local penalties or exactions for violations, I am constrained to conclude that the amendments are invalid because the board of supervisors does not presently have the authority to enact them. 12

1 Code of the County of Fairfax, Ch. 11.
2 See § 11-1-4.
3 See § 11-1-5, et seq.
4 See, e.g., §§ 11-1-7 and 11-1-8, providing for enforcement proceedings by the Commission; § 11-1-9 concerning Commission initiated court actions; § 11-1-11, providing for enforcement by county agencies by way of denials of public contracts and financial assistance. See, also, §§ 11-1-1 and 11-1-3(a)(3) declaring as unenforceable any discriminatory provision in any deed, mortgage, deed of trust or other instrument affecting interests in land or housing in the county.
5 Note, e.g., in contrast, that counties are empowered to adopt ordinances making unlawful discrimination in housing based on race, color, religion, national origin or sex. See §§ 36-87 and 36-96 of the Code of Virginia.
6 See § 15.1-776.1.
7 See § 63.1-171.2.
8 See § 63.1-171.6. See, also, § 40.1-28.7, which provides that "[n]o employer shall discriminate in employment or promotion practices against any person on account of a physical handicap which is unrelated to the person's qualifications and ability to perform the job." A handicapped person wrongfully discriminated against may seek an injunction under this section.
9 See § 63.1-171.7.
10 See § 63.1-171.4.
11 For example, information obtained by the human rights commission supporting a finding that the rights of a blind or otherwise physically disabled person had been interfered with as provided in § 63.1-171.4 could be relayed to the Commonwealth's attorney for action.
12 Thus, for example, I can perceive no authority to include the language "handicap or use of adaptive devices" in the provision in § 11-1-3(a)(3) which declares as unenforceable certain provisions in deeds and other instruments affecting interests in property. The application of enforcement sanctions contained in § 11-1-11 would also be of doubtful validity, in my opinion.
INDUSTRIAL COMMISSION. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. COMES WITHIN MEANING OF STATE AND POLITICAL SUBDIVISION AS USED IN RULES OF INDUSTRIAL COMMISSION, RULE 7.

September 10, 1982

The Honorable Edward M. Holland
Member, Senate of Virginia

This is in response to your inquiry wherein you have asked "whether or not WMATA [Washington Metropolitan Area Transit Authority] comes within the term 'State' for the purposes of Rule 7 of the Industrial Commission of Virginia."

WMATA is an entity created by interstate agreement among the governments of Virginia, Maryland and the District of Columbia for the purpose of creating and operating an efficient public transportation system in the Washington Metropolitan area. The area encompassed by the compact includes the counties of Arlington and Fairfax, and the cities of Alexandria, Falls Church and Fairfax in Virginia, the District of Columbia and the counties of Montgomery and Prince George in Maryland.

In a slightly different setting, the Supreme Court of Virginia has found that WMATA is a part of the Virginia State government. PEPCO v. State Corporation Commission, 221 Va. 632, 635, 272 S.E.2d 214, 215 (1980). In PEPCO, the determination of governmental status was made for the purpose of deciding whether the rates, terms and conditions of service offered by PEPCO to WMATA were exempt from the jurisdiction of the State Corporation Commission on the grounds that WMATA qualifies as a part of State government. The Court set out the following rationale in support of its conclusion:

"A governmental entity is one created by government to perform a governmental function for a public purpose. See Harrison v. Day, 200 Va. 764, 774, 107 S.E.2d 594, 601 (1959). Title III, Article III, Section 4 of the interstate compact provides that WMATA 'is hereby created, as an instrumentality and agency of each of the signatory parties hereto'. Title III, Article VII, Section 18(a), states that '[t]he General Assembly of Virginia hereby authorizes and designates the Authority as the agency to plan for and provide transit facilities and services for the area of Virginia encompassed within the [compact] Zone.' Two of the six members of WMATA's board of directors represent Virginia. Title III, Article III, Section 5(a). WMATA is vested with the power of eminent domain. Title III, Article XVI, Section 82(a). WMATA is funded, in part, by Virginia through the Northern Virginia Transit District Commission. See Code § 58-730.5." PEPCO at 221 Va. 632, 635.
WMATA has also been further characterized by the Supreme Court of Virginia as a "publicly conceived, owned and controlled Authority [which] was created under the Compact as an instrumentality and agency of Virginia...." Board of Supervisors of Fairfax County v. County Executive of Fairfax County, 210 Va. 253, 262, 169 S.E.2d 556, 562 (1969).

Rule 7 of the Industrial Commission applies, by its terms, not only to the State but also to its municipalities and political subdivisions. This Office has had occasion to express its opinion of the meaning of "political subdivision." In an Opinion found in 1977-1978 Report of the Attorney General at 454, the question was addressed whether the Peninsula Transportation District Commission is an agency or instrumentality of the State or a political subdivision for purposes of the Intergovernmental Cooperation Act of 1968. 42 U.S.C. § 4201, et seq. (1970). The following definition of a political subdivision was given in that Opinion:

"A political subdivision is a political division of the sovereignty of a state created by general law to aid in the administration of government. 56 Am.Jur.2d Municipal Corporations § 12 (1971). Such a subdivision is created by action of the legislature to exercise some portion of the sovereignty of the State in regard to one or more specific governmental functions. Such functions may be general, such as municipal government; other functions assigned may be specific, such as the provision of water and sewer service, or the provision of public transportation...Id., § 10." (Emphasis added.)

The criteria applied by the Supreme Court in the PEPCO case would be equally applicable in determining "State" status of WMATA under Rule 7 in this instance. Accordingly, it is my opinion that WMATA comes within the term "State" for purposes of Rule 7 of the Industrial Commission of Virginia and, more specifically, that WMATA is a "political subdivision" as the term is used in that Rule.

1The Rule in question provides "Self-insurance by the State, its Municipalities and Political Subdivisions. -- Permission for self-insurance by the State and its political subdivisions, as well as the municipalities of the State, will be granted, upon application therefor, without submission of proof of financial ability and without deposit of bond or other security. However, provision must be made for the premium tax provided for in Section 65.1-135 of the Act."

INDUSTRIAL DEVELOPMENT. AUTHORITIES. BONDS MAY ONLY BE SIGNED BY CHAIRMAN AND SECRETARY OF AUTHORITY.
October 7, 1982

The Honorable Douglas S. Vaught
Commonwealth's Attorney for Grayson County

This is in reply to your recent letter concerning the requirements for signatures on bonds issued by the Industrial Development Authority for the City of Galax. You ask "whether the bonds may be signed by a vice-chairman and the secretary or only by the chairman and the secretary," in light of the language contained in § 15.1-1379(b) of the Code of Virginia.

Section 15.1-1379, relating to the issuance of bonds, notes and other obligations of an industrial development authority, states, in subsection (b), as follows:

"All bonds shall be signed by the chairman of the authority or shall bear his facsimile signature, and the corporate seal of the authority or a facsimile thereof shall be impressed or imprinted thereon and attested by the signature of the secretary (or the secretary-treasurer) of the authority, and any coupons attached thereto shall bear the facsimile signature of said chairman."

It is an accepted principle of statutory construction that when a statute limits action to a particular manner or person, then the legislature has implied that such action cannot be done otherwise. See 1980-1981 Report of the Attorney General at 194; Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938). In light of this principle and of the express, mandatory language quoted above, I am of the opinion that the bonds may only be signed by the chairman and the secretary, as indicated.

You suggest that the authority's bonds may be signed by either the chairman or the vice-chairman, if the authority has adopted a resolution to that effect. An industrial development authority, created by the governing body of a municipality, is a political subdivision of the Commonwealth with such public and corporate powers as are set forth in Ch. 33 of Title 15.1. See § 15.1-1376. Section 15.1-1378 enumerates the powers of an authority, among which is included: "(j) to exercise all powers expressly given the authority by the governing body of the municipality which established the authority and to establish bylaws and make all rules and regulations, not inconsistent with the provisions of this chapter, deemed expedient for the management of the authority's affairs...." (Emphasis added.) In my opinion, a resolution of the authority authorizing someone other than the chairman and the secretary to sign the authority's bonds would be inconsistent with the express language of § 15.1-1379(b) and would be of no effect.
Insurance. Statutes. Retroactive Application to Existing Contracts.

February 10, 1983

The Honorable Charles L. Waddell
Member, Senate of Virginia

In your letter of January 27, 1983, you requested my opinion with respect to the effect of § 38.1-342.2. Section 38.1-342.2 was first enacted in 1973 in order to prohibit the use of subrogation clauses in prepaid health care plans, such as Blue Cross/Blue Shield plans. The Virginia Supreme Court had previously ruled that subrogation was available to the plans in order to offset claims they had paid to injured parties. See Collins v. Blue Cross, 213 Va. 540, 193 S.E.2d 782 (1973).

After enactment of the section, the plans began to insert a clause which prevents claimants from recovering benefits under the plan where a recovery from some other party is also obtained. In 1978, the Supreme Court of Virginia ruled that such a "non-duplication of benefits provision" was not a violation of the then existing prohibition on subrogation clauses in § 38.1-342.2. Reynolds Metals Co. v. Smith, 218 Va. 881, 241 S.E.2d 794 (1978). Thereafter, the General Assembly amended § 38.1-342.2 to prohibit the use of the "non-duplication of benefits provision" in any contract or plan delivered or issued for delivery in Virginia. This amendment became effective July 1, 1979.

The health plan in question asserts that the statute does not apply to the injured party's claim because it is made under a contract or plan issued prior to the effective date of the 1979 amendment. The injured party was enrolled as a participant in the plan prior to the effective date of the amendment as well. Apparently, the injury occurred after July 1, 1979. Although there are indications that the terms of the plans in question could have changed after July 1, 1979, I have not received any adequate factual basis to conclude that any changed or new plan actually was delivered or issued for delivery after that date.

Given these facts and the history of the statute as described above, your inquiry raises a single question: whether the statute may be retroactively applied to plans or contracts delivered or issued for delivery in Virginia prior to July 1, 1979, where an injury covered by the plan occurs after that date. In my opinion it cannot. In considering this question, I focus only on situations in which the participant became a member of the plan prior to July 1, 1979.

It is an established rule of statutory construction in Virginia that statutes will not be construed to be retrospective in their application in the absence of clear
legislative intent. Phipps, Adm'r v. Sutherland, 201 Va. 448, 111 S.E.2d 422 (1959). To construe statutes as retroactive, they must be "so clear, strong and imperative that no other meaning can be annexed to them...." Ferguson v. Ferguson, 169 Va. 77, 85, 192 S.E.2d 774 (1937).

There is nothing in the statute to indicate that the General Assembly intended to make § 38.1-342.2 retroactive to plans or contracts delivered or issued for delivery prior to July 1, 1979, solely because an injury occurs after the effective date of the statute. The section refers only to the delivery and issuance of plans or contracts, not to the date of personal injuries covered by the plans or contracts. Nor is there any indication that the language of the statute is intended to be retroactive in any other respect. Where a prepaid health plan or contract of insurance is issued before July 1, 1979, any "non-duplication of benefits provision" contained in it is enforceable against injuries incurred and claims made after that date.

This letter constitutes my official opinion based on the facts stated above. Facts different than those assumed in this Opinion could change the result; however, I am unable to conclude from the material provided that such different facts exist.

JAILS. GOOD CONDUCT CREDIT UNDER § 53.1-116 APPLIES TO THOSE SERVING SENTENCE IN JAIL ON WEEKENDS.

June 2, 1983

The Honorable T. E. McGregor
Sheriff of Pittsylvania County

You have asked whether the good time credit provisions of § 53.1-116 of the Code of Virginia apply to individuals who serve their sentences in jail on weekends.

The relevant part of § 53.1-116 states:

"Each prisoner shall earn good conduct credit at the rate of fifteen days for each thirty days served in which the prisoner has not violated the written rules and regulations of the jail."

As your inquiry noted, the present statute does not require that the time served be on a consecutive basis. Therefore, the language of the statute applies equally to all jail prisoners.

Accordingly, I am of the opinion that individuals who are serving their sentences in jail on weekends are eligible to qualify for good conduct credit within the meaning of § 53.1-116.
JAILS AND PRISONERS. REGIONAL JAILS. TRANSPORTATION OF PRISONERS IS RESPONSIBILITY OF SUPERINTENDENT OF REGIONAL JAIL.

October 7, 1982

The Honorable C. A. Rollins, Jr.
Sheriff of Prince William County

You have asked two questions dealing with your responsibilities and those of the superintendent of the Prince William Manassas Regional Adult Detention Center (a regional jail).

Your first question is whether the superintendent of that regional jail is responsible for transporting prisoners incarcerated in that facility to mental health institutions for evaluation, or whether this is the duty of the sheriff, who has no authority in the operation of the center.

Section 53.1-109 of the Code of Virginia states, in pertinent part, that

"The superintendent [of a regional jail] shall have and exercise the same control and authority over the prisoners committed or transferred to such jail...as the sheriffs of this Commonwealth have by law over the prisoners committed or transferred to their jails."

This Office has previously opined that this language, formerly codified as § 53-206.6, means that the superintendent of a regional jail has the responsibility of transporting prisoners in his care to the courts, hospitals, etc. 1974-1975 Report of the Attorney General at 218. That Opinion, in which I concur, further noted that a superintendent of a regional jail has the authority of a conservator of the peace while conveying prisoners to and from the jail.

Your second question is whether § 53-162 applies to regional jail superintendents. Effective July 1, 1982, Title 53 of the Code was repealed and Title 53.1 was enacted in lieu thereof. Former § 53-162 was replaced by § 53.1-119, and reads as follows:

"The sheriff shall provide officers to attend the courts within his jurisdiction while such courts are in session as the respective judges may require. He shall receive into the jail all persons committed by the order of such courts, or under process issuing therefrom, and all persons committed by any other lawful authority."

In light of the requirement in § 53.1-120 that each sheriff shall ensure the security of the courthouses and courtrooms within his jurisdiction, it is my opinion that the first sentence of § 53.1-119, dealing only with courts, would not apply to a superintendent of a regional jail. On the other
JUDGES. EXEMPTIONS FROM MANDATORY RETIREMENT AGE SET FORTH IN § 51-167(a).

January 5, 1983

The Honorable Robert N. Baldwin, Executive Secretary
Supreme Court of Virginia

This is in reply to your letter of December 29, 1982, in which you inquire of the applicability of the mandatory retirement provisions of § 51-167(a) of the Code of Virginia to certain categories of judges of courts not of record who began their service prior to July 1, 1970. In your letter you state:

"Section 51-167(a) of the Code of Virginia establishes mandatory retirement for any member of the Judicial Retirement System who attains seventy years of age. This provision also contains an exception which allows certain judges to serve beyond the mandatory retirement age.

I would appreciate your opinion as to whether the three categories of judges listed below are excepted from the mandatory retirement age set forth in § 51-167(a):

1. An individual who was a county judge prior to July 1, 1970, and who now serves as a judge in the current district court system.

2. An individual who was a regional juvenile and domestic relations court judge prior to July 1, 1970, and who continues to serve as a juvenile and domestic relations judge in the present district court system.

3. An individual who was a municipal juvenile and domestic relations judge prior to July 1, 1970, and who now serves as a juvenile and domestic relations judge in the present district court system.

For the purposes of this discussion, please assume that the county judge and regional juvenile and domestic relations judge were members of the former State Trial Justices' Retirement System. Also, assume that all the judges listed in the three examples are members of the present Judicial Retirement System."
Section 51-167(a) provides:

"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; however, any member who was a judge immediately prior to July 1, 1970, may serve as long as he would have been permitted under the law in effect immediately prior to July 1, 1970."

Section 51-161(3) defines "judge" to include "any judge of a district court of the Commonwealth other than a substitute judge of such district court."

Of course, in 1973 the district court structure replaced the county trial justice system, the regional juvenile and domestic relations court system and the municipal court system.

Turning to your first inquiry concerning a judge who began service prior to July 1, 1970, as a county judge, § 51-29.8, which was in effect immediately prior to July 1, 1970, provided in part:

"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." (Emphasis added.)

No other provisions of the Code of Virginia in force and effect at that time mandated that a county judge conclude his service as a county judge upon reaching any particular birthday. In the absence of such a State mandatory retirement age or limitation on service, the county judge was eligible "under the law" to continue service so long as he was reappointed by the appointing authority. This is the only conclusion which can be reached from a fair reading of § 51-29.8. Accordingly, I conclude that an individual who was a county judge or trial justice prior to July 1, 1970, and who continues to serve as a judge in the current district court system falls within the exception in § 51-167(a) and, therefore, is exempt from the mandatory retirement provisions of that section.

Turning to your second situation concerning a judge who began service prior to July 1, 1970, as a regional juvenile and domestic relations court judge, I find that § 51-29.19 is instructive. That section provided:

"Any former county judge who has been appointed judge of any regional juvenile and domestic relations court and as a consequence of such appointment has been required
to resign as such county judge shall be permitted to receive service credit under the Trial Justices' Retirement System and to retire as though his tenure as county judge had been unbroken, provided that his service as judge has remained unbroken, and provided such judge shall pay to the Trial Justices' Retirement Fund such amount as he would have been required to pay had he continued to serve as county judge between the time of his resignation and the effective date of this act." (Emphasis added.)

The language of that section did not establish a mandatory retirement age for regional juvenile and domestic relations judges in service prior to July 1, 1970; nor did other provisions of the Code of Virginia establish mandatory retirement requirements for judges of those courts prior to July 1, 1970. In the absence of State mandatory retirement provisions, I can only conclude that current district court judges who began service prior to July 1, 1970, as regional juvenile and domestic relations court judges fall within the exception to § 51-167(a) and are eligible to serve beyond the age of seventy. A prior Opinion of this Office concerning this particular issue reached the same result. See 1975-1976 Report of the Attorney General at 180.

Turning to your final question which concerns judges who were initially appointed prior to July 1, 1970, as municipal judges, I am unable to find any provision of State law in effect immediately prior to July 1, 1970, which mandated retirement for those judges at any particular age. In a prior Opinion of this Office found in the 1977-1978 Report of the Attorney General at 195, my predecessor considered this issue and opined, in effect, that the exemption of § 51-167(a) applied only to judges appointed prior to 1970 who were members of a State retirement system at that time. Because municipal judges were not members of a State retirement system, that Opinion concluded that the exemption was not applicable to them. For the reasons which follow, I must disagree with that Opinion and it is hereby expressly overruled.

The exception created in § 51-167(a) contains only one requirement -- that the judge be in service prior to July 1, 1970. For such a judge, the section permits him to "serve as long as he would have been permitted under the law in effect immediately prior to July 1, 1970." (Emphasis added.) The Code provision is clear and does not add as a condition that "the law" in question be only that which provided State retirement benefits under the former State retirement system to a limited number of judges. To the contrary, "the law" must embrace all State laws which circumscribe the eligibility of an individual to serve as judge.

Because § 51-167(a) is clear, there is no need to rely upon administrative interpretations as was done in the 1977-1978 Opinion. The question is simply whether "the law" in effect immediately prior to July 1, 1970, permitted the
judge to continue to be eligible for service beyond any particular age. If the law did not mandate retirement at a particular age, then it logically follows that the law permitted the judge to continue in service subject, of course, to reappointment and good health. Accordingly, because no provision of State law mandated retirement at a particular age for municipal judges in service prior to July 1, 1970, I am of the opinion that such individuals who continue to serve as district court judges fall within the exception to § 51-167(a) and may continue service beyond the age of seventy.4

The fact that the municipal judge was not a member of a State retirement system prior to 1973 has no bearing upon his eligibility to continue in office beyond the age of seventy. Any other interpretation would reach the anomalous result, without any basis, of further benefitting two categories of judges of courts not of record who happened to enjoy the unrelated benefits of a State retirement system while limiting the right of service of the judges of a third category when the General Assembly had not seen the need to do so.

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1In 1973, the General Assembly expanded the definition of "judge" by deleting reference to "regional juvenile and domestic relations, county, or county juvenile and domestic relations" and inserting "any judge of a district court...."

2This section was a part of Ch. 2.2 of Title 51 and concerned the Trial Justices Retirement System. It was repealed when Ch. 7 of Title 51 pertaining to the Judicial Retirement System became effective on July 1, 1970.

3As with § 51-29.8, § 51-29.19 was in effect immediately prior to July 1, 1970, and was repealed on that date by the act which created the Judicial Retirement System.

4I note that in an Opinion to the Honorable Benjamin L. Campbell, Judge, Juvenile and Domestic Relations District Court, dated September 11, 1981, found in 1981-1982 Report of the Attorney General at 205, my predecessor opined that a municipal juvenile and domestic relations court judge initially appointed prior to 1970 was grandfathered by the exception to § 51-167(a). In reaching its conclusion, that Opinion relied upon § 51-29.8 which, as can be seen from the quotation above, concerned only county judges. As I have stated, a person in Judge Campbell's position is eligible to continue service beyond the age of seventy because the law pertaining to his position in effect immediately prior to 1970 would have permitted him to serve beyond the age of seventy. Accordingly, while I reject the reasoning of the Campbell Opinion, I do agree with its result for the reasons stated in this Opinion.

JUDGES. RETIREMENT. MANDATORY RETIREMENT OF CIRCUIT COURT JUDGE INITIALLY COMMISSIONED IN 1969.
January 13, 1983

The Honorable Franklin M. Slayton
Member, House of Delegates

I write in response to your letter of this date in which you inquire whether the law requires a circuit court judge to retire under the following factual situation. The judge was initially commissioned as a circuit court judge on August 1, 1969. He was reappointed in 1975 and his term expires on January 31, 1983. The judge was born in May 1912, and, thus, reached the age of seventy in May 1982.

Section 51-167(a) of the Code of Virginia provides:

"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; however, any member who was a judge immediately prior to July 1, 1970, may serve as long as he would have been permitted under the law in effect immediately prior to July 1, 1970."

The retirement "law in effect" for circuit court judges immediately prior to July 1, 1970, was § 51-3 of the Code.¹

Section 51-3(b) provides in pertinent part:

"Any judge of any circuit court, or of any corporation or city court of any city of the first class, elected or appointed for the first time after June thirtieth, nineteen hundred fifty-four, and prior to March first, nineteen hundred sixty-two, shall retire from active service upon attaining the age of seventy-five years, regardless of his years of such service, and those elected or appointed for the first time after March first, nineteen hundred sixty-two, shall retire from active service upon attaining the age of seventy years regardless of his years of service."

As can be seen, it is clear that the "law in effect" immediately prior to July 1, 1970, required that a circuit court judge appointed for the first time after 1962 "shall retire" upon reaching the age of seventy.

Based upon the foregoing facts and analysis, it is apparent that the age seventy mandatory retirement provisions of § 51-167(a) are applicable to the judge to whom you make reference. Accordingly, I am of the opinion that the judge in question "shall be retired" twenty days after the convening of the 1983 regular session of the General Assembly.²
1982-1983 REPORT OF THE ATTORNEY GENERAL

Section 51-3 was repealed with the creation of the Judicial Retirement System by Ch. 779, Acts of Assembly of 1970.

I am aware of a letter dated September 4, 1981, from an employee of the Virginia Supplemental Retirement System which stated that the judge in question was "grandfathered to the provisions of the Trial Justices System" and, therefore, "may continue to serve indefinitely." Unfortunately, that conclusion was based upon the erroneous premise that the judge was a trial justice in 1969. There was no mandatory retirement age at that time for trial justices. As you state, the judge was appointed to the circuit court in 1969. It is my understanding that the author of the 1981 letter has reviewed her file and acknowledged her mistake.

JUDGMENTS. INTEREST RATE CHANGE APPLICABLE TO ALL OUTSTANDING JUDGMENTS.

November 1, 1982

The Honorable Charles E. King, Jr., Clerk
Circuit Court of Gloucester County

You have asked whether an amendment to § 6.1-330.10 of the Code of Virginia increasing the rate of interest on judgments requires that the calculation of interest on a criminal judgment in favor of the Commonwealth for fines and costs entered prior to the effective date of the amendment be based upon the newly amended rate for the period that the judgment remains outstanding after the effective date of the amendment. Two prior Opinions of this Office have held that interest upon a criminal judgment for fines and costs is determined in the same manner as is interest on civil judgments. See 1981-1982 Report of the Attorney General at 62 and 1978-1979 Report of the Attorney General at 142.

Section 8.01-382 provides in part that "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...." (Emphasis added.) This statute also provides that "[i]f a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest...at the rate as provided in § 6.1-330.10...." (Emphasis added.) Section 6.1-330.10 provides in part that "[t]he judgment rate of interest shall be ten per centum per annum...." (Emphasis added.) Section 6.1-330.10 was first introduced into the Code by Ch. 448, Acts of Assembly of 1975. Two years later, Ch. 617, Acts of Assembly of 1977, recodified the civil remedies and procedure title and made the interest provisions in § 8.01-382 quoted above applicable to decrees and judgments in nonjury trials on the same basis as the antecedent provisions of § 8-223 were applicable to jury trials.1 See Reviser's Note to § 8.01-382.
It is clear that the General Assembly intended that the rate of interest to be calculated for all judgments at the time they are entered is to be the rate specified in § 6.1-330.10. The distinction in § 8.01-382 between verdicts and judgments which "may provide for interest" and a judgment or decree "which does not provide for interest" focuses, not upon the rate of interest which is to be fixed, but upon "the period at which the interest shall commence." More precisely, the discretion given to the jury or a court goes to deciding the question whether prejudgment interest should be allowed, and not to deciding what rate of interest is to be allowed on the judgment or decree from its date of entry or even whether interest is to be allowed at all. Doyle & Russell v. Welch Pile Driving, 213 Va. 698, 703, 194 S.E.2d 719, 723 (1973); Safway Steel Scaffolds v. Coulter, 198 Va. 469, 478, 94 S.E.2d 541, 548 (1956); see, also, § 8.01-449 which requires that the judgment docket state "The time from which it bears interest" but does not mention the rate of interest. Thus, § 8.01-382 does not extend to a jury or a court the discretion to set a rate of interest different from that specified by the General Assembly in § 6.1-330.10. See 1981-1982 Report of the Attorney General at 209.2 The rate of interest on judgments and decrees is the lawful rate then in effect. Schwab v. Norris, 217 Va. 582, 587, 231 S.E.2d 222, 226 (1977).

Given the mandatory nature of interest to be paid on judgments and decrees, we may turn to the question whether the rate of interest is forever fixed by the lawful rate in effect at the time of the entry of the judgment or decree. Judgments do not earn interest under the common law. Thus, we must find our answer in the statutes regulating interest on judgments. Doyle & Russell, supra, 213 Va. at 703.

There is a split of authority among jurisdictions which have statutes regulating interest on judgments. The two schools of thought are divided between courts which view judgments as contractual and those which hold that interest on judgments is part of the statutory remedy and is a matter of legislative grace. In the former jurisdictions, the courts believe that a change in the interest rate on an outstanding judgment results in an unconstitutional, retroactive impairment of the obligation of the judgment contract and is, therefore, not permitted. The latter jurisdictions are persuaded that interest on judgments is imposed by operation of law and that the right to receive such interest depends entirely upon what the legislature has enacted. See 4 A.L.R.2d 932, § 10, at 949, 950 (1949).

According to the editors of this A.L.R. article, Virginia is aligned with those jurisdictions which do not allow a subsequent statutory change in the rate of interest on judgments to affect judgments entered prior to the effective date of the amendment. The editors' conclusion is based upon their reading of Brooke v. Roane & Co., 5 Va. (1 Call) 205 (1798). A prior Opinion of this Office addressing this question reached a similar conclusion relying, not upon
the Brooke case, but upon § 1-16 of the Code. See 1975-1976 Report of the Attorney General at 175. For the reasons which follow, I believe that the A.L.R. editors' conclusion and, to a degree, the prior Opinion to be incorrectly reasoned.

The Opinion rendered to the Honorable H. Ratcliffe Turner, Judge, Henrico County General District Court, dated June 14, 1976, held that when the statute prescribing the judgment rate of interest is amended, "such a legislative amendment operates prospectively only and has no effect on prior judgments." 1975-1976 Report of the Attorney General at 175, 176. I concur in the Opinion to the extent that interest already accrued prior to the effective date of the amendment may not be retroactively changed by the legislature. However, I disagree with the Opinion's conclusion that § 1-16 prevents the subsequent accrual of interest at the amended rate for a judgment outstanding at the time the amendment became effective. In pertinent part, § 1-16 provides:

"No new law shall be construed to repeal a former law, as to...any right accrued...under the former law, or in any way whatever to affect...any right accrued...before the new law takes effect...."  

The antecedent equivalent of § 1-16 has been held by the Supreme Court of Virginia to be no bar to the award of interest upon a judgment entered in an action which was initiated before the statute providing for such interest first became effective. Lewis v. Arnold, 54 Va. (13 Gratt.) 454, 462-463 (1856). Explaining the inapplicability of the language of § 1-16, the Court said:

"No one who has inflicted injury by the commission of a tort can be properly said to have an established right to withhold for any space of time the measure of reparation ascertained by the verdict of a jury to be due to the injured party. The justice of requiring the prompt payment of the sum which may be assessed by a jury in such case, and of allowing the party injured to receive, and of compelling the party withholding to pay, a fair compensation for retaining it, is just as clear as it is to make a similar requisition of one who is found to be the debtor of another by contract. And when it is entirely within the power of the wrongdoer wholly to avoid the new consequence which the [new law] in question attaches to the verdict, (as it is, by the prompt discharge of the damages,) I cannot see how the law can be said to be objectionable as being of a retrospective character." [Opinion by Justice Daniel.]

The decision was interpreting a change in the law which added to the types of judgments or decrees upon which interest could be allowed a judgment for an action in tort. Inasmuch as the Supreme Court of Virginia did not find objectionable the application of interest on a judgment in a tort action where no interest was allowable at the time the action was
commenced, I conclude that § 1-16 would not bar the analogous situation where the statutory rate of interest is amended after the judgment is entered. To the extent the Turner Opinion may be read to opine that a change in the interest rate prescribed by § 6.1-330.10 does not change the rate at which interest thereafter accrues on judgments outstanding at the time of the legislative change because of § 1-16, that Opinion is overruled.

It is not difficult to understand how the editors of 4 A.L.R.2d 932 have misconstrued the meaning of Brooke v. Roane & Co., 5 Va. (1 Call) 205 (1798). That opinion is very brief, there are few facts reported, and there are no citations to the applicable law. Some twenty-three years later, Supreme Court Judge Coalter likewise found the Brooke opinion to be something of a puzzle. It is only because he found it necessary to go back to the original Brooke record and then report the results of his efforts that we are able to learn what the true holding of the Brooke case was. Bent v. Patten, 22 Va. (1 Rand.) 25, 31 fn.* (1821). The chronology of events in Brooke may be summarized as follows:

1. An action was brought in the trial court for payment of a debt bearing five percent interest. The statutory legal rate of interest at the time the debt was contracted was five percent. While five percent remained the legal rate of interest, judgment was obtained on the debt.

2. At some later time, the judgment creditor sought execution on his judgment after the statutory legal rate had been raised by the legislature to six percent. The debtor, in lieu of suffering an execution on his property, tendered a forthcoming bond. The debtor subsequently breached the condition of the bond and the bond was forfeited.

3. The creditor sought a second judgment on the forfeited forthcoming bond and the trial court awarded judgment with interest at six percent.

4. On appeal, the Brooke court held the second judgment to be erroneous because it allowed interest at six percent instead of five percent.

The Brooke decision notes that the forthcoming bond was not a new contract and, therefore, the creditor was limited to the interest rate contracted for on the original debt.3

Unfortunately, the Brooke decision made reference to "the former judgment, which bore an interest of five percent only" without making it clear that it was not the judgment itself which was entitled to interest but the original debt. See, also, Boswell v. Big Vein Pocahontas Coal Co., 217 Fed. 822, 824 (W.D. Va. 1914). This latent ambiguity misled the A.L.R. editors to conclude that a change in the statutory
rate of interest on judgments in Virginia would not affect interest earned on judgments entered prior to the change.

If any doubt remains that the Brooke case does not stand for the proposition for which it is cited in 4 A.L.R. 2d 932, it is swiftly and decisively removed by an examination of the statutes of the day. As noted earlier, there is no interest on judgments or decrees at common law. Lewis v. Arnold, supra, at 464. I have traced the origins of § 8.01-382 and found that its earliest antecedents were first enacted in 1804 and 1805. Until those times, the common law controlled and there was no authority for interest on judgments. Consequently, the Brooke case, decided in 1798, has no relevance to the question you have asked and was improperly characterized in 4 A.L.R. 2d 932.

Left with no authority in the Commonwealth upon which we may rely for guidance in answering your question, a profitable comparison may be made between §§ 6.1-330.10 and 8.01-382 and their counterparts in sister jurisdictions where the highest courts have rendered a decision on the issue. Among the more recent decisions, Illinois, Kentucky and Missouri favor the view that an amendment to the rate of interest on judgments also amends the rate of interest accrued on judgments outstanding at the time of the amendment. Jurisdictions holding to the contrary include Kansas and Texas. Though all of the statutes are somewhat similar, they may be separated into jurisdictions which grant the entitlement to interest on judgments and then set the rate of interest in a separate provision (either by section, sentence or clause) and those jurisdictions which grant the entitlement and set the rate in the same provision. According to this analysis, the jurisdictions are divided between Virginia, Kentucky and Missouri in the former group and Illinois, Kansas and Texas in the latter group. Hence, Virginia, by the form in which her statutes are drafted, is aligned more closely with those jurisdictions holding that an amendment to the rate of interest on judgments holds in the prospective accrual of interest at the new rate on judgments that are outstanding. Ridge v. Ridge, 572 S.W.2d 859 (Ky. 1978); Senn v. Commerce-Manchester Bank, 603 S.W.2d 551 (Mo. 1980); Noe v. City of Chicago, 56 Ill.2d 346, 307 N.E.2d 376 (1974); Bartlett v. Heersche, 209 Kan. 369, 496 P.2d 1314 (1972); and Coastal Industrial Water Authority v. Trinity Portland Cement Division, 563 S.W.2d 916 (Tex. 1978).

It is arguable that the distinguishing characteristic of the statutes mentioned above is a distinction without a difference for substantive purposes. However, I am influenced by what I consider to be better-reasoned opinions in the Illinois, Kentucky and Missouri decisions. Unlike those decisions, the Kansas and Texas decisions follow the view mentioned earlier that a judgment is contractual in nature and should not be "retroactively" affected by a later change in a statute which is not, by its terms, expressly applicable to prior judgments. Bartlett, 496 P.2d at 1318; Coastal Industrial Water Authority, 563 S.W.2d at 918-919.
I believe that interest on judgments is a statutory remedy which acts by operation of law. The General Assembly has the power to ascertain the appropriate rate of this remedy in accordance with prevailing economic conditions. Noe, 307 N.E.2d at 379; Senn, 603 S.W.2d at 554; Ridge, 572 S.W.2d at 861; cf. 1972-793 Report of the Attorney General at 396(2) (amendment to a statute setting the interest rate on taxes applies thereafter to all interest accrued regardless of the year for which such taxes are assessed). In fact, there is no retroactive effect because it must be agreed that the amended rate of interest may only affect interest not already accrued. Noe, id.; Lewis v. Arnold, supra, 54 Va. at 463. Moreover, the judgment debtor should not be permitted to profit from changing economic circumstances by delaying satisfaction of the judgment. Lewis, id.

Therefore, in conclusion, it is my opinion that an amendment to § 6.1-330.10 increasing or decreasing the statutory rate of interest on judgments is applicable not only to judgments rendered on that day and thereafter but such an amendment is applicable as well to judgments previously rendered for interest accruing from the effective date of the amendment until paid or until a subsequent amendment to § 6.1-330.10. As stated above, this is applicable to judgments for fines and costs arising out of a criminal case.

1The recodification also made § 8.01-382 applicable to all actions and suits. The antecedent § 8-223 applied only to actions on contract, tort and suits in equity.

2As the Brice Opinion notes, there are exceptions relating to interest on judgments involving contracts for the loan of money and commercial paper.

3In addition to Judge Coalter's footnote in his concurring opinion in the Bent case, we are also aided by the full opinion of that Court which reaches the same conclusion regarding the facts in Brooke. Bent, supra, at 36-37.

4Antecedent sections of § 8.01-382 and the Codes in which they appear are: § 8-223 (1950); § 6259 (1919); §§ 3390, 3391 (1887); Title 51, Ch. 177, §§ 14, 18 (1849); Vol. 1 Rev. Code p. 508, Ch. 128, § 128 and p. 208, Ch. 66, § 58 (1819); Ch. 8, § 2, 1805 Acts of Assembly and Ch. 116, §§ 1, 5, 1804 Acts of Assembly.


6Given that there is no impairment of the obligation of contract, it may be asked whether, in the context of a
judgment for criminal fines and costs, an increase in the interest rate on such a judgment may result in a constitutionally impermissible ex post facto law. It is true that a fluctuating interest rate attaches legal consequences to a crime committed before the law took effect. See Weaver v. Graham, 450 U.S. 24, 31 (1981). However, I am persuaded that interest on a criminal judgment for fines and costs is not in the nature of criminal punishment which may not be increased by an ex post facto law. The fine and costs are not being increased. The election to satisfy the judgment or delay its payment and suffer the accrual of interest for nonpayment is a procedural matter entirely within the control of the convicted judgment debtor. See Weaver, 450 U.S. at 36, n. 21.

JUDGMENTS. NOTICE PROVISIONS OF § 8.01-296(2)(B) MUST BE FULLY COMPLIED WITH BEFORE VALID JUDGMENT MAY BE ENTERED BY GENERAL DISTRICT COURT, REGARDLESS OF WHETHER PARTY SEEKING DEFAULT IS REQUIRED TO PROVE HIS CASE.

May 20, 1983

The Honorable J. R. Zepkin, Judge
General District Court
Ninth Judicial District

This is in response to your request for an official opinion on whether § 8.01-296(2)(b) of the Code of Virginia prohibits a court from entering a judgment "[w]here service has been executed by posting and the party causing service has failed to mail a copy of the pleading to the party served..." but "the plaintiff was required to prove his case."

Section 8.01-296(2) sets forth the manner of serving papers upon natural persons by substituted service. The subsection provides, in pertinent part:

"b. If such service cannot be effected under subitem a of 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...."

In American Ry. Express Co. v. F. S. Royster Guano Co., 141 Va. 602, 608, 126 S.E. 678 (1925), aff'd 273 U.S. 274 (1927), the Virginia Supreme Court said:

"It is well settled 'that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely
nugatory, in which case the judgment fails for want of jurisdiction." (Citation omitted.)

The issue squarely presented by your inquiry is whether plaintiff's failure to comply strictly with the terms of § 8.01-296(2)(b) is "so serious as to make the...service entirely nugatory...." If the manner of service is so defective, the court may not have jurisdiction, and, if it lacks jurisdiction, any judgment rendered will be void. Moore v. Smith, 177 Va. 621, 15 S.E.2d 48 (1941). If the defect is not of a serious nature, however, the judgment may be merely voidable. American Ry. Express Co., supra.

It has been stated that "[t]he majority of the cases arising from defective service involve constructive or substituted service. The Court rigidly maintains that this type of service has no validity unless the terms of the statute are strictly followed." Defects in Process or Service in Virginia: Void or Voidable, 44 Va.L.Rev. 654, 656-657 (1958). (Emphasis added.) See, also, Robertson v. Stone, 199 Va. 41, 43, 97 S.E.2d 739 (1957). While the rule of strict construction evolved from cases decided under predecessor Code sections, the rule would apply with equal vigor to § 8.01-296.

To increase the likelihood of actual notice, § 8.01-296 revised former § 8-51 to require that before a default judgment can be entered, process must be mailed not less than ten days prior to the entry of judgment to the defendant's last known address, in addition to posting at his abode, as was the case under § 8-51 when personal service on a family member cannot be obtained. The General Assembly's requirement of more, rather than less, notice evinces an intent to require strict compliance with the notice provisions of the section. Any defect in the service, as in the example you posed, would therefore lead to a void judgment.

Regardless of any burden of proof placed on the plaintiff, if the defendant "fail[s] to plead or otherwise appear..." any judgment entered against him would be by default. Landcraft Co. v. Kincaid, 220 Va. 865, 867, 263 S.E.2d 419 (1980); Rule 3D:6(b), Rules of the Supreme Court of Virginia. Such a judgment would be valid only "if adequate notice has been given to the defaulting party." Landcraft Co., supra, 220 Va. at 870.

In summary, I am of the opinion that the notice provisions of § 8.01-296(2)(b) must be fully complied with before a valid judgment may be entered, regardless of whether the plaintiff was required to prove his case.

JURIES. PAYMENT OF PER DIEM ALLOWANCE INCLUDES EXPENSES.
April 6, 1983

The Honorable Adelard L. Brault
Member, Senate of Virginia

This is in response to your request for my opinion whether payment for jury service pursuant to §14.1-195.1 of the Code of Virginia may be treated as an amount received "for service as a juror" within the meaning of 5 U.S.C. § 55151 or whether it is a payment to cover "expenses" by jurors in the discharge of their duties. I assume that your question deals only with the daily allowance provided in § 14.1-195.1 and not special costs or exceptional expenses.

A brief review of the history of the statute will demonstrate the difficulty in providing a definitive answer to your inquiry. The 1982 session of the General Assembly amended §14.1-195.12 to remove all references to reimbursement for mileage expenses and to increase the daily compensation of jurors from $15 to $20. Chapter 610, Acts of Assembly of 1982. Prior to that amendment, there had been a specific provision allowing reimbursement to jurors for mileage expenses since 1884, when an allowance of four cents per mile was added to the daily compensation of one dollar. Chapter 163, Acts of Assembly of 1883-1884. Section 3160 of the Code of 1877; §8-208.33, Code of 1950, and its successor, §14.1-195.1. The mileage reimbursement rate was 20 cents per mile at the time of the subject amendment to §14.1-195.1. Section 4-9.08, Chapter 601, Acts of Assembly of 1981 (Appropriation Act).

Section 14.1-195.1 now provides for compensation to every person summoned as a juror in the amount of "twenty dollars for each day of attendance upon the court and other necessary and reasonable costs as the court may direct." The "other necessary and reasonable costs" are not limited or explained, but are left to the discretion of the court. Section 14.1-195.1 further provides that when jurors are summoned from another political subdivision they may be allowed "in addition to the above per diem, their actual expenses." "Per diem" is defined as "an allowance or amount of so much per day" which is often given to cover expenses, Black's Law Dictionary at 1023 (5th ed. 1979), and as "a daily allowance; a daily fee." Webster's New Collegiate Dictionary at 850 (1975).

In a prior Opinion, this Office enunciated the general rule regarding compensation of jurors as being that a juror is entitled to receive his per diem allowance for all the time he is necessarily in attendance on the court, whether or not during such time he is actually serving as a juror. See 1979-1980 Report of the Attorney General at 120. Because the General Assembly raised the per diem allowance by $5 per day at the same time it removed the mileage expense reimbursement provision, and because per diem allowances are generally provided for incidental expenses, as well as services rendered, it is reasonable to assume that the General
Assembly intended the per diem allowance to include mileage expenses and any other incidental expenses, rather than have the clerk determine the mileage allowance for each juror.

I am, accordingly, of the opinion that the payment of the daily allowance, as presently constituted, for juror attendance under § 14.1-195.1 is, in fact, a per diem for both attendance and expenses. Consequently, I cannot give a definitive answer to your question. You, of course, understand that the ultimate application of the federal statute rests with the federal government.

15 U.S.C. § 5515 provides as follows: "An amount received by an employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia for service as a juror or witness during a period for which he is entitled to leave under section 6322(a) of this title, or is performing official duty under section 6322(b) of this title, shall be credited against pay payable to him by the United States or the District of Columbia with respect to that period."

2The first paragraph of § 14.1-195.1 presently provides in pertinent part: "Every person summoned as a juror in a civil or criminal case shall be entitled to twenty dollars for each day of attendance upon the court and other necessary and reasonable costs as the court may direct. Jurors summoned from another political subdivision pursuant to § 8.01-363 may be allowed by the court, in addition to the above per diem, their actual expenses."

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. AUTHORITY TO AWARD ATTORNEY'S FEES IN CASES OF SUPPORT AND CUSTODY.

April 6, 1983

The Honorable James W. Flippin, Judge
Juvenile and Domestic Relations District Court
for the City of Roanoke

This is in response to your inquiry whether a juvenile and domestic relations district court has the authority to award attorney's fees in cases transferred to it under § 20-79(c) of the Code of Virginia.

Juvenile and domestic relations district courts have jurisdiction under § 16.1-241 in cases of custody, visitation, support, control or disposition of a child (subsection A); unlawful desertion and non-support (subsection E); and spouse support (subsection L).

Only circuit courts have jurisdiction of divorce suits. Section 20-96. On request of a party, a circuit court must
provide in a final divorce decree for (1) maintenance, support, care and custody of children, (2) support and maintenance for the spouse, and (3) counsel fees and costs if in the judgment of the court any or all of the foregoing should be as decreed. Section 20-79(b). Upon entry of a circuit court decree ruling on these matters, the juvenile and domestic relations district court is divested of jurisdiction and its previous orders become inoperative. Section 20-79(a).

After entering a divorce decree, however, a circuit court may transfer to a juvenile and domestic relations district court the enforcement of its support and custody orders. Furthermore, the circuit court may transfer "any other matters pertaining to support and maintenance for the spouse, [or to] maintenance, support, care and custody of the child...." Section 29-79(c). Thus a circuit court may transfer not only enforcement but all future matters, including modification of previous decrees and entry of new decrees based on changed circumstances. In cases transferred under § 20-79(c), an appeal may be taken to the circuit court in accordance with § 16.1-296 (formerly § 16.1-214).

Juvenile and domestic relations district courts are granted broad powers over matters which fall within their jurisdiction. Section 16.1-227. Their powers are to be construed "liberally" to effect the beneficial purposes of domestic relations law, and they are granted "all necessary and incidental powers and authority...." Section 16.1-227. In cases of custody, visitation or support of a child, a juvenile and domestic relations district court may make "any order of disposition to protect the welfare of the child and family as may be made by the circuit court" (§ 16.1-279(F)); and in cases of spouse support, the court may enter "any appropriate order to protect the welfare of the spouse seeking support" (§ 16.1-279(M)).

Juvenile and domestic relations district courts have been granted statutory power to award attorney's fees in specific classes of cases falling within their original jurisdiction. See § 16.1-267 (appointment of counsel), and §§ 16.1-279(I) and 20-71.1 (desertion and non-support proceedings). Those provisions are not applicable here, although they are indicative of the legislative intent to authorize the awarding of attorney's fees by the juvenile and domestic relations district courts.

The special status of attorney's fees in domestic relations cases is cogently expressed in Eddens v. Eddens, 188 Va. 511, 517, 50 S.E.2d 397, 402 (1948), where the Supreme Court noted:

"[A]llowances for counsel fees and suit money are of the same nature and are governed by the same general principles as allowances for maintenance and support ... allowances for counsel fees and costs are incidental..."
to and a part of the alimony decreed to be paid to the wife...."

More recently, the Court has upheld the power of courts to award attorney's fees incurred in contempt proceedings to enforce an order of the court for child support. Carswell v. Masterson, 224 Va. 329, ___ S.E.2d ___ (1982).

In my opinion, the General Assembly intended attorney's fees to be embraced as "any other matter[s] pertaining to support and maintenance for the spouse, [or to] maintenance, support, care and custody of the child..." for purposes of § 29-79(c). A contrary rule would either deprive a spouse of attorney's fees (a case may be transferred on motion of only one party), or require the spouse to initiate new proceedings for fees in circuit court after prevailing in a transferred matter. Such a result would be illogical as it would frustrate the purpose of § 20-79(c).

As the Supreme Court of Virginia has noted, the juvenile and domestic relations district courts are "particularly well equipped..." to supervise support and custody issues with which attorney's fees are so closely related. Werner v. Commonwealth and Werner, 212 Va. 623, 626, 186 S.E.2d 76, 78 (1972). Indeed, they were created for the express purpose of adjudicating such matters. Section 16.1-227.

I note also that the court which has heard the underlying dispute is in a far better position to decide the appropriateness of fees than the circuit court which has not had the benefit of hearing the underlying dispute.

For the foregoing reasons, it is my opinion that a juvenile and domestic relations district court has the authority to award attorney's fees in matters transferred to it under § 20-79(c).

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. RES JUDICATA BARS REOPENING OF CIVIL PETITION FOR NONSUPPORT WHICH INVOLVES SAME PARTIES AND SOME CAUSE OF ACTION. HAD PREVIOUSLY BEEN DISMISSED FOR INSUFFICIENT EVIDENCE.

March 31, 1983

The Honorable J. Taylor Williams, Judge
Juvenile and Domestic Relations District Court
Tenth Judicial District

You have asked whether the recent amendments to §§ 20-61.1 and 20-61.2 of the Code of Virginia can be the basis for an unwed mother to reopen a case involving a civil petition for child support against a putative father when that mother had previously initiated the child support petition in 1977 against the same putative father and it had been dismissed due to insufficient evidence.
Section 20-61.1 was amended by the 1982 session of the General Assembly to allow the introduction of results of medically reliable genetic blood grouping tests, including the human leukocyte antigen (HLA) test, in paternity actions against a putative father. See § 20-61.1(5). Section 20-61.2 was also amended by the 1982 session of the General Assembly to allow any court in which the issue of paternity arises to direct and order the alleged father, mother and child to submit to such blood grouping tests. Your inquiry, therefore, is whether the doctrine of res judicata would bar an unwed mother, who had filed a civil petition for child support in 1977 against the putative father of her child and who had then had her petition dismissed for insufficient evidence, from now seeking to reopen that petition against the same putative father, and seek to have blood grouping tests ordered under §§ 20-61.1(5) and 20-61.2.

The doctrine of res judicata has been explained by the Virginia Supreme Court as follows:

"'When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.'" Hagen v. Hagen, 205 Va. 791, 793, 794, 139 S.E.2d 821, 823 (1965), quoting Kemp v. Miller, 166 Va. 661, 674, 675, 186 S.E. 99 (1936).

The situation which you described is a motion to reopen an original petition previously dismissed for insufficient evidence. No new parties have been named and no new or separate cause of action has been alleged. Based on those facts, I am of the opinion that the doctrine of res judicata would bar the reopening of the case.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. SECOND PROSECUTION FOR CRIMINAL NONSUPPORT BASED ON AMENDMENT TO § 20-61.1 IS PROHIBITED.

August 20, 1982

The Honorable R. Baird Cabell, Judge
Juvenile and Domestic Relations District Court
Fifth District

You have asked whether the recent amendment to § 20-61.1 of the Code of Virginia can be the basis for a mother to file a second criminal support petition under § 20-61 against a
defendant when that mother had previously filed a criminal support petition prior to July 1, 1982, against the same defendant, the factual basis to establish paternity presented, and he had been found not guilty due to lack of proof of paternity.

Prior to July 1, 1982, evidence of paternity against a putative father was limited to four specific types of evidence. See §§ 20-61.1(1) through 20-61.1(4). Chapter 307, Acts of Assembly of 1982, effective July 1, 1982, amended § 20-61.1 by adding a new subsection (5), to also allow results of medically reliable genetic blood grouping tests, including the human leukocyte antigen (HLA) test, to establish paternity against a putative father. See § 20-61.1(5). Your inquiry, therefore, is whether a mother, who had filed a criminal support petition prior to July 1, 1982, against the putative father of her child who had then been found not guilty due to lack of proof of paternity, can now file a second criminal support petition against the same putative father, seeking to have blood grouping tests ordered pursuant to § 20-61.2 and admitted pursuant to § 20-61.1(5).

The Fifth Amendment to the United States Constitution and Art. I, § 8 of the Constitution of Virginia (1971) prohibit an individual from being placed in jeopardy twice for the same criminal offense. An essential factual issue in the criminal charge of nonsupport is whether the defendant is the father of the child. The defendant in your hypothetical inquiry has already been criminally charged once and found not guilty of criminal nonsupport due to lack of proof of paternity. This represents a resolution in the defendant's favor of at least one of the critical factual elements of the second offense charged. These same factual elements would have to be proven again in the second proceeding and would result in a second prosecution for the same offense after previously being found not guilty. Johnson v. Commonwealth, 221 Va. 736, 743, 273 S.E.2d 784, 789 (1981), cert. denied, U.S. , 102 S.Ct. 422, L.Ed.2d (1981). I am, therefore, of the opinion that a second prosecution of the individual for criminal nonsupport based on the provisions of the new amendment to § 20-61.1 would violate that individual's constitutional right to protection against double jeopardy.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. § 16.1-296 requires Circuit Court to assess writ tax, costs and fees on matters appealed to it from Juvenile and Domestic Relations Court only if trial fee could have been charged in Juvenile and Domestic Relations Court.

April 20, 1983

The Honorable Paul C. Garrett, Clerk
Circuit Court of the City of Charlottesville
This is in response to your request for an opinion pertaining to the payment of costs, taxes and fees in cases involving support, custody and visitation which are appealed to the circuit court from the juvenile and domestic relations district court. You note that § 16.1-296 of the Code of Virginia provides that costs, taxes and fees on appealed cases shall be assessed only in those cases in which a trial fee could have been assessed in the lower court.

Sections 14.1-123 and 14.1-125 specify the fees for services performed by the judges or clerks of district courts for processing criminal and civil cases. Section 16.1-107 sets forth the requirements, including fees, for appeals from courts not of record to the circuit court in civil cases.

Section 16.1-296 governs appeals from a final order of the juvenile and domestic relations district court. Although no specific costs, taxes or fees are prescribed in that section, Ch. 465, Acts of Assembly of 1982, added a specific paragraph addressed to the assessment of costs, taxes and fees on appealed cases. That provision reads as follows:

"Costs, taxes and fees on appealed cases shall be assessed only in those cases in which a trial fee could have been assessed in the juvenile and domestic relations court and shall be collected in the circuit court."

Prior to the 1982 amendment, this Office held that assessment of a writ tax, fees and costs in appeals of nonsupport and custody matters from a juvenile and domestic relations district court was required by the mandatory language in § 16.1-107. See Reports of the Attorney General 1981-1982 at 18; 1977-1978 at 94; 1974-1975 at 179. The rationale in those Opinions was that the juvenile and domestic relations district court is a "court not of record" and, therefore, the taxes, costs and fees imposed in district courts were likewise applicable to the juvenile and domestic relations district courts.

The amendment of § 16.1-296 in 1982 evinces an intent of the General Assembly to alter the manner in which costs, taxes and fees on appealed cases from the juvenile and domestic relations district court are to be assessed. The statutory language is susceptible to more than one interpretation; hence, it is necessary to resort to accepted principles of statutory construction to adopt the construction, consistent with the statutory language used, which will achieve the object intended by the legislature. See Norfolk Southern Railway Co. v. Lassiter, 193 Va. 360, 368-369, 68 S.E.2d 641 (1952); 1977-1978 Report of the Attorney General at 346.

The amendatory language in § 16.1-296 provides that costs, taxes and fees are to be assessed only in cases in which a trial fee could have been assessed in the lower court. There is currently no statutory provision for fees
classified as "trial fees." Therefore, interpreted literally, the 1982 amendment to § 16.1-296 precludes the assessment of any costs, taxes or fees in cases appealed from the juvenile and domestic relations district court. Such a construction, however, would mean the General Assembly performed a vain act in the enactment of the amendment. The ordinary rules of statutory construction dictate against ascribing such an intent to a legislative enactment, and I, therefore, reject such a construction. Accordingly, I interpret "trial fee" to be the fee for services performed by judges or clerks of district courts for processing criminal cases set forth in § 14.1-123, or civil proceedings enumerated in § 14.1-125.

Most matters involving the custody, visitation, support, control or disposition of a child are neither criminal nor civil proceedings within the customary usage of those terms in §§ 14.1-123 and 14.1-125. In § 16.1-241, which establishes the jurisdiction of the judges of the juvenile and domestic relations district courts, it is apparent that a distinction exists between proceedings involving the custody, visitation, support, control or disposition of a child and other cases in which a crime is charged or other persons are the adversary parties. (Compare subsections A and E.)

By virtue of § 16.1-260, the intake officer of a court service unit is the person who usually files the petition to invoke the court's jurisdiction. Such proceedings with respect to children, under Ch. 11 of Title 16.1, are designed to give paramount concern to the welfare of the child and the family, not to adjudicate disputes between litigants. See § 16.1-227. Accordingly, I conclude that matters initiated by a petition involving the custody, visitation or support of children are neither criminal nor civil cases within the contemplation of §§ 14.1-123, 14.1-125, or 16.1-107, and therefore no fee is required. Other cases initiated in the juvenile and domestic relations district court by a criminal process, summons or motion for judgment are cases in which fees and costs may be assessed.

In summary, if the case appealed to the circuit court is a criminal or civil one subject to the fees imposed by §§ 14.1-123, 14.1-125(1) and 16.1-107, the circuit court shall assess the usual costs, taxes and fees imposed on appealed cases. In appeals from juvenile and domestic relations district courts involving cases which are not subject to the fees prescribed by those sections (e.g., appeals from orders of child custody, visitation, or non-criminal actions for support), the circuit court cannot assess any costs, taxes or fees.

JUVENILES. ADDITIONAL JAIL TIME FOR ESCAPE CONVICTION MAY NOT BE IMPOSED UPON JUVENILE WHO IS SERVING TWELVE-MONTH TERM PURSUANT TO § 16.1-284.
November 3, 1982

The Honorable Charles L. McCormick, III, Judge
Juvenile and Domestic Relations District Court
Halifax County and the City of South Boston

You have asked what additional sentence may be imposed upon a juvenile who is serving a twelve-month term of confinement pursuant to § 16.1-284 of the Code of Virginia and who subsequently escapes from jail.

Under § 16.1-284, if a child fifteen years or older is charged with what would be a felony or misdemeanor if committed by an adult, the court may impose the penalties which may be given to adults for such offenses, "not to exceed twelve months in jail for a single offense or multiple offenses...." In the event the child commits a misdemeanor, he cannot be confined for more than twelve months.

This Office has opined that the language of § 16.1-284 demonstrates a legislative intent to establish an absolute maximum of twelve months in jail as the period a juvenile can serve for one or more offenses.1 Thus, it was held that a juvenile's suspended twelve-month sentence could not be added to a second twelve-month sentence for a subsequent felony; he could only serve twelve months in jail inasmuch as he would be guilty of "multiple offenses" within the meaning of § 16.1-284. Similarly, separate jurisdictions could not sentence a juvenile offender to a cumulative period exceeding twelve months. Most pertinent to your question, that Opinion concluded that the twelve-month limitation would be applicable to a situation wherein a minor commits several offenses over a short period of time and the Commonwealth brings the charges one at a time.

Consistent with the prior Opinion, I conclude that an original violation and a subsequent escape are "multiple offenses" under § 16.1-284. Thus, if a juvenile were originally sentenced to a twelve-month jail term, he could not be given additional time on the escape charge unless it were to run concurrently with the initial sentence. I would point out that nothing in this Opinion should be construed to limit the provisions of § 16.1-269, et seq., which permit a juvenile 15 years of age or older to be transferred to the jurisdiction of the circuit court and treated as an adult.


JUVENILES. CANNOT BE RELEASED FROM COURT-ORDERED CUSTODY TO POLICE OFFICER FOR INTERVIEW WITHOUT AUTHORIZATION OF COURT HAVING JURISDICTION OVER CHILD.
November 22, 1982

The Honorable J. A. Gondles, Jr.
Sheriff of Arlington County

You ask whether a juvenile may be released to a police officer for an interview without obtaining prior permission from a judge of the juvenile and domestic relations court when he is committed to the detention center by that court, or confined in the jail after certification for trial as an adult. Also, you ask whether the consent of a juvenile and domestic relations court judge must be obtained for a juvenile inmate in need of surgery, dental work, or other medical treatment, in the two circumstances described above.

Section § 16.1-241 of the Code of Virginia confers jurisdiction on judges of the juvenile and domestic relations court over all matters and proceedings involving the custody, visitation, support, control, or disposition of a child alleged to be delinquent. When jurisdiction is transferred to the circuit court for the trial of the juvenile as an adult, the juvenile and domestic relations court is divested of jurisdiction over matters concerning the child. See § 16.1-244. Section 16.1-249 contains specific provisions for the confinement of juveniles ordered detained by the court. A child may be placed in a detention home or group home approved by the Department of Corrections, another suitable place designated by the court and approved by the Department or in a jail or similar adult facility in specific limited circumstances. When a juvenile is certified for trial as an adult, he may be confined in a jail that meets the requirements of § 16.1-249(B).

These sections direct that a child be placed in one of the listed facilities if the court orders detention. The discretion to alter the circumstances of that confinement is not granted to the custodian of the juvenile. There is no statutory authority to permit the custodian to remove the child from custody for the reasons you suggest. I am, therefore, of the opinion that a juvenile may not be released from court-ordered custody for an interview with a police officer without the authorization of a judge of the court having jurisdiction over the child.

Regarding the question of medical treatment, I direct your attention to a recent Opinion dated October 4, 1982, to the Honorable Clay Hester, Sheriff for the City of Newport News. There it was noted that § 54-325.2(A) confers the authority to give consent to medical treatment commensurate with that of a parent, to the principal executive officer of the detention center or jail where the juvenile is detained. Also, juvenile and domestic relations court judges are authorized by § 16.1-241(D) to give consent for emergency surgical or medical treatment for an unmarried child when parental consent cannot be obtained (for the reasons specified). Pursuant to § 16.1-241(C), the court may give consent to activities that require parental consent when the
child is separated from the parent or legal custodian and is in the custody of the court. Under §§ 54-325.2(D), 54-325.2(E) and 54-325.2(F), a minor is deemed capable of giving consent for limited medical purposes. This section does not provide that a minor who has been certified for trial as an adult is deemed an adult for purposes of giving consent to medical treatment. Section 16.1-269, which provides the procedures for the transfer of minors to the circuit court for trial as an adult, does not purport to change the legal status of a minor to that of an adult.

Accordingly, I am of the opinion that where consent in the nature of parental consent is required for surgical, medical, or dental treatment, it must be obtained from the proper legal custodian of the juvenile under § 54-325.2(A) or from a judge of the court that has custody over the juvenile.

1Section 16.1-249(B) provides that: "A delinquent child or a child alleged to be delinquent who is fifteen years of age or older may be detained in a jail or other facility for the detention of adults provided (i) the detention is in a room or ward entirely separate and removed from adults, (ii) adequate supervision is provided and (iii) the facility is approved by the Department for the detention of children and only if:

1. Space in a facility designated in subsection A hereof is unavailable; 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."

2Section 54-325.2 provides in pertinent part: "A. Whenever any minor who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

***

2. Upon local superintendents of public welfare or social services or their designees with respect to (i) minors who are committed to the care and custody of the local board by courts of competent jurisdiction, (ii) minors who are taken into custody pursuant to § 63.1-248.9 of the Code and, (iii) minors who are entrusted to the local board by the parent, parents or guardian, when the consent of the parent
or guardian cannot be obtained immediately and, in the absence of such consent, a court order for such treatment cannot be obtained immediately.

** ***

5. Upon the principal executive officer of any other institution or agency legally qualified to receive minors for care and maintenance separated from their parents or guardians, with respect to any minor whose custody is within the control of such institution or agency."

Consent is unobtainable under the statute if the parent, or legal custodian, is not a resident of the Commonwealth, if his or her whereabouts is unknown, if reasonably prompt consultation cannot be had, or if the legal custodian fails to give consent or provide treatment when requested by the judge to do so. See § 16.1-241(D).

**JUVENILES. LIMITATIONS CONTAINED IN § 16.1-249 REGARDING PLACES OF CONFINEMENT FOR CHILDREN HAVE NO APPLICATION TO 18 YEAR OLD.**

March 14, 1983

The Honororable Robert F. Ward, Judge
Juvenile and Domestic Relations District Court
Twenty-Second Judicial District

You have asked if a juvenile in a detention home for pre-dispositional custody may be transferred to a jail facility upon attaining the age of eighteen years.

In my Opinion to you of February 25, 1983, I concluded that the limitations contained in § 16.1-249 of the Code of Virginia, regarding places of confinement for children, have no application to an eighteen year old. When a juvenile detained in a facility pursuant to § 16.1-249 attains the age of eighteen years, he may be confined in a jail in the same manner as adult prisoners. Accordingly, your inquiry is answered in the affirmative.

**JUVENILES. MUST APPEAR BEFORE MAGISTRATE BEFORE WARRANT MAY ISSUE.**

January 11, 1983

The Honororable Robert F. Ward, Judge
Juvenile and Domestic Relations District Court

You have referred to an Opinion to the Honorable Benjamin L. Campbell, Judge, Juvenile and Domestic Relations Court, dated April 8, 1982, found in the 1981-1982 Report of the Attorney General at 21, and pointed out that it was therein stated that § 16.1-256 of the Code of Virginia was a limitation upon authority of a magistrate to issue a warrant for the arrest of a juvenile in certain situations. You inquire whether that limitation requires that a juvenile who
JUVENILES. WHEN SENTENCED UNDER § 16.1-284 AND ATTAINS AGE EIGHTEEN, § 16.1-249 NO LONGER RESTRICTS CONFINEMENT.

February 25, 1983

The Honorable Robert F. Ward, Judge
Juvenile and Domestic Relations District Court

You have asked two questions concerning the confinement of juvenile offenders who reach the age of 18 during confinement.

You first ask whether I concur with a prior Opinion of this Office to the Honorable J. Elwood Clements, Sheriff of Arlington County, dated May 24, 1976, and found in the 1975-1976 Annual Report of the Attorney General at 202. The Opinion to which you refer concerns a situation involving a juvenile, sentenced to jail by a juvenile and domestic relations district court pursuant to former § 16.1-177.1 of the Code of Virginia, who attains the age of 18 years while incarcerated. The question there was whether the sheriff could place the 18 year old prisoner, who was sentenced as a juvenile, in the general population with other adult prisoners in the local detention center. The Clements Opinion reasoned that former § 16.1-196, which referred to

has been taken into custody physically appear before the magistrate prior to the issuance of a warrant.

There is no requirement in § 16.1-256 that a juvenile appear before the magistrate as a condition to the issuance of a warrant. In the Opinion to Judge Campbell, I concluded that § 16.1-256 did not permit a magistrate to issue a warrant on the basis of a telephone call from a judge, intake officer, or clerk. It was pointed out that the section clearly contemplated that the judge, intake officer or clerk, if reached and available, personally act in accordance with the authority given him by the section.

Sections 16.1-247(D) through 16.1-247(G), relating to the taking of a child into custody during hours when the juvenile and domestic relations district court is not open, provides various alternatives for an officer who takes such child into custody. Among those are release pursuant to a warrant on bail or recognizance or placing the child in a detention home, shelter facility, or jail after issuance of a warrant by a magistrate. If these alternatives are selected, then § 19.2-82, requiring that persons arrested without a warrant be brought "forthwith before a magistrate or other issuing authority having jurisdiction..." is applicable. Therefore, in my opinion, a magistrate in those instances may not act unless such child has been brought before him. On the other hand, where an officer seeks to obtain a warrant prior to taking a child into custody, the child need not be present at the time the officer seeks the warrant from the magistrate.
the manner in which juveniles are confined, has no application to an 18 year old prisoner even though such prisoner may have been sentenced as a juvenile under former § 16.1-177.1.

As you know, the juvenile and domestic relations district court law was rewritten by the 1977 session of the General Assembly. See Ch. 559, Acts of Assembly of 1977. Former § 16.1-177.1 is now substantively the same as § 16.1-284. This section specifies the manner in which a child 15 years of age or older may be sentenced as an adult. Such commitment is subject to the protections contained in §§ 16.1-249(B)(i), 16.1-249(B)(ii) and 16.1-249(B)(iii). This latter provision is substantively the same as former § 16.1-196. These protections require the separation of juveniles from adults, adequate supervision of juveniles, and approval of the facilities by the Department of Corrections.

After reviewing the current revisions of the juvenile and domestic relations district court law, I find no reason to deviate from the earlier Opinion to Sheriff Clements. When a juvenile sentenced under § 16.1-284 attains the age of 18 years, he may be confined in jail in the same manner as other adult prisoners.

LIBRARIES. ABOILISHMENT OF COUNTY LIBRARY BOARD.

August 5, 1982

The Honorable T. A. Emerson
County Attorney for the County of Prince William

You ask whether the Prince William County Board of Supervisors can dissolve, disband or otherwise nullify the Prince William County Library Board of Trustees. You note in your request for an Opinion that Prince William County operates under the county executive form of government. You further indicate that, pursuant to § 42.1-34 of the Code of Virginia, the county has contractually agreed to provide the City of Manassas with library services and that the city is represented on the Prince William County Library Board.

Section 42.1-33 grants county governing bodies the power to establish a free public library system for county residents. Section 42.1-35 provides that management and control of such library system shall be vested in a library board. Section 42.1-36, however, exempts counties having the county executive form of government from the requirement to form and create a library board. Therefore, the establishment of a library board is discretionary with the county governing body. See 1975-1976 Report of the Attorney General at 80.

It is well-settled in Virginia that a public body having the power to create a public office has the implied power to abolish it, absent an express provision of law to the
contrary. See Walker v. Massie, 202 Va. 886, 121 S.E.2d 448 (1961). Once established, the library board is vested with the responsibility for the management and control of the library system during its existence. However, as the library board's establishment was dependent upon the affirmative act of the board of supervisors, its continued existence is likewise dependent upon the board of supervisors. The board may decide to abolish the library board and instead form a library system within its executive branch. That option remains viable so long as an independent, nonregional public library system is utilized. See 1971-1972 Report of the Attorney General at 253.

You have indicated that the county does not have a regional library system. Nevertheless, by virtue of the express provisions of § 42.1-34, all contracting participants in the county system are protected as if in a regional system. Section 42.1-34 provides in pertinent part: "Any city or county thus contracting for library service shall be entitled to the rights and benefits of regional free library systems established in accordance with the provisions of § 42.1-37...." (Emphasis added.)

In enacting this legislation, the General Assembly has ensured the constituents of each jurisdiction the continued availability of a public library system, unless adequate advance notice is provided so that the affected jurisdiction may provide alternate arrangements.

Therefore, before abolishing the library board, due notice must be provided by the county to the City of Manassas. Under § 42.1-42, the city must consent to the abolishment of the board or be given two years advance notice, unless otherwise agreed.

The section specifically provides: "The formation and creation of boards shall in no wise be considered or construed in any manner as mandatory upon any city or town with a manager, or upon any county with a county manager, county executive, urban county manager or urban county executive form of government or Chesterfield County, by virtue of this chapter." Section 42.1-36.

LIBRARIES. LIBRARY BOARD REQUIRED FOR LOCALITIES CONTRACTING FOR LIBRARY SERVICES UNLESS EXCEPTED FROM REQUIREMENT.

November 23, 1982

The Honorable Donald Haynes
State Librarian

This is in reply to your recent letter asking whether a library board is mandatory when localities contract for library services under the provisions of § 42.1-34 of the
Code of Virginia. You point out in your letter that § 42.1-51 requires a public library system receiving State funds to establish and maintain an organization approved by the State Library Board. The State Library Board has for some time interpreted § 42.1-34 to require that there be a local library board as part of a library system's organization whenever counties or cities enter into library service contracts under authority of § 42.1-34.

Section 42.1-34 provides:

"Any city, town or county shall have the power to enter into contracts with adjacent cities, counties, towns, or state-supported institutions of higher learning to receive or to provide library service on such terms and conditions as shall be mutually acceptable, or they may contract for a library service with a library not owned by a public corporation but maintained for free public use. The board of trustees of a free public library may enter into contracts with county, city or town school boards and boards of school trustees to provide library service for schools. Any city or county governing body contracting for library service shall, as a part of such contract, have the power to appoint at least one member to the board of trustees or other governing body of the library contracting to provide such service. Any city or county thus contracting for library service shall be entitled to the rights and benefits of regional free library systems established in accordance with the provisions of § 42.1-37. The board of trustees or other governing body of any library established under the provisions of § 42.1-33 may also, with the approval of and on terms satisfactory to the State Library Board, extend its services to persons in adjacent areas of other states."

The governing body of every county, city and town is empowered to establish a public library. See § 42.1-33. If it elects to establish such a library, the governing body must appoint a library board, and thereafter the "management and control" of the library system is vested in the library board. See § 42.1-35 and 1977-1978 Report of the Attorney General at 233.

Section 42.1-36 provides, however:

"The formation and creation of boards shall in no wise be considered or construed in any manner as mandatory upon any city or town with a manager, or upon any county with a county manager, county executive, urban county manager or urban county executive form of government or Chesterfield County, by virtue of this chapter." (Emphasis added.)

The practice of the State Library Board that requires a public library system receiving State financial aid to establish and maintain a library board is consistent with
§§ 42.1-33 and 42.1-35 when applied to those counties, cities and towns which are not the type described in § 42.1-36. Those counties, cities and towns which fall within the provisions of § 42.1-36, however, may not be required by the State Library Board to create either a library board or a regional library board as a condition precedent to receipt of State funds. To make such a requirement for localities which are not statutorily required to have library boards would be contrary to the clear terms of § 42.1-36.

If a locality of the type described in § 42.1-36, which cannot be required to have a library board, contracts for library services with a locality which is required to have a library board, it is my opinion that a regional library board requirement may not be imposed as a condition for receipt of State funds. To impose such a condition upon a locality excused from the requirement for library boards would be contrary to § 42.1-36.

In summary, I am of the opinion that where contracts are entered into for library services under the provisions of § 42.1-34, a library board is required unless one of the parties to the contract is a city, town or county exempted by § 42.1-36, for which the creation of a library board is discretionary. Of course, for ease of administration, those localities exempted by § 42.1-36 may choose to create or to participate in the creation of either a library board or a regional library board.

LIEUTENANT GOVERNOR, VACANCY IN OFFICE. GOVERNOR EMPOWERED TO FILL UNDER ART. V, § 7.

December 2, 1982

The Honorable Hunter B. Andrews
Member, Senate of Virginia

This is in reply to your recent letter relating to the filling of a vacancy in the office of Lieutenant Governor. You first inquire:

"I. If a vacancy occurs in the office, does § 24.1-84 serve to fill the vacancy automatically by having the president pro tempore of the Senate perform the duties of the office?"

There is no provision in the Constitution of Virginia (1971) which expressly deals with filling a vacancy solely in the office of Lieutenant Governor. Article V, § 16 acknowledges the possibility of such a vacancy by providing that the Attorney General shall succeed to the office of Governor if a vacancy exists in the office of Lieutenant Governor when the Lieutenant Governor is to succeed to the office of Governor. Neither is there a statute which expressly deals with filling vacancies in the office of Lieutenant Governor. Section 24.1-82 of the Code of Virginia parallels the provisions of
Art. V, § 16 on succession to the office of Governor; hence, it recognizes the possibility of a vacancy, but does not provide a method for filling it.

The other relevant statutory provision which pertains to a vacancy in the office of Lieutenant Governor is § 24.1-84, which reads:

"When a vacancy occurs in the office of Lieutenant Governor only, the duties of that office shall be discharged by the President pro tempore of the Senate, but he shall not by reason thereof be deprived of his right to act and vote as a member of the Senate."

Manifestly, this section provides for the discharge of the duties of the Lieutenant Governor in the event of a vacancy in that office. It does not purport to provide the method for filling the vacancy. I, therefore, answer your first inquiry in the negative.

You next inquire:

"II. If a vacancy occurs and § 24.1-84 does not serve to fill or prohibit the filling of the vacancy, does the governor have authority under Article V, § 7 of the Constitution and §§ 2.1-18 and 2.1-19 to fill the vacancy?"

Sections 2.1-18 and 2.1-19 supplement Art. V, § 7 to confer power upon the Governor to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision. As indicated hereinabove, neither the Constitution nor § 24.1-84 provides a method for filling a vacancy in the office of Lieutenant Governor. Consequently, I conclude that the Governor is empowered to fill such a vacancy under Art. V, § 7 and § 2.1-18.

Your third question reads as follows:

"III. If the governor does have such authority, does he have discretion to exercise that authority or could he be compelled to fill the vacancy?"

As indicated above, both Art. V, § 7 and § 2.1-18 provide for the filling of vacancies in offices of the Commonwealth when the Constitution and laws make no other provision. The constitutional provision provides that the Governor "shall have power to fill," and the statutory provision provides that such vacancies "shall be filled by the Governor." The Supreme Court of Virginia has held that the constitutional provision (§ 73 of the 1902 Constitution) is discretionary in nature. Allen v. Byrd, 151 Va. 21, 144 S.E. 469 (1928). The Court there held that insofar as the statutory provision accords with (present) Art. V, § 7, it is valid, but it cannot be construed to make mandatory that which the Constitution has made discretionary. There has been no change in substance in the Constitution or statutes
which would lead me to a different conclusion. Accordingly, I am of the opinion that the Governor has the discretionary power to fill a vacancy in the office of Lieutenant Governor, but he cannot be compelled to exercise that power.

Your fourth question reads:

"IV. If the governor appoints to fill the vacancy, what is the term of that appointment?"

Article V, § 7 and § 2.1-19 are similar in providing the limitation upon the term of any appointee of the Governor to fill a vacancy in an office which is filled by election of the people. In view of such unequivocal language, I am of the opinion that the term of the Governor's appointee extends to the time of the qualification of the person elected at the next ensuing general election. In prior Opinions of this Office, such a provision has been construed to be self-executing, not requiring the issuance of any writ of election, despite the fact that it is a special election to be conducted at the time of the next general election. See 1971-1972 Report of the Attorney General at 256 and 1970-1971 Report of the Attorney General at 182.

Your fifth inquiry reads:

"V. If the governor does not appoint, is there a right under Article V, § 7, to an election to fill the unexpired term after a vacancy occurs which might be realized through an action to compel the holding of an election?"

By constitutional and statutory provisions, the Governor has the discretionary power to fill a vacancy in the office of Lieutenant Governor. If the Governor chooses not to exercise that power, he cannot be compelled to do so. Allen v. Byrd, supra. There is no constitutional or statutory provision providing an alternative method for filling the vacancy. Consequently, I am of the opinion that under such circumstances there is no authority to compel the holding of an election.

Finally, you have asked that I review two draft statutes enclosed with your letter and advise if there exists any constitutional infirmity to such statutory enactments. Draft A would amend § 24.1-84 to provide for filling the vacancy by action of the General Assembly only. Additionally, until the vacancy is so filled, the duties of that office shall be discharged by the President pro tempore of the Senate, as is presently provided in that section. Draft B would amend § 24.1-84 to provide that the vacancy shall be filled only pursuant to the provisions of that section, which provides that the President pro tempore of the Senate shall discharge the duties of the office for the unexpired portion of the term, but expressly precludes him from eligibility to succeed to the office of Governor under the provisions of Art. V, § 16.
Undoubtedly, the General Assembly is empowered to provide a method for filling a vacancy in the office of Lieutenant Governor, for it is only in the absence of a statutory provision so doing that the Governor is empowered to fill such a vacancy. Therefore, Draft A, which provides for an election by the General Assembly is an acceptable method for filling such a vacancy. I am of the opinion that such a procedure would present no constitutional objection.

Not so free of doubt, however, is the alternative plan proposed in Draft B. Rather than filling the vacancy with another person, this approach simply provides for a continuation of duties of the office by the President pro tempore of the Senate, while at once precluding such officer from being eligible to succeed to the office of Governor under Art. V, § 16. Arguably, except for succession, this is already the law, for § 24.1-84 presently provides for the discharge of the duties of the Lieutenant Governor in the event of a vacancy. The draft adds only the restriction on eligibility to succeed to the office of Governor. The real effect is to preclude "filling the vacancy."

I am of the opinion that a legislative proposal which deals only with the discharge of duties of the Lieutenant Governor does not serve to fill the vacancy which may exist in that office. Consequently, I entertain doubt that such a proposal would effectively preclude an exercise of the Governor's power under Art. V, § 7 to fill such a vacancy.

1Article V, § 7 reads in pertinent part: "The governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision. If such office be one filled by the election of the people, the appointee shall hold office until the next general election, and thereafter until his successor qualifies, according to law."

Section 2.1-18 provides: "When a vacancy occurs in any State office, whether the officer be elected by the people or the General Assembly, or be appointed by the Governor, and no other provision is made for filling the same, it shall be filled by the Governor."

LITERARY FUND. LEGISLATURE MAY MODIFY IN APPROPRIATIONS ACT RESTRICTIONS ON LOANS.

March 29, 1983

The Honorable Thomas R. Watkins, President
State Board of Education

This has reference to your letter relating to Literary Fund (the "Fund") loans for short term financing. There is presently a freeze on the extension of loans from the Fund in order that money in the Fund may be used for educational uses.
other than school construction. You ask whether a provision, which was passed by the 1983 session of the General Assembly as part of the Appropriations Act, authorizes the Board of Education, when it resumes making Fund loans, to make loans to local school boards for the refinancing of school construction projects begun with short-term financing.

The provision, contained in H.B. 30, Item 192.10(2) as passed by the General Assembly, provides:

"Any school division which requests, and has pending before the Board of Education, a Literary Fund Loan for an approved school project, shall not be denied or delayed in obtaining such loan solely for the reason that short term financing had been used to begin or complete construction on such project."

Section 22.1-146 of the Code of Virginia authorizes the Board of Education to make loans to school boards from the Fund "for the purpose of erecting, altering or enlarging school buildings in such school divisions" as make proper application. The only instance when school boards are permitted to use loans from the Fund for the retirement of previous loans is recited in § 22.1-148, which states that loans from the Fund, made for the purpose of enlarging of a building, may be used in part for the retirement of any previous unmatured loans on that building. In a recent Opinion, I expressed the view that under § 22.1-146, when Fund loans are resumed, school boards will be ineligible for Fund loans to refinance the erection or alteration of schools previously funded by short-term financing and completed. See Opinion to the Honorable John Watkins, Member, House of Delegates, dated February 2, 1983. See, also, § 22.1-148.

The provision in the Appropriations Act which you cite would allow the State Board of Education to extend a Fund loan to a school board and which currently has an application pending before the State Board of Education, where that board had incurred short-term debt to erect or alter the school building. The inclusion of that provision manifestly altered the existing law as interpreted in the Watkins Opinion. Consequently, the result reached in that Opinion is now altered.

The General Assembly is constitutionally mandated to set apart the Fund as "a permanent and perpetual school fund..." and is authorized to appropriate revenues to it. The Board of Education is required to administer the Fund "in such manner as may be provided by law." Article VIII, § 8 of the Constitution of Virginia (1971). Sections 22.1-142 through 22.1-161 are the statutes governing the administration of the Fund by the Board of Education. Manifestly, such statutory limitations may be amended or modified by the General Assembly. The legislature has broad power under the Constitution to prescribe the manner in which the Board of Education administers the Fund.
Inclusion of a provision in the Appropriations Act to govern the future granting of Fund loans, now "frozen," to provide revenues for other school purposes, is a permissible and appropriate way to direct the administration of the Fund. Clearly, the Appropriations Act may contain conditions or restrictions on the expenditure of appropriations. See State Board of Health v. Chippenham Hospital, 219 Va. 65, 70-71, 245 S.E.2d 430 (1978). Statutory provisions relating to the same subject will be read together to achieve a harmonious legislative scheme. See 1974-1975 Report of the Attorney General at 219. The positioning of a provision relating to the administration of the Fund in the Appropriations Act, rather than in Title 22.1, does not, therefore, lessen the authority given in that provision.

It is my opinion, therefore, that the proposed provision in its current form is constitutional and empowers the Board of Education to make a Fund loan to a school board that complies with the terms set forth in the provision.

1 Short-term financing, as you describe, consists of temporary loans, advances from other fund balances, and current operating funds; such financing does not include permanent financing, such as bonds authorized by local referenda or secured from the Virginia Public School Authority.

LITERARY FUND. LOANS CANNOT BE USED TO REFINANCE COMPLETED SCHOOLS. CAN REFINANCE IF ENLARGING SCHOOL.

February 2, 1983

The Honorable John Watkins
Member, House of Delegates

You ask whether school divisions which arrange short term financing for projects because of a "freeze" on loans from the Literary Fund will be eligible to refinance those projects with loans from the Literary Fund when such funds again become available?

Section 22.1-146 of the Code of Virginia authorizes the Board of Education to make loans from the Literary Fund "for the purpose of erecting, altering or enlarging school buildings in such school divisions" as make proper application. The only instance where school divisions are permitted to use loans from the Literary Fund for the retirement of previous loans is in § 22.1-148, which states:

"Whenever a loan is made from the Literary Fund for the purpose of enlarging a building, any part of the proceeds of such loan may, in the discretion of the Board, be used to retire any previous loan or loans on such building
although not matured at the time of such additional loan."

Thus, as a general proposition, a school division will not be eligible for a loan from the Literary Fund to refinance the construction of schools already completed and initially financed by local school bonds or short term financing. See 1979-1980 Report of the Attorney General at 293. When loans from the Literary Fund are resumed, a school division may, however, be eligible for a loan from the Literary Fund to enlarge a building and to use part of the proceeds of that loan to retire a previous loan on such building. The use of a Literary Fund loan for this purpose is, of course, conditioned upon the approval of the State Board of Education.

LOTTERIES. RAFFLE. ORGANIZATION IN EXISTENCE FOR LESS THAN TWO YEARS NOT ELIGIBLE FOR RAFFLE PERMIT UNDER § 18.2-340.3.

March 7, 1983

The Honorable Atwell W. Somerville
County Attorney for Orange County

You have asked whether a local Lion's Club which has applied for a raffle permit in Orange County meets the requirement for issuance of such a permit as set forth in § 18.2-340.3(A)(1) of the Code of Virginia. You indicate that this particular Lion's Club has been in existence and has been operating within Orange County for less than a year.

Section 18.2-340.3 requires that, prior to the issuance of a permit, the organization seeking a raffle permit must meet, inter alia, the following requirement:

"Such organization shall have been in existence and met on a regular basis in the city, town or county where application is made for a period of at least two years immediately prior to making application for such permit." See § 18.2-340.3(A)(1). (Emphasis added.)

The use of the word "shall" in the statute indicates a mandatory intent on the part of the General Assembly. See Reports of the Attorney General 1977-1978 at 117; 1976-1977 at 325; 1965-1966 at 175. From this I conclude that, if at the time of application, an organization has not been in existence and has not been operating for at least two years in the locality where application for the raffle permit is made, it fails to meet the requirements of § 18.2-340.3(A)(1).

Because you have indicated that the Lion's Club has been in existence and has been operating within Orange County for less than a year, I am of the opinion that it does not meet
the mandatory requirement for a raffle permit set forth in § 18.2-340.3(A)(1) and cannot be issued a raffle permit.¹

I have considered the fact that the local Lion's Club is part of and chartered by the International Association of Lion's Clubs, and the fact that the local club is a member of a statewide association of Lion's Clubs. Neither of these facts causes me to alter my opinion. The relevant issue to consider is whether this individual organization, which is applying for a raffle permit, has been in existence and has been meeting on a regular basis in Orange County for at least two years.

¹Because the particular club is a new one, the provisions of §§ 18.2-340.3(2) and 18.2-340.3(3), pertaining to relocated clubs, are not applicable.

MAGISTRATES. INCOMPATIBILITY OF OFFICES. SPOUSE OF COUNTY MAGISTRATE MAY NOT BE EMPLOYED EITHER AS CLERK IN COUNTY SHERIFF'S OFFICE OF SAME COUNTY OR AS CORRECTIONS OFFICER AT STATE CORRECTIONAL CENTER.

August 11, 1982

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

This is in reply to your letter inquiring whether the spouse of a county magistrate may be employed (1) as a clerk in the county sheriff's office, or (2) as a correctional officer in a State correctional facility. For the reasons hereinafter stated, the spouse may not be employed in either capacity without causing the magistrate to vacate his office.

Section 19.2-37 of the Code of Virginia expressly makes ineligible for the office of magistrate an individual whose spouse is a clerk or employee of the sheriff's office in the county or city the magistrate will be appointed to serve.¹ This Office has previously opined that a spouse's assumption of a position which would render the other spouse ineligible for appointment as magistrate under § 19.2-37 would operate as a surrender by the magistrate of his office so that he could not serve out the remainder of his term of office as magistrate.² Accordingly, I am of the opinion that § 19.2-37 operates to prohibit the spouse of a county magistrate from being employed as a clerk in the sheriff's office of the same county.

Whether the spouse of a county magistrate may be employed as a correctional officer in a State correctional facility is also governed by § 19.2-37. This section renders ineligible for the office of magistrate any individual whose spouse is "a law-enforcement officer or otherwise charged with the duty of enforcing any of the laws of this
Commonwealth or any ordinance of any political subdivision thereof...." This Office has previously opined that correctional personnel are not "law-enforcement officers" for the purposes of exempting certain "law-enforcement" officers from training requirements. Although § 19.2-81.2 authorizes trained correctional officers\(^4\) to detain persons under certain circumstances, it is only for the purpose of summoning a law-enforcement officer to arrest the person so detained. Thus, a correctional officer at a State correctional facility\(^5\) would not be a "law-enforcement officer" within the meaning of § 19.2-37.

Section 19.2-37, however, extends the prohibition of employment beyond law-enforcement officers to any person "otherwise charged with...enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof...." (Emphasis added.) Section 19.2-81.1 authorizes correctional officers to make warrantless arrests for violations of various State laws relating to prisons and prisoners. Additionally, as noted above, § 19.2-81.2 authorizes correctional officers to detain persons upon reasonable suspicion that they have violated certain State laws. Thus, a correctional officer at a State correctional facility would be a person charged with enforcing certain laws of the Commonwealth and § 19.2-37 would render ineligible for appointment any individual whose spouse is employed as a correctional officer at a State correctional facility. Further, as noted above, a spouse's acceptance of the position of correctional officer would operate as a surrender of the office of magistrate.

In summary, I conclude that § 19.2-37 operates to prohibit a spouse of a magistrate from being employed as either a clerk in the sheriff's office or as a corrections officer at a State correctional facility.

\(^1\)Section 19.2-37 provides in pertinent part that: "[a] person shall be eligible for appointment to the office of magistrate...if such person or his spouse is not a clerk, deputy or assistant clerk, or employee of any such clerk of a...sheriff's office in any county or city with respect to appointment to the office of magistrate of such county or city....."


\(^4\)Section 53.1-1 defines "correctional officer" as "a duly sworn employee of the Department of Corrections...."

\(^5\)Section 53.1-1 defines "State correctional facility" as "any correctional center...established and operated by the Department of Corrections."
February 8, 1983

The Honorable Elmon T. Gray
Member, Senate of Virginia

This is in reply to your letter which we received on February 2, 1983, requesting an opinion whether a member of the Waverly Planning Commission may also serve as a magistrate.

Section 19.2-37 of the Code of Virginia provides that "[a]ny person may be appointed to the office of magistrate under this title subject to the limitations of chapter 4 (§ 2.1-30 et seq.) of Title 2.1 of the Code and of this section." Neither § 19.2-37 nor ch. 4 of Title 2.1 prohibits a member of the planning commission from being appointed to the office of magistrate.

I am unaware of any other statutory provision which would prohibit such dual officeholding. Additionally, the common law doctrine of incompatibility of offices would not prohibit the member of the planning commission from also serving as a magistrate.

I am, accordingly, of the opinion that a member of the planning commission may simultaneously serve as a magistrate.

MAGISTRATES. TELEVISION MEDIUM MAY NOT BE UTILIZED IN LIEU OF PERSONAL APPEARANCE BEFORE MAGISTRATE BY ARRESTEE OR POLICE OFFICER.

April 8, 1983

The Honorable Fred W. Bateman, Chief Judge
Circuit Court of the City of Newport News

You have requested my opinion whether a magistrate can utilize "a form of television" to assist him in the performance of his judicial duties. In the proposed format, the duty magistrate at the main police station could swear and visually and audibly interview a citizen or a law enforcement officer at a satellite police station via television, thereby eliminating the necessity of having a magistrate present at the second location. You indicate that this procedure would improve the coverage of both locations without increasing the number of magistrates.

I am unaware of any Virginia decisions or cases in which this procedure has been addressed. As you know, the present practice in Virginia is for individuals having business with the magistrate to appear personally before him. I am unaware of any authority which specifically permits a magistrate to perform his duties through electronic means. To the contrary, it appears that the relevant statutes contemplate that an arrestee, witness or a law enforcement officer must physically appear before the magistrate. For example, under
§ 19.2-80 of the Code of Virginia, a person arrested under a warrant must be brought "before" an official having authority to grant bail. Similarly, a person arrested without a warrant must be brought forthwith "before" a magistrate or other issuing authority. See §§ 19.2-82 and 46.1-179. Furthermore, as a prerequisite to the issuance of a search warrant, an affidavit must be "filed with" the magistrate who subsequently attaches a copy of the approved affidavit to the search warrant. See §§ 19.2-54 and 19.2-56.

Accordingly, in the absence of specific legislative authority authorizing the suggested procedure, I am constrained to conclude that the present statutory framework dealing with the duties of magistrates contemplates physical presence and does not permit a magistrate to perform his duties via television.

MARINE RESOURCES COMMISSION. NO ROYALTIES FOR USE OF MATERIALS DREDGED FROM STATE-OWNED BOTTOMS ARE DUE FROM SUBCONTRACTORS TO VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION OR FROM SUBCONTRACTORS ON CONGRESSIONALLY APPROVED NAVIGATION PROJECTS.

September 29, 1982

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You have asked my opinion on a matter concerning the Marine Resources Commission's (the "Commission") authority to charge royalties for removal of materials from subaqueous bottoms pursuant to § 62.1-31 of the Code of Virginia. You note in your inquiry that § 62.1-31 exempts the Virginia Department of Highways and Transportation from payment of royalties for the removal of such materials. As you note, presumably the rationale for the exemption is to preclude one State agency from assessing another for the use of state-owned resources. Because the Virginia Department of Highways and Transportation (the "Department") routinely contracts for the construction of its projects, you ask whether the benefits of the exemption must accrue directly to the Department through reduction in contract costs in order for the Department to qualify for the exemption. You also ask, as a corollary, a similar question with respect to certain federal government projects.

Section 62.1-31 provides, in part, "[t]he Virginia Department of Highways and Transportation shall be exempt from all such fees and royalties otherwise assessable pursuant to this section." It is my understanding that on most projects requiring the removal of subaqueous materials, the Department obtains the permit directly from the Commission. The Department's contractor then works pursuant to the permit obtained by the Department. The exemption provided for in § 62.1-3 is unqualified. Accordingly, I am of the opinion that the Department is entitled to the
statutory exemption regardless of the underlying circumstances relating to economic benefit.  

With respect to the matter concerning your second inquiry, § 62.1-3 provides in part that

"Statutory authority is hereby conferred for the doing of such acts as are necessary for...the construction and maintenance of congressionally approved navigation and flood-control projects undertaken by the United States Army Corps of Engineers, United States Coast Guard, or other federal agency authorized by Congress to regulate navigation, navigable waters, or flood control...."

Because § 62.1-3 provides statutory authority for the construction and maintenance of congressionally approved navigation and flood control projects, those projects do not require Commission permits. Therefore, the provision concerning a royalty for the removal of bottom material does not come into effect because that provision only applies to an activity or project for which a permit is required. Accordingly, I am of the opinion that the Commission cannot assess a royalty for removal of bottom material dredged as a part of a congressionally approved navigation or flood control project which is statutorily exempt from the permit requirements.

1Section 62.1-3 provides, in pertinent part, as follows: "The Marine Resources Commission shall have the authority to issue permits for all other reasonable uses of state-owned bottomlands, including but not limited to, the taking and use of material, the placement of wharves, bulkheads, dredging and fill, by owners of riparian lands, in the waters opposite such riparian lands, provided that such wharves, bulkheads and fill shall not extend beyond any lawfully established bulkhead line. **

A fee of twenty-five dollars shall be paid for issuing each such permit as charge for such permit, but if the cost for the project or facility is to be more than $10,000, the fee paid shall be $100. A fee of twenty-five dollars shall be paid for issuing each permit for recovery of underwater historic property. When the activity or project for which a permit is requested involves the removal of bottom material, the application shall so state and the Marine Resources Commission shall specify in each such permit issued a royalty of not less than twenty cents per cubic yard for new removal, provided that no royalty for the removal of bottom material shall exceed the amount of sixty cents per cubic yard of material removed...."

2The Department's contracts are, of course, let to the lowest responsible bidder.

MARRIAGE. VALIDITY OF MARRIAGE PERFORMED BY UNAUTHORIZED MINISTER TO BE DETERMINED BY COURT.

April 19, 1983

The Honorable Robert M. Morton, Jr., Clerk
Circuit Court of Grayson County

This is in reply to your request for an opinion regarding the disposition of a marriage license under the following circumstances:

"This office recently issued a marriage license to two residents of this County. The residents of this County proceeded to take the Virginia marriage license and were married by a minister who is a resident of the State of North Carolina, and who was not qualified in the State of Virginia to perform the rites of matrimony.

The license was returned to this office by the North Carolina minister with the minister's statement partially completed, indicating the name, address and date of marriage; but not the proper place and date of qualification of the minister to perform the rites of matrimony in Virginia."

You have asked (1) whether the marriage is valid, (2) whether it is your duty, as clerk, to question the validity of the marriage, and (3) if the marriage is invalid, what action is required.

You did not state whether the marriage was solemnized in North Carolina or Virginia. If in North Carolina, I am of the opinion that the marriage was invalid, for, except in rare cases hereinafter mentioned, a marriage license must be obtained in the state where the solemnization is performed. See 1960-1961 Report of the Attorney General at 187 and 1951-1952 Report of the Attorney General at 101. This conclusion is grounded on the fundamental rule of law that each state, within constitutional limitations, has the ultimate authority over marriages. Loving v. Virginia, 388 U.S. 1 (1967); Maynard v. Hill, 125 U.S. 190 (1888). As stated by the Court in Maynard, supra, at 204-207:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

Both Virginia and North Carolina have enacted legislation prescribing the requirements for entering into
the bonds of matrimony, which requirements must be met in order to constitute a valid marriage. Each requires pre-marital physical examination certificate (North Carolina § 51-9; § 20-1 of the Code of Virginia). Each requires a license (North Carolina § 51-6; Virginia § 20-14). Finally, both states require a ceremony (North Carolina § 51-1; Virginia § 20-13).

There is a rule that a marriage valid where performed is valid everywhere, with certain exceptions not here material. In the case of a marriage celebrated in North Carolina by a North Carolina minister, based on a Virginia license, however, there would not be a valid marriage in that state. Neither would it be valid in Virginia. See Greenhow v. James, 80 Va. 636 (1885).

Virginia has provided an exception to the requirement of celebrating the marriage in the state where the license is issued. Section 20-37.1 validates certain marriages solemnized outside Virginia under a license issued in this State. That section does not apply in this case, however, because the section expressly states that the marriage must be performed by a minister authorized to celebrate the rites of marriage in this State. That section reads as follows:

"All marriages heretofore solemnized outside this State by a minister authorized to celebrate the rites of marriage in this State, under a license issued in this State, and showing on the application therefor the place out of this State where said marriage is to be performed, shall be valid as if such marriage had been performed in this State."

Assuming, on the other hand, that the marriage in question was celebrated in Virginia, the fact that the North Carolina minister, not licensed to perform ceremonies in Virginia, standing alone, would not be sufficient to invalidate the marriage. See 1977-1978 Report of the Attorney General at 251 and § 15-31. That section reads as follows:

"No marriage solemnized under a license issued in this State by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, or any defect, omission or imperfection in such license, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

This validation statute does not apply in the case of solemnization in North Carolina, because in that situation the problem is not want of authority of the person performing the ceremony or defect in the license. There, the marriage
would be invalid because it failed to satisfy North Carolina law.

I, therefore, am of the opinion that the answer to your first inquiry depends upon where the marriage ceremony took place. If in North Carolina, the marriage is invalid. If in Virginia, the marriage is valid.

In response to your second inquiry, I am of the opinion that you, as clerk, do not have the right to question the validity of the marriage, irrespective of where the marriage was celebrated. See 1977-1978 Report of the Attorney General at 251. In that Opinion, this Office expressed the view that neither the clerk nor the State registrar has the power or duty to determine whether a marriage is valid, that function being one for the courts.

In response to your third question, I am of the opinion that it is your duty, pursuant to § 32.1-267, to transmit the record which is provided you to the State Registrar of Vital Records and Health Statistics despite the fact that the record is incomplete or appears to be of doubtful validity.

MEDICAID. ITEM 418 OF 1982 APPROPRIATION BILL AUTHORIZES, CONSISTENT WITH TITLE XIX OF SOCIAL SECURITY ACT AND WITH VIRGINIA CODE § 32.1-74, ELIMINATION OF STATE MEDICAID PAYMENTS FOR PODIATRIC SERVICES RENDERED BY PROFESSIONAL PODIATRIST.

August 23, 1982

The Honorable Benjamin J. Lambert, III
Member, House of Delegates

You have asked whether Item 418 of the 1982 Appropriations Act, Ch. 684, Acts of Assembly of 1982, eliminated State Medicaid payments to podiatrists entirely or only for certain podiatric services. Item 418, in relevant part, directed the State Department of Health, which administers the Virginia Medical Assistance Program (hereinafter "Medicaid"), to "[d]iscontinue provision of non-mandatory professional podiatry...services...." You advise that, as a consequence, the Medicaid Program adopted a policy eliminating payment for podiatry services rendered by a podiatrist while continuing to make payments to physicians for mandatory physician services which may include care which a podiatrist is also authorized by law to perform. You have also asked whether that policy violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

It is necessary to determine the meaning of the terms "mandatory" and "non-mandatory" professional podiatry services. 42 U.S.C. § 1396a(a)(13)(B) and 42 C.F.R. § 440.210 require that the state Medicaid Plan include, at least, the following six mandatory services: (1) inpatient
hospitalization services (42 C.F.R. § 440.10); (2) outpatient hospital services (42 C.F.R. § 440.20); (3) other laboratory and x-ray services (42 C.F.R. § 440.30); (4) skilled nursing facility services, screening and diagnostic services and family planning services (42 C.F.R. § 440.40); (5) physician services (42 C.F.R. § 440.50); and (6) Home Health Services (42 C.F.R. § 440.70). If a state elects to do so, it may also include in its state Medicaid Plan a provision for other optional non-mandatory remedial health services. These are defined in 42 U.S.C. § 1396d(a) which states:

"(6) [N]edical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law." (Emphasis added.)

Previously, Virginia's Medicaid Plan made provision for payment for podiatric services, defined in § 54-273(8) of the Code of Virginia, as an optional service when rendered by a professional podiatrist. By virtue of the enactment of Item 418, however, Virginia's Medicaid Plan now only makes provision for payment for podiatric services when rendered by a physician as a mandatory service.

I am, therefore, of the opinion that the language used by the General Assembly in Item 418 of the 1982 Appropriations Act, Ch. 684, Acts of Assembly of 1982, eliminates State Medicaid payments entirely for services rendered by a professional podiatrist.

Thus, the inquiry is whether the General Assembly's action creates an equal protection problem under the Fourteenth Amendment to the United States Constitution. The United States Supreme Court in Beal v. Doe, 432 U.S. 438, 444 (1977), held there was nothing in the language of Title XIX of the Social Security Act which required a participating state to fund "every medical procedure falling within the delineated categories of medical care." Furthermore, each state is given "broad discretion to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent' with the objectives..." of Title XIX.

In District of Columbia Podiatry Society, et al. v. District of Columbia, et al., 407 F.Supp. 1259, 1262-1266 (D.D.C. 1975), a group of podiatrists challenged the District of Columbia's Medicaid Plan which limited the services that a podiatrist may furnish while permitting physicians to furnish a full range of podiatric care. The court, in rejecting the plaintiff's challenge, recognized the necessity of allowing states to utilize funds in the most economic manner possible, funding only necessary medical expenses. These same arguments, given the clear and unequivocal language contained in Item 418, could be said to apply to the actions of the legislature and the Virginia Medicaid Program, Virginia Department of Health, regarding podiatry services.
That portion of the Appropriations Act which eliminates funding for podiatry services does not violate the Fourteenth Amendment's Equal Protection Clause if there is a rational basis for it. McDonald v. Board of Education, 394 U.S. 802, 808-809 (1969), held that challenges on equal protection grounds must be rejected if a rational relationship can be found between the challenged statute and some constitutionally permissible state purpose. The management of limited financial resources is a valid state purpose and has a direct relationship to the General Assembly mandate expressed in Item 418. See, also, Dandridge v. Williams, 397 U.S. 471, 485 (1970). Accordingly, your second question is answered in the negative.

In summary, our research and review of the legal questions raised in your letter lead to these conclusions: (1) that the language of the Appropriations Act adopted by the 1982 General Assembly forbids medical payments for "non-mandatory" podiatric services; (2) that federal medicaid law defines the term "non-mandatory" in such a way that podiatric services provided by podiatrists are not now compensable under the Virginia Medicaid Plan; and (3) the legislative action regarding the subject does not violate the Equal Protection Clause of the Fourteenth Amendment.

MENTAL HEALTH AND MENTAL RETARDATION. COMMUNITY SERVICES BOARD MEMBER MAY NOT SERVE MORE THAN TWO SUCCESSIVE TERMS.

March 31, 1983

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

This is in response to your letter of March 22, 1983, in which you ask if a former member of the Hanover County Services Board is eligible for reappointment to the board. The member served two successive terms. The last term ended on December 31, 1982.

Appointments to community services boards are governed by § 37.1-196 of the Code of Virginia. That section provides in part:

"The term of office of each member of the community services boards shall be for three years from the first day of January of the year of appointment, or, at the option of the governing body of a county or city, from the first day of July of the year of appointment...No person shall be eligible to serve more than two successive terms; provided that persons heretofore or hereafter appointed to fill vacancies may serve two additional successive terms."

In Hanover County, terms of members of the services boards begin on January one. See Hanover County Code § 2-37. The fact that a person was not appointed on or before January 1,
1983, does not alter the fact that the current term in question began on that day. Because no time has elapsed between the terms, it is my opinion that the person in question is not eligible to serve for the term commencing January 1, 1983. See Opinion to the Honorable Prince B. Woodard, President, Mary Washington College, dated August 20, 1982; 1975-1976 Report of the Attorney General at 222.

MOTOR VEHICLES. ALCOHOL SAFETY ACTION PROGRAM.

October 8, 1982

The Honorable Robert T. Vaughan, Judge
General District Court of Halifax County

You have asked whether a court may apply the amended provisions of § 18.2-271.1 of the Code of Virginia to a conviction for driving under the influence (hereinafter "DUI") that occurred prior to the effective date of the amended statute. The conviction about which you inquire occurred in April 1982, and resulted in the suspension of the offender's driver's license for a twelve month period. You specifically inquire if the court may now place that person in an alcohol rehabilitation program and either suspend the suspension of his license and/or issue the person a restricted license.

The provisions of § 18.2-271.1 which became effective on July 1, 1982, allow a court either to suspend the period of driver's license suspension or issue a restricted driver's permit for persons convicted under § 18.2-266 or similar laws. These limited exceptions to the automatic withdrawal of a DUI offender's driving privileges are contingent upon the offender's successful participation in an alcohol safety action program as prescribed by § 18.2-271.1.

As a general proposition and in the absence of an express provision to the contrary, newly enacted legislation is applied only prospectively. See Opinion to the Honorable William G. Petty, Commonwealth's Attorney for the City of Lynchburg, dated August 12, 1982, which applies this rule to the 1982 amendments of § 18.2-271.1. That Opinion holds that the amended version of § 18.2-271.1 does not apply where a DUI defendant is arrested prior to, but is tried subsequent to the July 1, 1982, effective date of the legislation. Similarly, I am of the opinion that the newly enacted provisions of § 18.2-271.1 may not be applied to modify the suspension of a driver's license resulting from a conviction that occurred prior to July 1, 1982.

MOTOR VEHICLES. BLOOD ALCOHOL TESTS. MEMBERS OF LOCAL RESCUE SQUADS OR SHERIFF'S DEPARTMENT WHO ARE DESIGNATED BY COURT TO WITHDRAW BLOOD SAMPLES MAY DO SO WHEN CALLED TO SCENE OF ACCIDENT PROVIDED THEY ARE NOT INVOLVED IN ARREST OF DRIVER WHOSE BLOOD SAMPLE IS TO BE TAKEN.
The Honorable Harry O. Tinsley
Sheriff of Madison County

You have asked for an Opinion concerning the taking of blood samples pursuant to § 18.2-268 of the Code of Virginia. You have stated that in Madison County the circuit court has appointed only two persons to take such samples. Both persons are members of the local rescue squad and one of the persons is also a deputy sheriff. You have asked specifically whether such person can take a blood sample if either person is called to the scene of an accident where a driver is arrested by another officer and his blood is to be tested.

Section 18.2-268(d), which designates which persons can withdraw blood under § 18.2-268, makes no mention of such person's involvement with the arrest of the driver whose blood is to be tested. Section 18.2-268(r1), on the other hand, states that the person who administers a breath test pursuant to § 18.2-268 cannot be the arresting officer, or any person with the arresting officer at the time of the arrest, or any person participating in the arrest. Basic principles of statutory construction require the conclusion that if the General Assembly had wanted to place the same restrictions on the person who takes a blood sample that it placed on the person who administers a breath test, it would have done so.

Although § 18.2-268(d) places no restriction on the person taking the blood sample concerning his presence at the time of the driver's arrest, § 18.2-268(d1) requires the arresting or accompanying officer to take possession of the blood sample from the person who administered the test. Thus, subsection (d1) requires, by implication, that the person taking the sample and the arresting officer not be the same person.

I am, therefore, of the opinion that either of the two persons authorized to take blood samples in Madison County may do so when he is called to the scene of an accident provided he is not the arresting officer and does not participate in the arrest of the driver whose blood sample is to be taken.

MOTOR VEHICLES. BLOOD ALCOHOL TESTS. PERSONS AUTHORIZED TO WITHDRAW BLOOD.

The Honorable Charles R. Watson
Commonwealth's Attorney for the County of Chesterfield

You have asked whether § 18.2-268(d) of the Code of Virginia requires that all the medical personnel described
therein be individually designated by order of a circuit court before they are permitted to withdraw blood, to determine its alcoholic content, from persons arrested for driving while intoxicated. Section 18.2-268(d) states, in relevant part:

"(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof." (Emphasis added.)

The apparent intent of this statute is to permit only physicians, registered professional nurses, and graduate laboratory technicians to withdraw blood without a court's approval. The language "or a technician or nurse designated by order of a circuit court" is stated in the disjunctive, and describes a category of persons having less apparent medical training than persons engaged in the professions named in the first part of subsection (d). Moreover, because designation of persons by a circuit court is conditioned upon the recommendation of a licensed physician, it would be unreasonable to construe the statute to apply this qualification to the first category, which includes physicians.

Accordingly, I am of the opinion that § 18.2-268(d) authorizes physicians, registered professional nurses and graduate laboratory technicians to withdraw blood without a court’s approval. Other nurses and technicians may, however, perform this service if designated by order of a circuit court acting upon the recommendation of a licensed physician.

MOTOR VEHICLES. "BOOT" MAY NOT BE USED TO IMMOBILIZE VEHICLE IMPROPERLY PARKED IN PRIVATE PARKING SPACE.

December 14, 1982

The Honorable Henry E. Hudson
Commonwealth’s Attorney for Arlington County

You have asked three questions concerning the use of a "boot" by a merchant to immobilize vehicles parked without his permission in his parking spaces on privately owned property. According to your inquiry, the merchant's spaces are specifically designated and a sign warns that vehicles parked without his permission will be towed or immobilized. A "boot" is a secured device which the merchant places around a wheel of a vehicle in order to immobilize the vehicle.
Your first question is whether a private citizen may lawfully use a "boot" to immobilize vehicles parked in his spaces without his permission, or whether he is limited to the remedies enumerated in § 46.1-551 of the Code of Virginia.

As indicated in your question, § 46.1-551 provides owners, operators, or lessees of parking lots with certain specified remedies for dealing with trespassing vehicles. The section authorizes a lessee of a parking space to remove a vehicle parked without his permission "by towing or otherwise." The section also makes it lawful for the lessee, in lieu of having the vehicle removed by towing or otherwise, to have "a duly authorized official or officer" ticket the vehicle for a parking violation, and it further authorizes Arlington County to enact ordinances concerning the removal of trespassing vehicles from private parking lots. Section 46.1-551 does not mention the immobilization of trespassing vehicles.

Pursuant to the authority granted by § 46.1-551, the governing body of Arlington County has enacted an ordinance governing the removal of trespassing vehicles from private parking lots. Section 14-104.2 of the Code of Arlington County (1978). That ordinance does not specifically authorize owners or lessees of parking spaces to immobilize vehicles parked in their spaces without their permission.

It is an accepted principle of statutory construction that two bodies of law which pertain to the same subject matter are in pari materia, and should be harmonized to give effect to both if possible. See 1981-1982 Report of the Attorney General at 273. Likewise, the mention of one thing in a statute implies the exclusion of another, and a statute limiting things to be done in a particular manner implies that it shall not be done otherwise. See 1980-1981 Report of the Attorney General at 209.

This Office has previously opined that peace officers should not deviate from the requirements of § 46.1-2, an analogous statute to § 46.1-551, which governs the removal of unattended, abandoned or immobile vehicles from public highways, unless the vehicle is creating a public hazard. See 1981-1982 Report of the Attorney General at 342. Similarly, it is my opinion that private citizens in the situations described above should not deviate from the remedies prescribed in § 46.1-551, and that they may not immobilize vehicles parked in their spaces without permission.

Your second question is whether a private citizen may demand a fee for removing an immobilizing device from a vehicle parked in his space without his permission. Due to my opinion on your first question that a private citizen may not immobilize a vehicle parked in his space without his permission, it is unnecessary for me to answer your second question.
Your third question is whether the use of a boot to immobilize a vehicle is a civil conversion or a criminal offense under § 18.2-146.

Any distinct act of dominion wrongfully exerted over the property of another and in denial of his rights or inconsistent therewith, may be treated as a conversion, and it is not necessary that the wrongdoer apply the property to his own use. See Universal C.I.T. Credit Corp. v. Kaplin, 198 Va. 67, 92 S.E.2d 359 (1956); 19 M.J. Trover and Conversion § 4 (1979). I am of the opinion, therefore, that a lessee of a parking space who without authority immobilizes a vehicle parked in his space without his permission may have civilly converted the vehicle. Of course, whether there has been a conversion will be dependent upon the particular facts of each case.

Section 18.2-146 provides that it shall be a Class I misdemeanor to "willfully" tamper with any vehicle for the purpose of "temporarily or permanently preventing its useful operation...."

The term "willfully" means a perception of the facts requisite to constitute a crime, and generally does not require knowledge of the unlawfulness of the act. Good v. Commonwealth, 155 Va. 996, 154 S.E. 477 (1930). I also note that statutes which are penal in nature must be strictly construed. See Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953). Accordingly, whether a lessee of a parking space who immobilizes a trespassing vehicle is acting with the intent necessary to constitute a violation of § 18.2-146 will be dependent upon the particular facts of each case.

MOTOR VEHICLES. CERTAIN VEHICLES OWNED OR USED EXCLUSIVELY BY VOLUNTEER FIRE DEPARTMENT EXEMPT FROM REGISTRATION AND LICENSING REQUIREMENTS.

September 10, 1982

The Honorable Robert S. Bloxom
Member, House of Delegates

You state that a local volunteer fire department owns a car which it uses exclusively to carry equipment such as fire extinguishers, air packs and protective coats to and from fires. You have asked whether § 46.1-46 of the Code of Virginia requires that such a vehicle be licensed. You indicate that the vehicle is painted fire company color and lettered in accordance with Code provisions to identify the volunteer fire department having control over its operation.

Section 46.1-46 provides an exemption from registration and licensing requirements for "fire-fighting trucks, trailers and semitrailers upon which there is permanently attached fire-fighting apparatus..." so long as such vehicles
are under the "exclusive control of a volunteer fire department...." The section further provides an exemption for

"[O]ther vehicles owned or used exclusively by such volunteer fire departments or volunteer lifesaving or first aid crews or rescue squads; provided that any such vehicle is used exclusively as an ambulance or lifesaving and first aid vehicle and is not rented, leased or loaned to any private individual, firm or corporation, and no charges are made by such organizations for the use of such vehicles. Such equipment must be painted a distinguishing color and conspicuously display in letters and figures, not less than three inches in height, the identity of the volunteer fire department, lifesaving or first aid crew or rescue squad having control of its operation, provided, however, that such equipment be used exclusively in the prevention and control of fires, or for lifesaving, first aid or rescue activities...."

In my opinion the vehicle in question meets the criteria of § 46.1-46 and is thereby exempt from registration and licensing. The last portion of the last sentence quoted above clearly exempts vehicles used "exclusively in the prevention and control of fires" provided the vehicle meets the other criteria. According to the information furnished with your letter, the vehicle is used exclusively in the prevention and control of fires and does meet the other criteria. Accordingly, I am of the opinion that the vehicle is exempt of registration and licensing requirements so long as it meets the criteria specified by § 46.1-46.¹

¹I call your attention to that portion of § 46.1-46 which requires the owner to file with the Division of Motor Vehicles certification of certain facts by the clerk of the circuit court prior to the owner's operating the vehicle on the highways of the Commonwealth.

MOTOR VEHICLES. CHILD RESTRAINT LAW. VIOLATIONS TO BE TRIED AS ANY OTHER TRAFFIC INFRACTION.

February 8, 1983

The Honorable J. Taylor Williams, Judge
Juvenile and Domestic Relations
District Court for Appomattox County

This is in response to your recent letter in which you inquire as to the proper court for hearing cases involving safety restraint devices subject to §§ 46.1-314.2 and 46.1-314.3 of the Code of Virginia when the operator of the vehicle is an adult over the age of 18 years of age.
I gather from your inquiry that your concern is whether violations of the child restraint law (Ch. 634, Acts of Assembly of 1982) should be heard by the juvenile and domestic relations side of the district court system.

I note first that the child restraint law has no express provision vesting jurisdiction in any particular court. I note also that, arguably, all violations of the child restraint law could be heard in the juvenile courts on the theory that the purpose of the child restraint law is to protect minor children and that the juvenile courts have jurisdiction over cases involving the welfare of children.

Section 46.1-314.5(A) of the child restraint law provides, however, that:

"Any person, including those subject to jurisdiction of a juvenile and domestic relations district court, found guilty of violating the provisions of this article shall be subject to a civil penalty in the amount of twenty-five dollars for a violation of § 46.1-314.2, or, if applicable, a civil penalty in the amount of ten dollars for failure to carry a statement as required by § 46.1-314.3." (Emphasis added.)

The emphasized language indicates that the legislature did not intend that the juvenile courts have jurisdiction over all violations of the child restraint laws; otherwise, the phrase "including those subject to jurisdiction of a juvenile and domestic relations district court" would have no meaning.

I am, accordingly, of the opinion that the legislature intended that violations of the child restraint law be heard by the same courts that would hear any violation which is considered a traffic infraction.\(^1\) Consequently, juvenile and domestic relations district courts would hear such cases only where the driver charged with the violation is a minor.\(^2\)

\(^{1}\)Traffic infraction is defined by § 46.1-1(40) as follows: "'Traffic infraction' shall mean any violation of any provision of chapters 1 through 4 (§§ 46.1-1 to 46.1-347) of this title, or of any ordinances, rules or regulations established thereunder, not expressly defined as a felony or misdemeanor, and otherwise not punishable by incarceration or by a fine or more than one hundred dollars."

\(^{2}\)Exclusive jurisdiction is conferred upon juvenile and domestic relations district courts in such cases by § 16.1-241(A)(6).
June 17, 1983

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

You have asked whether the term "salesman" in § 46.1-115(a) of the Code of Virginia as amended in 1983 includes part-time salesmen.

By enactment of Ch. 381, Acts of Assembly of 1983, § 46.1-115(a) was amended to more clearly delineate those persons authorized to operate motor vehicles with dealers' license plates. The amended statute permits these specially licensed vehicles to be operated by "dealers, corporate officers of such dealers, salesmen or full-time employees of such dealers and any part-time employee, but only while such part-time employee is moving a motor vehicle from one point to another at the specific direction of the dealer."

In determining whether a part-time salesman will be considered a "salesman" or a "part-time employee" within the meaning of § 46.1-115(a), it is important to note that the legislature has made a distinction between different dealer employees. Salesmen have been singled out as a separate class of dealer employee by § 46.1-115(a), and are distinguished from other general employees. Furthermore, the term salesman has not been restricted to full-time employees as have the general employees.

In light of the foregoing it is my opinion that part-time salesmen fall within the definition of salesmen and are not, therefore, subject to the restrictions imposed on other part-time employees in the use of dealer licensed motor vehicles.

1Formerly, § 46.1-115(a) permitted "dealers or their authorized representatives..." to operate motor vehicles with dealers' license plates.

2In § 46.1-115(a), full and part-time "employees" are grouped together as a class by the conjunctive "and," and this class of general "employees" is distinguished from other classes, such as "corporate officers" and "salesmen," by the disjunctive "or."

MOTOR VEHICLES. DEALERS. REIMBURSEMENT FROM MANUFACTURERS FOR WARRANTY SERVICE UNDER § 46.1-547.1(A).

May 5, 1983

The Honorable Charles L. Waddell
Member, Senate of Virginia
You have asked whether the warranty compensation provisions of § 46.1-547.1(a) of the Code of Virginia are applicable to merchants who sell boats, boat engines, trailers or camping trailers.

Section 46.1-547.1(a) requires "[e]ach motor vehicle manufacturer, factory branch, distributor or distributor branch..." to compensate motor vehicle dealers for "warranty service required of the dealer by the manufacturer...." A motor vehicle dealer, as defined in the Virginia Motor Vehicle Dealer Licensing Act, §§ 46.1-515 through 46.1-550.5 (the "Act"), is one who buys and sells new or used motor vehicles, trailers or semitrailers. See § 46.1-516(a). Boats and boat engines are not motor vehicles or trailers within the meaning of the Act, and are not, therefore, subject to the warranty reimbursement provisions of § 46.1-547.1(a).

Trailers as defined in § 46.1-1(33) are specifically included as one of the types of vehicles sold by motor vehicle dealers who are entitled to be reimbursed under § 46.1-547.1(a) for warranty service that is required by the manufacturer. Camping trailers, whether self-propelled or "designed to be drawn by a motor vehicle," are also included under the warranty compensation provisions of § 46.1-547.1(a). Self-propelled camping trailers are encompassed by the definition of "motor vehicles," and camping trailers that are not self-propelled fall within the definition of "trailers" as those terms are applied in the Act.

In summary, dealers who sell boats and boat engines are not entitled to compensation from the manufacturer for warranty repairs under § 46.1-547.1(a). However, dealers who sell trailers, self-propelled camping trailers or camping trailers designed to be pulled by other vehicles are motor vehicle dealers within the meaning of the Act, and are entitled to reimbursement for warranty repairs which fall within the scope of § 46.1-547.1(a).

1A "vehicle" is a device by which people or property are transported upon the highway. See § 46.1-1(34). Section 46.1-1(15) defines a "motor vehicle" as a self-propelled vehicle. A "trailer" is defined in § 46.1-1(33) as a "vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

2See §§ 46.1-1(33) and 46.1-1(33a).
The Honorable Robert C. Boswell  
Commonwealth's Attorney for Floyd County

You have asked whether an automobile dealer may use dealer tags on a four-wheel drive vehicle while a snow removal blade is attached to it and snow is scraped, for compensation, from private driveways, parking lots and public streets in front of businesses.

Section 46.1-115(a) of the Code of Virginia which deals with the permissible use of dealers' license plates, provides in pertinent part that:

"Dealers' license plates shall not be used on motor vehicles such as wrecking cranes or other service motor vehicles for the use or operation of which dealers charge or receive compensation."

In my opinion, it is of no consequence that the driveways and parking lots are private and not public in nature. The dealer must use public streets to travel to the point where he engages in the snow removal task. This travel is as much a part of the work project as is the actual snow removal. Accordingly, I am of the further opinion that a four-wheel drive vehicle that has a snow removal blade attached to it and which is used to scrape snow from private driveways, parking lots and public streets for compensation is a service motor vehicle within the statutory meaning of the prohibition contained within § 46.1-115(a). The use of dealers' license plates on the vehicles in question, therefore, would be impermissible.

November 8, 1982

The Honorable William L. Heartwell, III  
Commonwealth's Attorney for Botetourt County

You have asked whether it is a violation of § 46.1-115(a) of the Code of Virginia for a licensed motor vehicle dealer to utilize dealers' license plates obtained pursuant to the provisions of § 46.1-113 on newly repaired or assembled vehicles when those vehicles are operated as commercial trash pick-up vehicles for the purpose of testing such vehicles for manufacturing or repair flaws.

In the situation which prompts your inquiry, a company which repairs, assembles and sells trash pick-up vehicles also operates a commercial trash pick-up service. This company would like to substitute, from time to time, a newly repaired or assembled vehicle for one of its regularly
licensed vehicles used in the commercial trash pick-up business. According to the company, such substitution provides a form of field testing which is the best method for discovering flaws in the assembly or repair performed on the vehicle.

Section 46.1-115(a) reads as follows:

"Permissible use of dealers' license plates; generally. -(a) Such dealers' license plates may be used on motor vehicles, trailers and semitrailers owned by or assigned to, duly licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their authorized representatives. Dealers' license plates shall not be used on motor vehicles such as wrecking cranes or other service motor vehicles for the use or operation of which dealers charge or receive compensation."

The first sentence of § 46.1-115(a) originally was limited to the operation of a vehicle "for demonstration or sale." However, that language was deleted by Ch. 579, Acts of Assembly of 1964, and, since that time, this Office has opined that the permissible, non-commercial use of dealers' license plates by a dealer and his authorized representatives is quite broad. See 1968-1969 Report of the Attorney General at 172; 1971-1972 Report of the Attorney General at 272.

It must be recognized, however, that § 46.1-115(a) provides in its second sentence that dealers' license plates shall not be used when compensation will be received for the use of the vehicle. Clearly, this means that dealers' license plates may not be used on a vehicle regularly utilized as part of a trash pick-up service. The question thus presented is whether § 46.1-115(a) would proscribe the use of such plates on a vehicle which is merely substituted for a fully licensed commercial vehicle so that a brief test can be run?

On the basis of the rationale expressed in the previously noted Opinions, I believe that the use of dealers' license plates on vehicles being tested prior to sale to determine their ability to perform their intended function would be appropriate under the first sentence of § 46.1-115(a), provided that the vehicle being tested is operated by the dealer or by an authorized representative of the dealer.

It is my opinion that if an accepted method of testing is briefly to operate the vehicle as part of a commercial enterprise, the use of dealers' license plates during such testing is permissible. Each situation must be evaluated on a case-by-case basis. The company so using the vehicle must intend merely to test the vehicle, and so use the vehicle in a manner which comports to its intent.
MOTOR VEHICLES. DRIVING WHILE INTOXICATED. DEFENDANT CHARGED WITH DRIVING WHILE INTOXICATED PRIOR TO JULY 1, 1982, BUT TRIED SUBSEQUENT TO THAT DATE MAY BE ASSIGNED TO ALCOHOL REHABILITATION PROGRAM PURSUANT TO § 18.2-271.1 WITHOUT HAVING FIRST BEEN CONVICTED.

August 12, 1982

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

You have asked for an Opinion as to the proper disposition of a charge of driving while intoxicated in violation of § 18.2-266 of the Code of Virginia where the defendant was arrested prior to July 1, 1982, but is tried subsequent to that date. Prior to July 1, 1982, completion of an alcohol rehabilitation program pursuant to § 18.2-271.1 could be accepted by a court in lieu of a conviction. However, § 18.2-271.1 was amended by Ch. 301, Acts of Assembly of 1982, effective July 1, 1982, to provide that a defendant must first be convicted of driving while intoxicated before being referred to an alcohol rehabilitation program. Your question is whether a person who is arrested and charged prior to July 1, 1982, and who is subsequently tried for that offense after July 1, 1982, may be referred to an alcohol rehabilitation program without having first been convicted.

The effect of a statutory amendment on a pending criminal prosecution is stated in Washington v. Commonwealth, 216 Va. 185, 193, 217 S.E.2d 815, 823 (1976), as follows:

"The general rule is that statutes are prospective in the absence of an express provision by the legislature. Thus when a statute is amended while an action is pending, the rights of the parties are to be decided in accordance with the law in effect when the action was begun, unless the amended statute shows a clear intention to vary such rights. Burton v. Seifert Plastic Relief Co., 108 Va. 338, 350-51, 61 S.E.933, 938 (1908)."

In light of the rule stated in Washington v. Commonwealth, and because there is nothing in Ch. 301 to indicate that the General Assembly intended its provisions to apply retroactively, I am of the opinion that the 1982 amendment to § 18.2-271.1 operates prospectively. Therefore, in cases in which the action was commenced (i.e., the defendant was arrested) prior to July 1, 1982, it is my opinion that the defendant should be tried in accordance with the law in effect at that time. Accordingly, such a defendant may be referred to an alcohol rehabilitation program without having first been convicted.

MOTOR VEHICLES. FLASHING WHITE EMERGENCY LIGHTS NOT AUTHORIZED BY STATUTE.
August 31, 1982

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

You have asked whether Virginia law permits the use of flashing white lights on ambulances or similar emergency vehicles operated by a county.

Section 46.1-267 of the Code of Virginia specifies that ambulances and similar emergency vehicles may be equipped with "flashing, blinking or alternating red emergency lights...." The concluding paragraph of that section, hereinafter quoted, clearly indicates that the vehicle lighting devices specified by statute are exclusive.

"No motor vehicle shall be operated on any highway which is equipped with any lighting device other than lamps required or permitted in this article [Art. 7, Ch. 4, Title 46.1]...or required by the federal Department of Transportation."

Prior Opinions of the Attorney General have found that permissible vehicular lighting devices are limited to those specified by statute. See 1976-1977 Report of the Attorney General at 185 (blue lights may not be used on fire department vehicles); 1976-1977 Report of the Attorney General at 175 (amber lights may not be used on trucks with wide loads).

Because the General Assembly has designated red as the color of lights which may be used on emergency vehicles, I am of the opinion that flashing white lights may not be used on ambulances or similar emergency vehicles.

MOTOR VEHICLES, HABITUAL OFFENDER. RESTORATION OF DRIVING PRIVILEGE PURSUANT TO § 46.1-387.9:2 DOES NOT PURGE INDIVIDUAL'S DRIVING RECORD. CONVICTIONS UPON WHICH HABITUAL OFFENDER ADJUDICATION IS BASED CAN AGAIN BE USED AS BASIS FOR SUBSEQUENT HABITUAL OFFENDER ADJUDICATION PROCEEDING.

April 6, 1983

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for the County of Wythe

You have requested my opinion on proceeding against a person as an habitual offender for driving while intoxicated ("DWI") under the following circumstances:

"An individual is adjudicated a habitual offender as a result of three separate DWI convictions within ten years. Pursuant to Section 46.1-387.9:2 of the Code of Virginia, 1950, as amended, after a period of five years, he petitions the Court for restoration of his privilege to operate a motor vehicle, and the Court
accordingly restores his privilege to drive. Within the ten year period, and after his driving privileges are restored, the individual is convicted again of DWI. In a proceeding to have the individual adjudicated again as a habitual offender, may the Commonwealth rely not only upon the latest DWI conviction, but two of the three former DWI convictions previously relied upon?"

Section 46.1-387.2 of the Code of Virginia defines an habitual offender.¹

It seems clear that this definition of habitual offender would again, after a fourth conviction, fit the hypothetical situation you have described, unless that individual's record at the Division of Motor Vehicles has been somehow purged of the earlier DWI convictions.²

I can find nothing to indicate that an individual's driving record is to be purged when a court restores that individual's privilege to operate a motor vehicle pursuant to § 46.1-387.9:2. Unlike § 46.1-387.9:1, which provides that upon restoration the court shall order the Commissioner of the Division of Motor Vehicles "to purge the copy of the order finding such person an habitual offender from the permanent records of the Division," § 46.1-387.9:2 provides only for restoration of the individual's driving privilege. It does not provide for purging that individual's driving records. While the legislature could have provided that an individual's driving record would be purged of earlier convictions after restoration under § 46.1-387.9:2, the fact that it did not do so would indicate that the individual's driving record is not affected by such restoration.

Moreover, the purpose of the Habitual Offender Act (the "Act") is to protect the public from individuals who have demonstrated their disregard for our traffic laws.³ In order to protect the motoring public, the General Assembly has provided for an indefinite license revocation under the Act for individuals who have demonstrated their disregard for drunk driving laws three times. There is no reason to believe that the legislature considered an individual with four DWI convictions less dangerous than one with three such convictions, even if several years have passed between the third and fourth convictions. In my opinion, the Act requires that such an individual again have his license revoked indefinitely, and that he not be given a chance to accumulate three additional convictions before the State can again take action to remove him from the road indefinitely.

I might add that a similar question was presented to the Supreme Court of Virginia in a petition for appeal styled Stanford Junior Mowbray v. Division of Motor Vehicles, Supreme Court Record No. 812105. By Order dated September 1, 1982, the Court refused to review a decision of the Circuit Court of Fairfax County which let stand a revocation of Mowbray's operator's license by the Division of Motor Vehicles, pursuant to § 46.1-421(b). That revocation was
based in part on a DWI conviction which had been used once before to revoke Mowbray's operator's license pursuant to § 46.1-421(b) and pursuant to the Act. Mowbray's operator's privilege had been restored after a five year period pursuant to §§ 46.1-387.9:2 and 46.1-421(c), but subsequently he had accumulated another DWI conviction. Accordingly, the Division of Motor Vehicles had again revoked his license under § 46.1-421(b) on the basis of the new conviction and the three previous convictions. The trial court affirmed the revocation order, and, as stated, the Supreme Court refused to review the trial court's decision.

In light of the foregoing, I am of the opinion that the Commonwealth may rely on the previous DWI convictions in an habitual offender adjudication such as you describe.

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1 This section sets out in that part pertinent to conviction of the offense of driving while intoxicated that: "An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions...for separate and distinct offenses, described in subsections (a)...(c) of this section, committed within a ten-year period...provided...the date of the offense most recently committed occurs within ten years of the date of all other offenses...(a) Three or more convictions...singularly or in combination, of the following separate and distinct offenses arising out of separate acts: ***(2) Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of § 18.2-266...."

2 I assume that this is what you mean when you ask whether the Commonwealth may "rely" on the former DWI convictions.

3 Section 46.1-387.1 states the policy behind the Act: "It is hereby declared to be the policy of Virginia: (1) To provide maximum safety for all persons who travel or otherwise use the public highways of the State; and (2) To deny the privilege of operating motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the Commonwealth, the orders of her courts and the statutorily required acts of her administrative agencies; and (3) To discourage repetition of criminal acts by individuals against the peace and dignity of the Commonwealth and her political subdivisions and to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws."

MOTOR VEHICLES. ISSUANCE OF CERTIFICATE OF TITLE IN NAMES OF TWO PERSONS, NOT HUSBAND AND WIFE, AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP.
You have asked whether § 46.1-68.1 of the Code of Virginia can be interpreted to permit the Division of Motor Vehicles to issue a motor vehicle title and registration to two persons, not husband and wife, as joint tenants with the right of survivorship. Section 46.1-68.1 provides that:

"The Division upon receiving an application for a certificate of title for a motor vehicle, trailer or semitrailer, to be issued in the names of two natural persons who are husband and wife, jointly with right of survivorship shall issue to the owners thereof a certificate of title accordingly. Any such certificate issued in the name of two persons who are husband and wife may contain an expression such as 'or the survivor of them,' which shall be deemed sufficient to create joint ownership during the lives of the two owners, and individual ownership in the survivor. A certificate issued in the names of two persons who are husband and wife, with their names separated only by the disjunctive pronoun 'or' (such as, for example, 'John Jones or Mary Jones,') shall be deemed to be the substantial equivalent of a certificate issued to them or to the survivor of them (such as for example, 'John Jones or Mary Jones, or the survivor of them'). Whenever, in this article, the word 'owner' appears, it shall be deemed to include both of such joint owners during their lives, and the survivor of them.

Nothing herein shall be construed to prohibit the issuance of certificate of title in the names of two or more persons as owners in common; and the issuance of a certificate in the names of two or more persons, conjunctively, shall be deemed to be sufficient evidence of ownership of undivided interests in such vehicle nor shall anything herein be construed to grant immunity from enforcement of any liability of any person owning such vehicle, as one of two joint owners, to the extent of his interest in the vehicle, during the joint lives of the owners thereof."

The apparent intent of this statute is to authorize the Division of Motor Vehicles, upon receiving proper application, to issue a certificate of title for a motor vehicle in the names of a husband and wife jointly with the right of survivorship. For purposes of automobile titles, this statute restores the right of survivorship, when requested, as an incident to a joint tenancy between husband and wife, notwithstanding § 55-20 of the Code which abolished the right of survivorship as an incident to joint tenancies generally.
It is a rule of statutory construction that where the legislature makes express mention of one thing, the exclusion of others is implied.\(^1\) In § 46.1-68.1 the General Assembly has expressly provided that a title may be issued to joint tenants with right of survivorship where those tenants are husband and wife. It has also provided that a title may be issued to two or more persons as owners in common. But it has said nothing about issuance of a title to two persons, not husband and wife, as joint tenants with right of survivorship. Thus, under the doctrine of expressio unius est exclusio alterius, it appears that this statute was not intended to permit issuance of such a title.

Accordingly, I am of the opinion that § 46.1-68.1 permits the Division of Motor Vehicles, upon receipt of a completed application for a certificate of title, to issue a motor vehicle title and registration to two persons as joint tenants with the right of survivorship only to a husband and wife.


MOTOR VEHICLES. LOCAL LICENSE FEES. TOTAL LOCAL LICENSE FEE COLLECTED PURSUANT TO § 46.1-65 AND CH. 487, ACTS OF ASSEMBLY OF 1974 AND CH. 258, ACTS OF ASSEMBLY OF 1977 MAY NOT EXCEED TWENTY-FIVE DOLLARS.

August 12, 1982

The Honorable James E. Durant
Treasurer for the City of Falls Church

You have asked two questions pertaining to the provisions of Ch. 487, Acts of Assembly of 1974, as amended by Ch. 258, Acts of Assembly of 1977, which authorize the governing bodies of Alexandria, Arlington, Fairfax County, Fairfax City and Falls Church to charge additional annual motor vehicle license fees for the purpose of funding each jurisdiction's share of operating deficits of the Washington Metropolitan Area Transit Authority.

Your first question is whether a locality may legally charge the maximum local license fee under § 46.1-65 of the Code of Virginia and still charge the full five dollar fee permitted by Chs. 487 and 258. In my opinion, this inquiry must be answered in the negative. Chapters 487 and 258 specifically provide that no local license fee shall exceed twenty-five dollars. If a locality charges the maximum local license fee permitted by § 46.1-65, plus the five dollar additional fee authorized by Chs. 487 and 258, the total license fee for a car weighing over 4,000 pounds would be thirty dollars, exceeding the twenty-five dollar limit established in Chs. 487 and 258. It would appear that in
order to keep total license fees at or below the twenty-five dollar limit while maintaining the five dollar additional license fee permitted under Chs. 487 and 258, a locality must forego raising the local motor vehicle, trailer and semi-trailer license fees to the maximum now permitted under § 46.1-65.

You have also asked whether the additional fee permitted by Chs. 487 and 258 must be prorated for an individual purchasing a local license in mid-year (as are the license fees permitted by § 46.1-65). I am aware of no requirement that the additional license fees be prorated, and, therefore, I am of the opinion that the localities may prorate such fees, or not, as they see fit.

MOTOR VEHICLES. PARKING VIOLATIONS. SUMMONS FOR PARKING VIOLATIONS MUST BE SERVED PERSONALLY IN ORDER TO JUSTIFY TRIAL IN ABSENTIA.

July 1, 1982

The Honorable D. B. Marshall, Judge
Sixteenth Judicial District

You have asked whether a summons issued pursuant to the provisions of § 46.1-254.1 of the Code of Virginia for the enforcement of city parking ordinances, must be served on defendants personally in order to justify trying them in their absence.

Assuming the parking citation is uncontested, there will be no summons or warrant issued. If, however, the citation is not collected by such procedure as permitted by § 46.1-254.1, a summons is then served on the accused. The procedure for service of a summons for a violation of a county, city or town parking ordinance is prescribed by § 19.2-76.2, which provides that:

"Notwithstanding the provisions of § 19.2-76, whenever a summons for a violation of a county, city or town parking ordinance is served in any county, city or town it may be executed by mailing by first class mail a copy thereof to the address of the owner of the vehicle as shown on the records of the Division of Motor Vehicles. If the person fails to appear on the date of return set out in the summons, the summons shall be executed in the manner set out in § 19.2-76 of this Code.

No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for his failure to appear on the return date of the summons." (Emphasis added.)

It is my opinion that, although § 19.2-76.2 provides that a summons for a parking violation may be executed initially by mailing a copy to the defendant by first class
mail, it is nevertheless necessary for the defendant to appear in response to the mailed summons in order that he be tried. If he fails to appear, personal service, as provided in § 19.2-76, would be required before trial in absentia would be justified. Therefore, your inquiry is answered in the affirmative.

1Section 46.1-254.1 reads in pertinent part as follows: "(a) Any ordinance regulating parking by a city or county under the provisions of §§ 46.1-252, 46.1-252.1, 46.1-253 or 46.1-254 shall contain provisions that require: (1) that uncontested payment of parking citation penalties be collected and accounted for by a city or county administrative official or officials who shall be compensated by the city or county; (2) that contest by any person of any parking citation shall be certified in writing, on an appropriate form, to the appropriate district court, by such administrative official or officials; and (3) that such administrative official or officials shall cause complaints, summons or warrants to be issued for delinquent parking citations."

2"An officer may execute within his jurisdiction a warrant or summons issued anywhere in the State. A warrant shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally, or, if the accused be a corporation, in the same manner as in a civil case. The officer executing a warrant shall endorse the date of execution thereon and make return thereof to a judicial official having authority to grant bail. The officer executing a summons shall endorse the date of execution thereon and make return thereof to the court to which the summons is returnable...."

MOTOR VEHICLES. PERSONAL PROPERTY TAXES ASSESSED WHERE VEHICLE NORMALLY GARAGED OR PARKED.

October 25, 1982

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

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

"We are making our automobile assessments from the Division of Motor Vehicles listing and have found several persons who continue to keep their mailing address in Giles County and are buying Virginia license tags but who live and keep these vehicles in states other than Virginia.

My question is since neither the person or the vehicle is actually located in Virginia, can we assess these vehicles and require them to pay Personal Property tax
in Giles County and if not what steps can be taken to get them off our Division of Motor Vehicles listing. This applies to persons other than service personnel."

Section 58-834 of the Code of Virginia provides, in pertinent part, that "the situs for purposes of assessment of motor vehicles...shall be the county...where the vehicle is normally garaged...or parked...." This Office has previously held that the place of issuance of the registration and license tags is not controlling in determining the situs of the vehicle for the purpose of personal property taxation. See 1978-1979 Report of the Attorney General at 283 and 1966-1967 Report of the Attorney General at 205. You have indicated that the vehicles in question are kept "in states other than Virginia" and I assume from this that the vehicles are normally garaged outside of Virginia. I, therefore, must conclude that no Virginia locality has the authority to assess such vehicles for purposes of personal property tax.

You have also asked what steps can be taken to have such vehicles taken off your Division of Motor Vehicles ("DMV") listing. It appears that such listing is compiled by DMV, pursuant to § 46.1-32, based upon information supplied by the vehicle owners. However, according to personnel at DMV, owners sometimes fail to provide such information, or fail to update such information when they move. If you find incorrect information on the listing supplied to you, you may point out the error to DMV by marking corrections on a copy of the listing and returning it to DMV. I understand that DMV personnel will then update the pertinent records so that subsequent listings will be corrected.

MOTOR VEHICLES. PROVISIONS OF "IMPLIED CONSENT LAW" APPLY ONLY AFTER SUSPECT HAS BEEN PLACED UNDER ARREST.

September 23, 1982

The Honorable Charles M. Stone, Judge
Henry County General District Court

You ask several questions relating to the provisions of § 18.2-267 of the Code of Virginia.

You ask first whether §§ 18.2-267 and 18.2-268 are "to be read together so that (a) a driver on Virginia highways impliedly consents to the preliminary test under Section 18.2-267, and (b) the requirements mandated in Section 18.2-267 are procedural and not substantive..." as explained in § 18.2-268(s).

The provisions of § 18.2-268, Virginia's "implied consent law," apply only after a suspect has been placed under arrest.1 This is in contrast to the breath analysis provided for in § 18.2-267 which is to be administered prior to the suspect's arrest, and is a tool to determine whether there is probable cause to charge the suspect with driving
under the influence ("DUI"). See Opinion to the Honorable Joseph A. Gallagher, Judge, Thirty-First Judicial District, dated August 31, 1981.

Consequently, I am of the opinion that a driver on the public highways of Virginia does not impliedly consent to the preliminary breath test under § 18.2-267, nor do I find the requirements mandated in § 18.2-267 to be of the same character as those stated in § 18.2-268(s).

Your second question is whether the rights afforded by § 18.2-267 are as follows:

"(a) A suspect is entitled to have his breath analyzed to determine the probable alcoholic content of his blood, if equipment is available.

(b) A suspect has the right to refuse to permit his breath to be analyzed.

(c) Failure to permit the analysis shall not be evidence against a suspect if he is prosecuted under § 18.2-266?"

I agree with you that the above-mentioned rights are afforded by § 18.2-267. I would add, however, that another right afforded the suspect under § 18.2-267 is that the results of such preliminary breath analysis are not to be admitted into evidence in any prosecution under § 18.2-266.

Your third question is whether the arrest of a suspect is rendered illegal because of the officer's failure to advise the suspect of his rights concerning the preliminary breath test under § 18.2-267. This Office has previously expressed the opinion that failure of the officer to advise the suspect of his rights under § 18.2-267 (formerly § 18.1-54.1) does not affect his prosecution for driving under the influence. See 1972-1973 Report of the Attorney General at 286 and 1970-1971 Report of the Attorney General at 269. The expression of a similar view may be found in the 1977-1978 Report of the Attorney General at 254. Neither the results of the breath analysis, nor the refusal to take the test has any place in a prosecution under § 18.2-266. I am of the opinion that the failure to advise the suspect of his rights under § 18.2-267 does not render the arrest illegal, because such a test has no bearing on his subsequent trial.

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1Section 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 1, 1973, 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." (Emphasis added.)

MOTOR VEHICLES. REGISTRATION. FERTILIZER SPREADER EXEMPT FROM REGISTRATION REQUIREMENTS OF § 46.1-41, UNDER CERTAIN CIRCUMSTANCES.

May 6, 1983

The Honorable Robert S. Bloxom
Member, House of Delegates

You have asked whether a liquid fertilizer spreader (a specialized piece of farm equipment with large flotation type tires used to apply liquid fertilizer to farm crops) must be licensed in order to be operated over Virginia highways between the office of the fertilizer distributor and the farms where it will be used.

Section 46.1-41 of the Code of Virginia provides that, with certain exceptions, all motor vehicles, trailers and semitrailers intended to be operated upon any highway in this State must be registered and titled.1 There are several exceptions provided in § 46.1-41 for motor vehicles, tractors and other equipment used for agricultural purposes, including, specifically, fertilizer spreaders drawn by farm tractors. See § 46.1-45(h).2 Thus, it appears that tractor drawn fertilizer spreaders are generally exempt from licensing requirements.

There is an important limitation on the foregoing exemption. This Office has previously opined that the provisions of § 46.1-45(h) are modified by the terms of § 46.1-45(a), so that the exemptions provided in § 46.1-45(h) do not apply to vehicles which are operated over the highways for distances in excess of ten miles. See 1968-1969 Report of the Attorney General at 159. See, also, 1974-1975 Report of the Attorney General at 279, and 1952-1953 Report of the Attorney General at 152. In reaching that conclusion, the Attorney General recognized the lack of the mileage limitation in paragraph (h); but, to interpret paragraph (h) without including the limitation in paragraph (a) would require that (h) be disassociated from the context of § 46.1-45. Paragraph (h), standing alone, has no logical meaning.

The foregoing interpretation has been recognized for a number of years without challenge in the General Assembly or by the courts. Accordingly, it is my opinion that, pursuant to § 46.1-45(h), fertilizer spreaders need not be licensed so long as they are drawn by farm tractors, are not operated over the highways of Virginia in excess of ten miles, and are not operated on a for-hire basis.3
Section 46.1-41 provides, in pertinent part, that: "Except as otherwise provided in §§ 46.1-42 through 46.1-49, 46.1-119 and 46.1-120 every person, or his duly authorized attorney-in-fact, including every railway, express and public service company, owning a motor vehicle, trailer or semitrailer intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor in the name of the owner."

Section 46.1-45 provides, in pertinent part, that: "(a) No person shall be required to obtain the registration certificate, license plates and decals or to pay the fee prescribed therefor, pursuant to the provisions of this chapter...for any motor vehicle, trailer or semitrailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin; provided, that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. The foregoing exemption from registration and license requirements shall also apply to any vehicle hereinbefore described or to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, when such trailer is used by the owner thereof for the purpose of moving farm produce and livestock from such farm along a public highway for a distance not to exceed ten miles to a storage house, packing plant or market, when such use is a seasonal operation.

(b) The exemptions contained in this section shall also apply to farm machinery and tractors; provided, further, that such machinery and tractors may use the highways in going from one tract of land to another tract of land regardless of whether such land be owned by the same or different persons.

(h) The exemptions contained in this section shall also apply to any trailer or semitrailer or fertilizer spreader drawn by a farm tractor, or any motor vehicle when used by a farmer, his tenant, agent or employee, or cotton ginner or peanut buyer or fertilizer distributor in transporting unginned cotton or peanuts or fertilizer owned by such farmer, cotton ginner or peanut buyer or fertilizer distributor from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, or from fertilizer distributor to farm and upon return to such distributor, when not operated on a for-hire basis."

(Emphasis added.)

"Operation...for hire" is defined in § 46.1-1(35) as "any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or
indirectly...." It is arguable that a fertilizer distributor who transports fertilizer in a fertilizer spreader from his office to the farm and then applies that fertilizer to the farmer's fields, falls within the definition of "for-hire" operation. A fertilizer spreader must be considered a motor vehicle, trailer or semitrailer operating over the highways of the State, and the distributor receives compensation for the service of applying the fertilizer. However, in my opinion, this definition of for-hire operation is satisfied only if the service for which compensation is received is the service of operating the equipment over the highways. In the situation suggested in your letter, the distributor receives compensation for the service of applying the fertilizer to the fields, not for the service of operating on the highways. Accordingly, I do not believe such operation is "operation on a for-hire basis."

**MOTOR VEHICLES. RENTALS TO COMPANY'S OWN EMPLOYEES ARE TAXABLE BY LOCALITY AS TANGIBLE PERSONAL PROPERTY.**

January 24, 1983

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

You have asked whether automobiles maintained by a company and rented for the exclusive benefit of its own employees are taxable as tangible personal property or as merchants' capital. For the reasons hereinafter stated, I am of the opinion that such automobiles are taxable as tangible personal property.

In 1981 the General Assembly enacted certain amendments to Title 58 that reclassified "daily rental passenger cars" for the purpose of local taxation. See Ch. 145, Acts of Assembly of 1981. The amendments removed daily rental passenger cars from the ambit of local taxation as tangible personal property and reclassified them as merchants' capital and intangible personal property. See §§ 58-405 and 58-833 of the Code of Virginia. The new law assessed an additional two percent tax on the gross proceeds from the rental of daily rental passenger cars under the Virginia Motor Vehicle Sales and Use Tax Act and provided for the distribution of this additional tax to the localities. See §§ 58-685.12:1(A) and 58-685.23(ii).

Automobiles rented exclusively by a company to its own employees are not "daily rental passenger cars" as defined by § 58-685.12:1(B). Daily rental passenger cars are "held for rental" by rentors "engaged in the business" of rental automobiles. See §§ 58-685.12:1(B) and 58-685.11(7). The company in question is not engaged in the business of renting automobiles but is engaged in some other business and holds the disputed automobiles as a perquisite for its own employees.
Moreover, automobiles rented exclusively by a company to its own employees do not fit the definition of "merchants' capital." See § 58-833. Merchants' capital, which specifically includes daily rental passenger cars as of the effective date of the 1981 amendments, also excludes in general terms, "tangible personal property not offered for sale as merchandise...." Section 58-833. The company in question maintains the disputed automobiles for its own use, i.e., the exclusive benefit of its own employees and does not offer them for sale as merchandise.

Automobiles rented by a company exclusively to its own employees are neither merchants' capital nor daily rental passenger cars within the meaning of §§ 58-685.12:1 and 58-833. These automobiles are not, therefore, subject to the special tax provisions of § 58-685.12:1(A) and should continue to be classified and taxed by localities as tangible personal property.

MOTOR VEHICLES. REVOCATION OF OPERATOR'S LICENSE. VIRGINIA ALCOHOL SAFETY ACTION PROGRAM. PROVISIONS OF § 46.1-421(A) ARE INAPPLICABLE TO CONVICTION FOR WHICH INDIVIDUAL HAS BEEN ASSIGNED TO AND SUCCESSFULLY COMPLETED VASAP PROGRAM.

December 17, 1982

The Honorable William T. Wilson
Member, House of Delegates

This is in response to your recent letter, from which I quote:

"In 1974 a man was convicted of driving under the influence. He did not go on VASAP [Virginia Alcohol Safety Action Program]. In August of 1982 he was again charged with driving under the influence. Can the Court now convict him of driving under the influence, place him on VASAP, grant him a restricted permit for one year, and suspend the balance of the mandatory sentence? The Court is willing to do that in this particular case, but there is concern that DMV may keep the person's permit an additional year after the year during which the restricted license is in effect."

There are apparent inconsistencies between the two statutes which are applicable to your question. For example, § 18.2-271 of the Code of Virginia provides for a two-year license suspension for a second conviction for driving under the influence which is more than five but less than ten years after the first such conviction. On the other hand, § 46.1-421(a) provides for a three-year revocation under the same circumstances. 1

Moreover, § 18.2-271 provides the judge with the discretion to suspend two years of the license suspension imposed pursuant to that section for second convictions
occurring within five years of the first, and one year for second convictions occurring between five and ten years of the first. Section 46.1-421(a) has no provisions for suspension of the revocation. Consequently, in the situation you describe, if the court suspends the individual's license for two years under § 18.2-271 and then suspends one year of the suspension and grants a restricted license for the other year of the suspension, it is arguable that under § 46.1-421 the Commissioner of the Division of Motor Vehicles will be forced to revoke the individual's license for a third year.

The provisions of § 18.2-271 with which we are here concerned were added by Ch. 301, Acts of Assembly of 1982. That act amended several different Code sections pertaining to drunk driving laws, but it did not amend § 46.1-421(a). Thus, it might be argued that the new provisions of § 18.2-271 have, by implication, repealed or amended the conflicting provisions of § 46.1-421(a).

However, even though Ch. 301 did not amend § 46.1-421(a), two of the chapter's new provisions refer specifically to § 46.1-421(a), thus raising an inference that the legislature was aware of the provisions of § 46.1-421(a) and intended that those provisions remain unaltered. If that be the case, then some way of reconciling the two statutes must be available.

One of the references to § 46.1-421(a) in Ch. 301 is an addition to § 18.2-271.1 (the VASAP statute), which provides, in subparagraph (b), that:

"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." (Emphasis added.)

(A similar provision was also added to § 18.2-271.1(b1).) It would seem from these provisions that the legislature intended that the provisions of § 46.1-421(a) would not apply to a conviction for which the individual was assigned to a VASAP program, for otherwise these new provisions would have no meaning.

Accordingly, it is my opinion that § 46.1-421(a) does not apply to a conviction for which the individual is assigned to VASAP, unless the individual fails to successfully complete the VASAP program. Consequently, a court may suspend one year of the two-year suspension and grant a restricted license for the remaining year to an individual convicted of driving under the influence for a second time within ten years, but not within five years, without fear that the Commissioner of the Division of Motor Vehicles will then revoke the accused's license for an
additional year. The provisions of § 46.1-421(a) will not apply to such an individual, unless he fails to successfully complete the VASAP program.

Section 18.2-271 provides, in pertinent part, that: "Except as provided in § 18.2-271.1, the judgment of conviction if for a first offense under § 18.2-266, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of six months from the date of such judgment. If such conviction is for a second or other subsequent offense (i) within five years of a first offense conviction under § 18.2-266 such person's license to operate a motor vehicle, engine or train shall be suspended for a period of three years or, (ii) within five to ten years of a first offense conviction under § 18.2-266 such person's license to operate a motor vehicle, engine or train shall be suspended for a period of two years from the date of the judgment of conviction... Six months of any license suspension or revocation imposed pursuant to this section for a first offense conviction may be suspended, in whole or in part by the court upon the entry of such person convicted into and the successful completion of a program pursuant to § 18.2-271.1. Upon a second conviction, the court may not suspend more than two years of such license suspension or revocation if such second conviction occurred less than five years after a previous conviction under § 18.2-270, nor more than one year if such second conviction occurred five to ten years after a previous conviction."

However, § 46.1-421(a) provides, in pertinent part, that: "The Commissioner [of the Division of Motor Vehicles] shall forthwith revoke and not thereafter reissue for three years the operator's or chauffeur's license of any person upon receiving a record of a conviction of such person for a violation of the provisions of § 18.2-266 pertaining to driving under the influence of drugs or intoxicants... subsequent to a prior conviction for a violation of... the provisions of § 18.2-266 or § 18.2-272; provided that the subsequent violation has been committed within ten years from the prior violation; provided, that if the Commissioner has received a copy of an order as provided in § 18.2-271.1, he shall not revoke such license, but shall proceed as provided in § 46.1-417."

This interpretation is consistent with the last sentence of § 46.1-421(a) which provides that "if the Commissioner has received a copy of an order as provided in § 18.2-271.1, he shall not revoke such license, but shall proceed as provided in § 46.1-417." It appears that this language in § 46.1-421(a) applies only to orders issued under § 18.2-271.1(b1) concerning out-of-state convictions, since the provisions of § 46.1-417 referred to in § 46.1-421(a) apply only to such orders. However, it is apparent from other provisions of Ch. 301 that the General Assembly intended that in-state and out-of-state convictions would be
treated similarly under the new drunk driving laws (compare Ch. 301 § 18.2-271.1(b) with Ch. 301 § 18.2-271.1(b1)), so that this interpretation is consistent with that legislative intent.

MOTOR VEHICLES. SALVAGE DEALERS. MAY BE REGULATED BY LOCALITIES UNDER JUNK DEALER STATUTE, BUT ARE NOT, BY DEFINITION ENCOMPASSED BY JUNK DEALER PROVISIONS OF § 54-825, ET SEQ.

April 28, 1983

The Honorable J. G. Overstreet
County Attorney for Bedford County

You have asked whether a person who is licensed to conduct business as a salvage dealer under Title 46.1 of the Code of Virginia, must also obtain a junk dealer's license from the locality in accordance with § 54-825, et seq.

Salvage dealers are licensed and regulated by the Commonwealth under the Motor Vehicle Dealer Licensing Act (the "Act"), found in §§ 46.1-515 through 46.1-550.5, and the Disposition of Salvage Motor Vehicles provisions of Title 46.1 are contained in §§ 46.1-550.6 through 46.1-550.14. Section 46.1-528(b) of the Act provides:

"The licenses...required by this chapter are in addition to licenses...imposed by other provisions of law and nothing contained in this...chapter shall be construed as exempting any person...from any license...imposed by any other provision of law."

Thus, the regulation of salvage dealers under the Act was not intended by the legislature to preempt the concurrent licensing authority of the localities. The question remains, however, whether a salvage dealer is necessarily a junk dealer.

Section 46.1-550.6 defines salvage dealer as "any person...who purchases a salvage vehicle...for purposes of resale as parts or as salvage only." Junk dealers, on the other hand, are defined in § 54-825 as persons who purchase and sell "any kind of secondhand articles, junk, rags, rag cullings, bones, bottles...old lead pipe...old rubber articles, or other like commodities...." Although there are no Virginia cases interpreting the general phrases "secondhand articles" and "other like commodities," the statutory construction doctrine of ejusdem generis dictates that the scope of these general phrases is limited by the specific items enumerated in the definition of junk dealer. In the case of Bullman v. City of Chicago, 367 Ill. 217, 10 N.E.2d 961 (1937), an Illinois court applied this doctrine in interpreting the phrase "any secondhand article whatsoever" in a junk dealer statute similar to Virginia's law. The court held that dealers in used or dismantled automobiles or
automobile parts were not dealers in "secondhand articles" within the meaning of the junk dealer statute because the phrase "secondhand articles" was not "applicable to articles of a superior grade or more valuable than those described by the particular words "junk, rags." Id. 10 N.E.2d at 966. Thus, the court concluded that a salvage dealer who deals in nothing but the resale of used motor vehicle parts is not a "junk dealer."

In summary, the regulation of salvage dealers by the Commonwealth under Title 46.1 does not preclude localities from imposing appropriate regulations upon salvage businesses. However, a salvage dealer is not, by definition, a junk dealer. The determination of whether the junk dealer provisions of § 56-825, et seq., apply to a particular business must be made independently of the salvage dealer provisions of Title 46.1.

1 The doctrine of ejusdem generis provides that where general words follow the enumeration of particular classes or things, the general words will be construed as applying only to things of the same general class as those enumerated.

MOTOR VEHICLES. WEIGHT LAWS. TRUCK-TRAILER COMBINATION. TRUCK MUST BE LICENSED FOR TOTAL GROSS WEIGHT.

June 14, 1983

The Honorable William R. Shelton, Chief Judge
Chesterfield General District Court

You have asked whether a dump truck carrying a load and pulling a trailer would be in violation of § 46.1-159 of the Code of Virginia if the dump truck was not licensed for the total amount of the weight of the two vehicles plus their load.

I refer you to § 46.1-157(a) which provides:

"In the case of a combination of a truck or tractor truck and a trailer or semitrailer, each vehicle constituting a part of such combination shall be registered as a separate vehicle, and separate vehicle license plates shall be issued therefor, but, for the purpose of determining the gross weight group into which any such vehicle falls pursuant to § 46.1-154, the combination of vehicles of which such vehicle constitutes a part shall be considered a unit, and the aggregate gross weight of the entire combination shall determine such gross weight group. The fee for the registration certificate and license plates for a trailer or semitrailer constituting a part of such combination shall be seventeen dollars. Provided, however, if such trailer or semitrailer exceeds a gross
Moreover, § 46.1-157(b) further provides:

"In determining the fee to be paid for the registration certificate and license plates for a truck or tractor truck constituting a part of such combination the fee shall be assessed on the total gross weight and the fee per 1,000 pounds applicable to the gross weight of the combination when loaded to the maximum capacity for which it is registered and licensed. However, there shall be no deduction from this fee for the registration fee of the trailer or semitrailer in the combination." (Emphasis added.)

The dump truck and trailer clearly constitute what is known as a truck-trailer combination and each of the vehicles of course is part of the combination. The license fee is based on the gross weight of the combination and is determined by the schedule opposite the weight group contained in § 46.1-154(a). "Gross weight" is defined in § 46.1-161 as "the aggregate weight of a vehicle or combination of vehicles and its load." Thus, in applying for a license, the owner of the dump truck must indicate the aggregate gross load for which he desires the vehicle licensed.

Accordingly, I am of the opinion that if the dump truck is not licensed for the aggregate gross weight of the dump truck with its load and the trailer that is being pulled, the dump truck would be in violation of § 46.1-159 because the gross weight of the combination of vehicles would be in excess of the gross weight on which the dump truck is registered and licensed.

1This question pertains to potential overweight violations by motor vehicles not designed and used for the transportation of passengers pursuant to § 46.1-154 and does not pertain to potential axle weight violations pursuant to § 46.1-339.

NATIONAL GUARD. ARMY FORCES. MILITARY LEAVE AND MILITARY COMPENSATION IS IN ADDITION TO FULL PAY FROM PUBLIC EMPLOYER. PUBLIC EMPLOYMENT SENIORITY AND LEAVE TIME CONTINUE TO ACCRUE WHILE ON MILITARY LEAVE.

April 27, 1983

The Honorable Marshall E. Honaker
Sheriff of the City of Bristol

You have asked whether an employee who is a member of the organized reserve forces of the United States Armed
Forces should receive both his regular pay as a public employee and his military pay when on annual active duty for training or whether, in the alternative, he must take annual leave to cover those days on reserve duty.

Section 44-93 of the Code of Virginia states that:

"All officers and employees of the State or of any city, county or town who shall be members of the organized reserve forces of any of the armed services of the United States, national guard or naval militia shall be entitled to leaves of absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they shall be engaged in annual active duty for training, or when called forth by the Governor pursuant to the provisions of § 44-75; there shall be no loss of pay during such leaves of absence, not to exceed fifteen days per calendar year. When relieved from such duty, they shall be restored to positions held by them when ordered to duty." (Emphasis added.)

The underlined portions of the statute, when read together, provide the answer to your question. Members of the national guard and reserves are entitled to leaves of absence without loss of pay. This means that the State, city, county, or town employing such members must continue their pay while they are absent for such military duty for a period not to exceed fifteen days per year. In addition, you will note that they are also entitled to such leaves of absence without loss of accrued leave. This refers to annual leave, sick leave, etc., to which the employee is normally entitled as a result of his employment. Because they are entitled to continuing pay without losing accrued leave as a result of military duty, it follows that they cannot be charged with leave time while performing such military duties. The foregoing has been the consistent interpretation of this statute by this Office for many years. See Reports of the Attorney General 1976-1977 at 235 (with regard to the present statute); 1939-1940 at 157; 1931-1932 at 136 (with regard to the predecessor of the present statute which applied only to State employees).

Finally, you should note that § 44-93 was amended by the 1983 session of the General Assembly,¹ so that effective July 1, 1983, national guard or reserve members will receive fifteen days of paid military leave each federal fiscal year (October 1 to September 31), rather than each calendar year. This will not entitle them to any more paid leave than before, but simply avoids confusion caused by the fact that they go to fifteen days of annual training once each federal fiscal year, not once each calendar year.

¹Ch. 590, Acts of Assembly of 1983, reads, in pertinent part, "there shall be no loss of pay during such leaves of
absence, not to exceed fifteen days per federal fiscal
year...."

NEWSPAPERS. NOTICE. WHETHER NEWSPAPER PROPOSED FOR
PUBLICATION OF OFFICIAL NOTICES IS ONE OF "GENERAL
CIRCULATION" UNDER § 15.1-504 IS FACTUAL DETERMINATION TO BE
MADE BY COUNTY BOARD OF SUPERVISORS.

December 28, 1982

The Honorable Thomas W. Athey
County Attorney for the County of York

This is in reply to your recent letter inquiring as to
the meaning of the term "having a general circulation" as it
is used in statutes requiring publication of official notices
in local newspapers. You submit in your letter and its
attachments facts and figures relating to the York Town Crier
and inquire as to its eligibility for publication of such
notices. You ask the following questions:

"1. Does the York Town Crier have a 'general
circulation' in York County?

2. Can the Board of Supervisors of York County find as
a fact whether a newspaper has a general circulation in
the County or is it purely a question of law?"

There are as yet no Virginia Supreme Court decisions
interpreting the term "general circulation." A prior Opinion
of this Office relies upon decisions in other jurisdictions
in setting forth the following criteria as being among those
for determining whether a newspaper is one of "general
circulation": (1) the diversity of interests of its
subscribers, (2) the diversity of the news published therein,
and (3) the breadth of the area in which the newspaper is
circulated or distributed. The Opinion goes on to point out
that whether a newspaper is one of "general circulation" is
therefore a matter of substance rather than size. See

Information contained in your letter and its attachments
demonstrates the following about the York Town Crier:

1. It contains a variety of news stories of primarily
local interest, with space devoted also to features,
advise and other columns, editorials, letters to the
editor, advertisements (including classifieds), sports,
legal notices and announcements of business, club and
other meetings and events. Its general management
states a goal of "[c]omplete and authoritative coverage
of York/Poquoson events, with a special emphasis on
local government, elections, school events and sports."

2. It is distributed weekly by sales in local business
establishments and by mail to subscribers through every
post office in the county. Total circulation is approximately 4500. Its current paid circulation in the county is shown to be approximately 3400 (most of which is concentrated in one magisterial district), with just over twenty percent of that in newsstand sales and the remainder by mail subscription. (York County's 1980 population was just over 35,000.)

As indicated hereinafter, this factual situation must be weighed against the criteria set forth above in order to determine if the York Town Crier is a newspaper of "general circulation" in York County.

With regard to your second question, whether or not a newspaper proposed to be used for publication of official notices is one of "general circulation" is a factual determination to be made by the public official or body that is required to cause the notice to be published. See Reports of the Attorney General 1981-1982 at 269; 1972-1977 at 295; 1970-1971 at 277. In the present case, and with respect to the notice requirements of § 15.1-504, I am of the opinion that the Board of Supervisors of York County is the responsible body.

1You refer specifically to § 15.1-504 of the Code of Virginia, relating to county governing body adoption of ordinances, which provides, in part, as follows: "Except as otherwise authorized by law, no such ordinance shall be passed until after descriptive notice of an intention to propose the same for passage shall have been published once a week for two successive weeks prior to its passage in some newspaper published and having a general circulation in the county...." (Emphasis added.)

2More recently, the Supreme Court of North Carolina, in a case of first impression in that jurisdiction, reviewed the leading cases on the subject and reached the following tests to determine if a newspaper is one of "general circulation" within the meaning of statutes containing general language similar to that of Virginia's:

1. It must have a content that appeals to the public generally, that is, it must contain items of general interest. Examples cited are national, state or county news, editorials, human interest stories and advice columns.

2. It must have more than a de minimis number of readers in the jurisdiction, in order to satisfy quantitative considerations inherent in the term "general circulation." This is to be determined in context.

3. Readership must not be entirely limited geographically to one community or section in the county. This does not require even distribution of readership in every section, nor must the paper be the one of widest geographical distribution in the county.

4. It must be available to the general public in the jurisdiction, that is, anyone in the county who wishes to subscribe to it may do so.
ORDINANCES. SUBDIVISONS. MAY DEFINE "SUBDIVISION" AND CREATE EXCEPTIONS TO DEFINITION, BUT MAY NOT EXEMPT SOME SUBDIVISIONS FROM COMPLIANCE WITH SUBDIVISION REGULATIONS. ORDINANCE MAY NOT INCLUDE VARIANCE PROCEDURE.

November 29, 1982

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

This is in reply to your request for my opinion concerning the validity of certain sections of the Northumberland County Subdivision Ordinance. Section 2-26 of that ordinance defines the term "subdivide"¹ and then lists five separate classes of divisions of land which will not be required to comply with complete subdivision regulations. You ask, first, "whether or not the definition as contained in the county ordinance is rendered invalid by reason of any of the exemptions listed therein," and, secondly, "whether or not a plat of any division of land which is otherwise exempt is nevertheless required to be recorded pursuant to the terms of Section 15.1-430(1) of the Code of Virginia."

As you point out, § 15.1-430(1) contains a definition of "subdivision" which is applicable "unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465...."² See Board of Supervisors of Loudoun County v. Georgetown Land Company, 204 Va. 380, 131 S.E.2d 290 (1963).

It is to be noted that § 2-26 of the Northumberland County Subdivision Ordinance, as it is presently worded, does not create exceptions to its definition of "subdivide." By its very terms the definition includes every division of land. Section 2-26 does purport to exempt some divisions of land from compliance with complete subdivision regulations. In that regard, I am of the opinion that it is invalid because § 15.1-473(a) specifically provides that after the adoption of a subdivision ordinance in a locality "[n]o person shall subdivide land without making and recording a plat of such subdivision and without fully complying with the provisions of this article and of such ordinance."³ See, also, 1973-1974 Report of the Attorney General at 706.

In answer to your second question, inasmuch as every division of land is a subdivision by virtue of the definition in § 2-26, a plat of each division must be prepared and recorded. See § 15.1-473(a), supra.

You also inquire as to the validity of § 7-1 of the subdivision ordinance, which allows the governing body to waive any provision of the ordinance upon a subdivider's submission of evidence showing that strict adherence would cause unnecessary hardship. Although a variance procedure is specifically authorized with respect to zoning regulations in § 15.1-495, no such statutory authority exists with respect to subdivision regulations. A prior Opinion of this Office, in which I concur, holds that inclusion of a variance procedure in a subdivision ordinance is improper. See 1976-1977 Report of the Attorney General at 199. Accordingly, I am of the opinion that § 7-1 of the Northumberland County Subdivision Ordinance is invalid.

1 Section 2-26 states, in part, as follows: "SUBDIVIDE: To divide any lot, parcel, or tract of land. The term includes re-subdivide. For each division of land a plat shall be filed with the Subdivision Agent."

2 The full text of § 15.1-430(1) is as follows: "'Subdivision,' unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.1-475."

3 Note that § 15.1-466(k) requires a subdivision ordinance to provide "[f]or reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, subject only to any express requirement contained in the Code of Virginia." (Emphasis added.) Thus, a subdivision ordinance may exempt this particular class of land divisions from compliance with local subdivision regulations. "If a statute expressly excepts a class which would otherwise fall within its terms, the exception negates the idea that any other class is to be excepted." Reese v. Wampler Foods, Inc., 222 Va. 249, 252, 278 S.E.2d 870 (1981).
The Honorable Clay Hester  
Sheriff of the City of Newport News

You have asked several questions concerning the computation of good conduct credit pursuant to § 53.1-116 of the Code of Virginia which provides a separate and distinct method for the awarding of good time to those individuals committed to a local jail from that provided for inmates incarcerated in State penal institutions.

Your first inquiry is whether an inmate must serve thirty days before becoming eligible for the fifteen days good conduct credit provided by § 53.1-116. This Office has previously expressed the view that an inmate must serve the specified amount of time provided before he may be awarded good time credit which he earned for satisfactorily serving the specified time. See 1979-1980 Report of the Attorney General at 268. I am of the opinion that, in order for an inmate to become eligible for the fifteen days of good conduct credit provided for in § 53.1-116, he must first serve thirty days without violating the written rules and regulations of the jail.

You next inquire as to whether the fifteen days for thirty days provided for in § 53.1-116 is synonymous with "one for one." I am of the opinion that the phrase "fifteen days for thirty days" is not synonymous with receiving one day good conduct credit for each day served. I necessarily reach this conclusion because the legislature specifically provided that an inmate only receive fifteen days good conduct time for thirty days served. It is a general rule of statutory construction that words used in a statute are to be given their natural and ordinary meaning, unless it plainly appears that they are used in some other sense. When the intention of the legislature is expressed in clear and precise terms, there is no need for construction, and effect should be given to the manifest meaning of the terms. Commonwealth v. Bailey, 124 Va. 800, 97 S.E. 774 (1919). Further, a statute directing things to be done in a particular manner implies that it shall not be done otherwise. See 1976-1977 Report of the Attorney General at 199. One for one implies that thirty days of good conduct are earned for each thirty days satisfactorily served and such is not the case under § 53.1-116.

Your next question is whether § 53.1-116 applies to sentences of less than thirty days. As indicated above, it is my opinion that, in order to become eligible for good conduct credit, an inmate must first satisfactorily serve thirty days of his sentence. At that point he receives fifteen days of good conduct credit. In a situation where an individual only has a ten day sentence, it is my opinion that he earns no good conduct credit because he has not served the initial requisite thirty day period.
Your last inquiry is whether § 53.1-116 applies to the case of mandatory jail sentences for convictions of drunk driving offenses. Section 18.2-270 provides for certain mandatory sentences for second, third and subsequent violations of that section. In light of the fact that none of the mandatory sentences provided by § 18.2-270 is for a period of time longer than thirty days, the provisions of § 53.1-116 would, therefore, be of no benefit to individuals convicted of drunk driving who receive only the minimum mandatory sentences provided for in § 18.2-270.

Section 53.1-116 provides, in pertinent part, the following: "The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall keep a record of each prisoner. Each prisoner shall earn good conduct credit at the rate of fifteen days for each thirty days served in which the prisoner has not violated the written rules and regulations of the jail."

**Overruled by Opinion to the Honorable Henry E. Hudson, Commonwealth's Attorney for Arlington County, dated November 16, 1982.**

July 29, 1982

The Honorable Charles R. Hawkins
Member, House of Delegates

You have asked whether the good time jail credit as set forth in § 53.1-1161 of the Code of Virginia applies to offenses which occurred prior to July 1, 1982. You have also asked whether the aforementioned statute applies to offenses which occurred prior to July 1, 1982, where the defendants were not sentenced to jail until after July 1, 1982. That section was amended by the 1982 session of the General Assembly when it recodified Title 53 and, as a result of the amendment, the credit provisions are different.

In Morris v. Smith, 223 Va. 286, 286 S.E.2d 151 (1982), the Virginia Supreme Court held that the good conduct credit which can be earned by an inmate must be determined by the statutes in effect at the time when sentence is pronounced. Morris, supra, at 152. See § 1-16 of the Code.

It is, therefore, my opinion that the good conduct credit provisions of § 53.1-116 apply to any person sentenced to jail on or after July 1, 1982, regardless of when the offense was committed. The provisions of § 53-151 as in
effect prior to July 1, 1982, will govern sentences pronounced prior to that date.

Section 53.1-116 provides in pertinent part that a prisoner confined in a jail shall earn good conduct credit at the rate of fifteen days for each thirty days served in which the prisoner has not violated the written rules and regulations of the jail. The predecessor of § 53.1-116 was § 53-151.

PARDON, PROBATION AND PAROLE. GOOD CONDUCT CREDIT. PURSUANT TO § 53.1-116 MAY NOT BE "BANKED" FOR APPLICATION AFTER RELEASED AGAINST SENTENCES TO BE SERVED IN FUTURE BUT MAY BE APPLIED TO REMAINING INCREMENTS OF SENTENCES CURRENTLY BEING SERVED.

October 5, 1982

The Honorable James H. Turner, III
Sheriff of Henrico County

You have inquired whether an individual incarcerated in jail with three consecutive thirty day sentences may receive good conduct credit pursuant to § 53.1-116 of the Code of Virginia, on the basis of having a total of ninety days to be served; or whether the individual's time must be computed as three separate thirty day sentences, thereby causing the person to serve each sentence in its entirety and not be eligible for good conduct credit.

Section 53.1-116 provides, in pertinent part, that each prisoner earns good conduct credit at the rate of fifteen days for each thirty days served. The section specifically provides that "time so deducted shall be allowed to each prisoner for such time as he is confined in jail." (Emphasis added.)

In an Opinion dated July 14, 1982, to the Honorable Clay Hester, Sheriff for the City of Newport News, I opined that in order for an inmate to become eligible for the fifteen days credit provided in § 53.1-116, he must first serve thirty days without violating the written rules and regulations of the jail. I am of the further opinion that even though thirty days must be served first to be eligible for the fifteen day credit, this statute provides for the application of credit, once received, to the total time period for which he is then under sentence to serve in that jail. The statute does not permit a prisoner, however, to "bank" credit for application, after release, against sentences to be served in the future.

Relating this rationale to the factual situation you have posed, the individual in question, under the statute, would serve sixty days and thereby earn thirty days good
conduct credit. The thirty day credit would then be applied to the remaining thirty day sentence, resulting in the individual serving a total of sixty days of the ninety days of incarceration.

PARDON, PROBATION AND PAROLE. PRISONERS. GOOD CONDUCT CREDIT. § 53.1-116 APPLICABLE ONLY TO INMATES COMMITTING OFFENSES BEFORE JULY 1, 1982; NOT APPLICABLE TO PERIODS OF CONFINEMENT PRIOR THERETO. EARLIER OPINION OVERRULED.

November 16, 1982

The Honorable Henry E. Hudson
Commonwealth's Attorney for Arlington County

You have referred to § 53.1-116 of the Code of Virginia, and inquired whether the amendment thereto, effective July 1, 1982, is applicable to all inmates. You also have inquired whether it is applicable to periods of confinement prior to the effective date.

Section 53.1-116 formerly authorized a good conduct credit for jail inmates at the rate of ten days for each twenty served in which an inmate had not violated any written rules and regulations of the jail. The 1982 amendment changed this rate to fifteen days for each thirty days served.

Under the law prior to the amendment, a jail inmate would be entitled to a credit of ten days after he had served twenty days without violating a rule or regulation, whereas under the law as amended, it would be necessary for him to serve an additional ten days before he would be entitled to any credit, thus increasing the time necessary to earn any credit. Accordingly, while the amendment may have been intended to be procedural in nature, it will have substantive effects.

The United States Supreme Court recently held unconstitutional a Florida statute repealing an earlier statute and reducing the amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence. The Court held that such a statute constituted an ex post facto law as applied to prisoners whose crime was committed before the statute's enactment. Weaver v. Graham, 450 U.S. 24 (1981). The Court reasoned that the statute on its face applied only after its effective date, but the effect of the enactment was to alter the consequences attached to a crime already completed, changing the quantum of punishment, thus having a retrospective and more onerous effect on those prisoners whose crime was committed before the statute's enactment. Thus, even if such a statute merely alters penal provisions accorded by the grace of the legislature, it violates the ex post facto prohibition in the United States Constitution, Art. I, § 9, Cl. 3 and Art. I, § 10, Cl. 1.
I am, accordingly, of the opinion that the amendment to § 53.1-116 is applicable only to individuals committing an offense on or after July 1, 1982, and consequently, it is not applicable to periods of confinement prior to that date.

I am not unmindful of an earlier Opinion of this Office to the Honorable Charles R. Hawkins, Member, House of Delegates, dated July 29, 1982, concerning a similar question. That Opinion was based upon language of the Virginia Supreme Court in Morris v. Smith, 223 Va. 5, 286 S.E.2d 151 (1982), wherein it was stated that the amount of good conduct credit which can be earned by an inmate must be determined by the statutes in effect at the time when sentence was pronounced. Thus, we concluded that the provisions of § 53.1-116 applied to any person sentenced to jail on or after July 1, 1982, regardless of when the offense was committed, and that the provisions of § 53-151, the predecessor to § 53.1-116, as in effect prior to July 1, 1982, governed sentences pronounced prior to that date. For the reasons stated herein, however, I am persuaded that the United States Supreme Court's holding in Weaver, supra, is the controlling authority with respect to the questions you have asked. Accordingly, to the extent that the Hawkins Opinion conflicts with the instant Opinion, the former is expressly overruled.

PHYSICALLY HANDICAPPED. UNIFORM SIGNS. ENFORCEMENT OF PARKING SPACES RESERVED FOR HANDICAPPED.

October 14, 1982

The Honorable George W. Jones
Member, House of Delegates

You have asked three questions concerning the erection of signs designating parking spaces reserved for persons who have a handicap and the enforcement of such reserved parking designations. Specifically, you asked:

"1. Would a sign indicating a handicap parking space be considered a 'regulatory and warning sign'?

2. In the event the above is in the affirmative, would not such signs have until January 1, 1986 to meet the requirement of the Federal Government for conformity or compliance with the revisions contained in the 1978 manual issued by the United States Department of Transportation?

3. If the answer to number two is in the affirmative, would the present signs used for handicap parking space designation, although not the signs called for in the 1978 manual, be enforceable if properly erected?"

Standard highway signing in the United States is the joint responsibility of the states and federal government.
23 U.S.C. §§ 109(b) and 109(d) (1976); 23 U.S.C. § 402(a) (Supplement IV 1980); 23 C.F.R. § 655.601, et seq. Each state, in cooperation with its political subdivisions, is required by 23 C.F.R. § 1204.4 (1981), 23 U.S.C. §§ 109(d) and 402(a) to have a program which, among other features, provides for maintaining conformity with the current federal administration manual. The sanction of withholding of federal aid highway funds may be imposed if such conformity is not maintained.

The General Assembly of Virginia has enacted two statutes to carry out the federal statutory scheme. Under § 46.1-173 of the Code of Virginia, the State Highway and Transportation Commission (the "Commission") has the authority to "provide a uniform system of marking and signing" of State highways under its jurisdiction and "such system of marking and signing shall correlate with and so far as possible conform to the system adopted in other states." The statute also provides penalties if such signs are not obeyed. Under § 46.1-187, local authorities erecting signs on roads within their respective jurisdictions must conform such signs in size, design and color to those erected by the Department of Highways and Transportation.

The current Manual of the Uniform Traffic Control Devices (the "Manual") by the Federal Highway Administration ("FHWA") was issued in 1978 and the Commission, under the authority granted it by § 33.1-12 and § 46.1-173, adopted the Manual for the Commonwealth on March 15, 1979. Revision No. 1 of the Manual issued in December 1979, provided an example of a sign regulating parking for handicapped persons.

Your first question is thus answered in the affirmative. Section 2B-31 of the 1978 Manual provides that a sign denoting a parking space reserved for handicapped parking is a regulatory sign. That sign is to have a white background with the lettering and outside border being green and the "access" logo (the stylized wheelchair) in blue.

With respect to your second question, I am of the opinion that full compliance, i.e., conversion of all signs to the standard signs, is not required until January 1, 1986.

In the December 18, 1980, Federal Register, FHWA established, as a goal, 2 dates for the states to obtain full compliance with the national standards provided in the 1978 Manual and its revision. Regulatory and warning signs (two different types of signs) are to be in conformity by January 1, 1986. 45 Fed. Reg. 83378 (1980).

With respect to your third question, I am of the opinion that signs not in compliance with the color scheme of the 1978 Manual and Revision No. 1, are enforceable, at least until January 1, 1986, if such signs are in proper position and sufficiently legible to be seen by the ordinarily
observant person as required by §§ 46.1-173, 46.1-181.4:1 and 46.1-187.

1Until Revision No. 1 was issued the standard no parking regulatory sign without handicap logo or just a handicap logo sign with "no parking" added had evolved to meet the need. Revision No. 1 added the standardized sign.

2Consultations with counsel for the FHWA reveals that FHWA views those compliance dates as goals and not requirements.

PRISONERS. GOOD CONDUCT CREDIT. TERMS OF PLEA AGREEMENT MAY NOT ABROGATE SHERIFF’S DUTY TO AWARD GOOD CONDUCT CREDIT.

April 8, 1983

The Honorable James A. Gondles, Jr.
Sheriff of Arlington County

You indicate that several inmates are serving sentences at your facility under court orders mandating that they are to earn no good conduct credit while incarcerated.

With respect to this situation, you have raised the following three questions:

"1) If an agreement is made during sentencing, and the judge concurs, where the subject will serve a specified amount of time in jail with no good conduct credit -- is this law still applicable?

2) Can no good time credit be imposed as a condition of probation?

3) What control does the sentencing judge have over good time credit?"

Section 53.1-116 of the Code of Virginia provides, in part, that

"The jailer shall keep a record of each prisoner. Each prisoner shall earn good conduct credit at the rate of fifteen days for each thirty days served in which the prisoner has not violated the written rules and regulations of the jail.***So much of an order of any court contrary to the provisions of this section shall be deemed null and void." (Emphasis added.)

By use of the above-quoted, unambiguous language, the General Assembly has placed an affirmative duty upon the jailer to award good conduct credit to a prisoner who complies with jail rules and regulations. The jailer's duty is unconditional. It is not affected by the terms of a plea bargain agreement or the approval of either the court or the
prisoner. Indeed, the express language of § 53.1-116 makes it clear that the sentencing court is without authority to enter an order which abrogates the jailer's duty. The jailer's duty is separate and distinct from the criminal process which brings the prisoner to jail to serve his sentence.

With respect to your questions, I am, therefore, of the opinion that a prisoner is to be awarded good conduct credit by the jailer, provided he qualifies for same, and the sentencing court is without authority to modify the jailer's duty in any way.

PRIVACY ACT. PERSONAL INFORMATION. SOCIAL SECURITY NUMBER AND JOB CLASSIFICATION ARE PERSONAL INFORMATION.

July 22, 1982

The Honorable Frank W. Nolen
Member, Senate of Virginia

This is in response to your letter which was received July 12, 1982, in which you ask several questions pertaining to the Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386 of the Code of Virginia (the "Act").

It is my understanding that you have been furnished certain information concerning a highway project and that the information includes a list of the social security numbers of employees who worked on the project. You wish to discuss the project with several of the employees who worked on the project. You have asked the Department of Highways and Transportation to furnish you with the names of the individuals corresponding to the social security numbers, together with the individuals' job titles or classification. In this context you ask the following questions:

"(1) Are Social Security account numbers 'personal information' per § 2.1-379(2)?

(2) Are job classifications (laborer, truck driver, etc.) 'personal information'?

(3) Per § 2.1-382, does the 'data subject' have to be notified in order for an agency such as the Highway Department to supply a legislator with the name and job classification that goes with a particular Social Security number?"

Section 2.1-379(2) defines "personal information" as

"[A]ll information that describes, locates or indexes anything about an individual including his...employment record, or that affords a basis for inferring personal characteristics...or things done by...such individual...."
An individual's social security number would provide such information and, therefore, I am of the opinion that it would fall within the definition of "personal information" as used in the Act. See 1977-1978 Report of the Attorney General at 310.

In response to your second question, I am of the opinion that a job title or job classification would constitute "personal information" for the same reasons that a social security account number constitutes personal information under the Act.

In response to your third question, § 2.1-382(A)(2) provides in pertinent part that any agency maintaining personal information shall

"Give notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency...." (Emphasis added.)

Section 2.1-382(C) provides, however, that

"Neither any provision of this chapter nor any provision of [the Freedom of Information Act]...shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of...any public officer, official or employee at any level of State, local or regional government in this Commonwealth...."

Because subsection (C) of § 2.1-382 provides for regular access to the information which you request, I am of the opinion that § 2.1-382(A)(2) is not applicable. Therefore, I conclude that it is not necessary for the Department of Highways and Transportation to give notice to the individuals that you have requested their name and job classification.

There are certain exceptions which are not applicable to this Opinion.

PROCESS. LONG ARM STATUTE. PERSONAL SERVICE REQUIRED IN DIVORCE ACTION.

September 16, 1982

The Honorable Willard I. Walker, Judge
Circuit Court of the City of Richmond

This is in reply to your inquiry regarding service of process in certain causes of action for divorce or separate
maintenance. Specifically, you inquire whether the provisions of §§ 8.01-328.1(A)(8) and 8.01-328.1(A)(9) of the Code of Virginia, when read together with § 8.01-329, permit service of process upon the Secretary of the Commonwealth against a nonresident defendant.

Notwithstanding § 8.01-329, which generally permits service of process on the Secretary of the Commonwealth in certain cases, I am of the opinion that personal service of process must be obtained against the nonresident defendant in divorce actions in which the court exercises personal jurisdiction pursuant to either § 8.01-328.1(A)(8) or § 8.01-328.1(A)(9).

Sections 8.01-328.1(A)(8) and 8.01-328.1(A)(9) expanded those occasions in which courts may exercise personal jurisdiction over nonresident parties to include certain causes of action for child or spousal support and divorce or separate maintenance. All of the subparagraphs of § 8.01-328(A) deal with personal jurisdiction over nonresidents, but only in subsections (A)(8) and (A)(9) did the legislature specify the manner by which proof of service of process on the nonresident party was to be obtained. Subsection (A)(8) conditions personal jurisdiction on the fact that "proof of service... is made by a law-enforcement officer authorized to serve process in the jurisdiction where the nonresident party is located..." while subsection (A)(9) conditions personal jurisdiction upon the fact that "proof of service of process in person on the nonresident party is obtained." By expressly requiring the manner of service of process in these two subsections, the legislature has impliedly excluded all other alternative methods of service which are permissible under the general terms of § 8.01-329 to other situations involving personal jurisdiction.

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1Section 8.01-328.1(A) reads, in pertinent part: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

8. Having (i) executed an agreement in this Commonwealth which obligates the person to pay spousal support or child support to a domiciliary of this Commonwealth, or to a person who has satisfied the residency requirements in suits for annulments or divorce for members of the armed forces pursuant to § 20-97 provided proof of service of process on the nonresident party is made by a law-enforcement officer authorized to serve process in the jurisdiction where the nonresident party is located, or (ii) been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person; or

9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is
based, or at the time a cause of action arose for divorce or separate maintenance or at the time of commencement of such suit, if the other party to the matrimonial relationship resides herein; provided that proof of service of process in person on the nonresident party is obtained. Service of process under this paragraph may be made by any law-enforcement officer authorized to serve process in the jurisdiction where the nonresident party is located.

Section 8.01-329 reads in part: "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."

PROFESSIONAL AND OCCUPATIONAL REGULATION. DEPARTMENT OF COMMERCE. EMPOWERED, THROUGH ITS DIRECTOR AND REGULATORY BOARDS, TO ENFORCE LAWS AND REGULATIONS GOVERNING PROFESSIONS AND OCCUPATIONS UNDER TITLE 54.

October 20, 1982

The Honorable Bernard L. Henderson, Jr., Director
Department of Commerce

You have requested my opinion whether §§ 54-1.21 and 54-1.35 of the Code of Virginia are sufficient authority to require clerks of courts to notify the Department of Commerce (the "Department") of criminal convictions of persons in occupations subject to the Department's jurisdiction.

Section 54-1.21 authorizes a regulatory board1 to refuse to grant a permit, licence, registration or certificate to an applicant who has been convicted of a crime only if such criminal conviction "directly relates to the trade, occupation or profession for which the permit, license, registration or certificate is sought." This statute does not impose any duty upon anyone to advise the boards of any convictions.

Section 54-1.35 imposes a duty upon the clerk of the circuit court to report to the Department any conviction of a person for violating "any statute which the Department is empowered to enforce...."

The Department is governed and administered by the Board of Commerce2 and the Director of the Department (the "Director").3 Regulatory boards have been established by the Board of Commerce to administer certification and licensing systems as provided in §§ 54-1.25 and 54-1.26. The Department, through its Director and the regulatory boards,
is empowered to enforce the laws and regulations governing professions and occupations under Title 54 of the Code of Virginia.4

Because § 54-1.35 is narrowly drawn to refer to violations of statutes "which the Department is authorized to enforce," I am of the opinion that a clerk of a circuit court is required to report to the Department only convictions of criminal violations of Title 54.5 I am unaware of any other provision of law that would require clerks of all Virginia courts to report periodically all criminal convictions simply because the convicted person is a member of an occupation subject to the Department's jurisdiction.

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1As defined in § 54-1.18.
2See §§ 54-1.25 and 54-1.26.
3See §§ 54-1.31, 54-1.32 and 54-1.33.
4See §§ 54-1.20, 54-1.28 and 54-1.33.
5See, for example, § 54-571 which makes it a misdemeanor for a person not authorized by law to conduct or pilot a vessel to or from sea, or to or from any port or place in Virginia.

PROFESSIONAL AND OCCUPATIONAL REGULATION. LOCAL ORDINANCE ADOPTED PURSUANT TO § 15.1-11.4 DESIGNED TO REQUIRE APPLICANT FOR CERTIFICATE TO ENGAGE IN PLUMBING, BUILDING-RELATED MECHANICAL OR ELECTRICAL WORK IN LOCALITY TO FURNISH EVIDENCE OF ABILITY AND PROFICIENCY TO ENGAGE IN SUCH WORK. GRANDFATHER CLAUSE IN § 36-99.1 REFERS TO PRIOR CERTIFICATION PROCEDURE DESIGNED TO PROTECT PUBLIC WELFARE AND IS THUS REGULATORY IN NATURE. DOES NOT APPLY TO LICENSES OBTAINED FROM COMMISSIONER OF REVENUE PRIOR TO JULY 1, 1978.

November 8, 1982

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

This is in reply to your recent letter in which you ask whether electricians, plumbers or building-related mechanical workers who have obtained a license from the commissioner of revenue to conduct their respective businesses in Isle of Wight County pursuant to Title 58, Ch. 7, Art. 5 of the Code of Virginia prior to July 1, 1978, may be required to submit to examination to determine their qualifications to engage in such businesses as required by a proposed Isle of Wight County ordinance to be adopted pursuant to § 15.1-11.4.

An ordinance adopted pursuant to § 15.1-11.4 is designed to require an applicant for a certificate to engage in plumbing, building-related mechanical or electrical work in the county to furnish evidence of his ability and proficiency to engage in such work. Section 15.1-11.4 makes it clear that the county ordinance is regulatory in nature and its

Section 36-99.1, a part of Art. 1, Ch. 6 of Title 36 concerning the Uniform Statewide Building Code, generally provides that no electrical, plumbing or building-related mechanical workers shall be required to be examined or certified by the Board of Housing and Community Development or by a locality at the direction of said board if such worker was certified or licensed prior to July 1, 1978.¹ The normal purpose of such a "grandfather" provision is to delay the application of some new or stricter standard. See 1980-1981 Report of the Attorney General at 331. Given this purpose, it is clear that the prior certification procedure referred to in § 36-99.1 refers to one which was designed to protect the public welfare and is regulatory in nature.

Title 58, Ch. 7, Art. 5, §§ 58-297 through 58-303.1,² to which you refer in your question, provides for licensure of certain contractors by local commissioners of revenue. These sections are for the purpose of raising public revenue and not to regulate business for the protection of the public welfare. Thus, the tax statutes in Title 58 in question are not comparable to the grandfathered certification procedures contemplated by § 36-99.1. Therefore, compliance with the taxing statute prior to 1978 will not absolve a worker from the regulatory requirements imposed pursuant to other provisions of the Code. Bowen Electric Company v. Foley, 194 Va. 92, 97, 72 S.E.2d 388 (1952).³

Accordingly, I am of the opinion that the "grandfather clause" set forth in § 36-99.1 for such workers does not apply to licenses obtained from the commissioner of revenue prior to July 1, 1978, pursuant to § 58-297, et seq.

¹Because there is no indication in your letter whether the proposed ordinance is being considered by the locality at the direction of the Board of Housing and Community Development, I will assume, for purposes of this Opinion, the applicability of the grandfather clause of § 36-99.1.

²Certain of these sections were repealed and replaced by new sections by the 1982 session of the General Assembly to be effective January 1, 1983. See Ch. 633, Acts of Assembly of 1982. The legislative changes do not affect the conclusion herein.

³In Bowen, supra, the Supreme Court noted that it would be illogical to argue that any person holding himself out as a lawyer, who paid the State revenue license fee imposed by one section of the Code would thereby be excused from submitting himself to the bar examination or otherwise establishing his professional qualifications as required by other sections of the Code. I am of the opinion that the same reasoning applies to the situation which you present.
PROFESSIONAL AND OCCUPATIONAL REGULATION. § 54-1.28 DOES NOT AUTHORIZE DELEGATION OF ORAL EXAMS TO NON-BOARD MEMBERS.

January 12, 1983

The Honorable G. Timothy Oksman
Chairman, Board of Commerce

In your letter of December 22, 1982, you describe a licensing procedure used by several professional boards and inquire as to its legality. Several boards charged with professional licensing administer oral examinations as part of their licensing process. These oral examinations are frequently administered by a committee comprised of one board member and two other members of the applicable profession who are not members of the board.

You then ask the first of two questions, "Is there legal authority for an oral examination to be administered in part by individuals who are not members of the professional board which is authorized to license?"

Section 54-1.28 of the Code of Virginia establishes the powers and duties of regulatory boards. Their powers and duties include the authority "[t]o examine the qualifications of each applicant for certification or licensing within its particular regulatory system to include preparation, administration and grading of examinations." Of course, administrative boards "may validly act only within the authority conferred upon them by statutes vesting power in them." Sydnor Pump and Well Company, Inc. v. Taylor, et al., 201 Va. 311, 316, 110 S.E.2d 525 (1959). Ministerial functions of a board may be delegated to an agent to determine some fact or state of things upon which the [boards] may make laws operative. Otherwise, the wheels of government would cease to operate. Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957). On the other hand, the administration of an oral examination for licensure is not a ministerial function which the boards may properly delegate to individuals who are not members of the boards. Grading or evaluation of oral examinations is so discretionary that I doubt that there can be a valid delegation of those functions. This is the ultimate function of the board. I, therefore, answer your question in the negative.

You next ask, "Is it a violation of the Virginia Conflict of Interests Law or any other law for a member of such an oral examination committee to administer an oral examination to a candidate who is currently working for a committee member or who has an agreement or understanding that he will work for a committee member after passing the oral examination and obtaining a license?"

I am of the opinion that § 2.1-352 (a portion of the Virginia Conflict of Interests Act) applies to the situation you describe. The interest of the member in the transaction
(the applicant's examination) is personal and pecuniary, as defined in § 2.1-348(f). This transaction is not one of general application, because it relates directly to the member's contractual arrangement with the applicant. Hence, the law requires the member to disclose his interest and disqualify himself from further participation on behalf of the board. Accordingly, your second question is answered in the affirmative.

1I assume that the examination is not one in which a simple "yes" or "no" answer is contemplated.
2This answer would not be applicable to a board, such as the Board of Bar Examiners, where the General Assembly has expressly provided for a delegation of authority for the conduct and grading of its examinations. See § 54-57.1.
3Section 2.1-352 provides in pertinent part: "Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency."

PROFESSIONAL AND OCCUPATIONAL REGULATION. § 54-929 authorizes behavioral science boards to hire non-board members to participate in administration of oral examinations.

February 2, 1983

The Honorable Bernard L. Henderson, Jr., Director Department of Commerce

You have asked whether § 54-929 of the Code of Virginia enables the Virginia Boards of Psychology, Social Work and Professional Counselors to "hire non-board members to participate in the administration of oral examinations when at least one board member is also participating." That section states that the boards about which you inquire have the authority to evaluate the qualifications of individuals applying for licensing and, in this context, to prepare and administer examinations. That section further provides that the subject boards have the authority to "hire independent examiners and/or to establish examining committees." (Emphasis added.)

In an Opinion to the Honorable G. Timothy Oksman, Chairman, Board of Commerce, dated January 12, 1983, I opined that grading and evaluating applicants for professional licenses were functions unique to the professional boards which could not be delegated in the absence of express legislative authority. The authority to hire independent
examiners grants to the subject boards the authority to hire an independent person who interrogates closely or tests students by questions. See Webster's New Collegiate Dictionary 397 (1974) defining "examine[r]."

Implicit in the examiner's role is the responsibility to analyze the applicant's answers to the examiner's questions. If the examiner's role is more narrowly confined, he would do no more than would a proctor who merely supervises the taking of a written examination. By authorizing the subject boards to hire independent examiners or to establish examining committees, I believe the General Assembly permitted the boards to delegate responsibility in the manner contemplated by footnote 2 of the Oksman Opinion. Accordingly, I answer your question in the affirmative.

Please note, however, that while independent examiners may, pursuant to § 54-929, evaluate examinations, the boards must remain free to accept or reject the recommendations of those examiners. The ultimate decision as to the qualifications of an individual for licensure must be that of the boards, and cannot be delegated to examiners who are not board members.

1No such grant of authority has been made to the Drug and Alcoholism Certification Committees created by § 54-934. Section 54-930 lists the powers and duties of those committees including the "preparation and administration of examinations." That language by itself does not authorize preparation, administration or evaluation of examinations by those who are not members of the certification committees.

PUBLIC OFFICERS. COMPATIBILITY. BOARD OF SUPERVISORS. MEMBER MAY SERVE AS PAID LEGISLATIVE AIDE DURING GENERAL ASSEMBLY SESSION.

October 12, 1982

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

This is in reply to your letter of September 24, 1982, inquiring whether the Virginia Conflict of Interests Act prohibits a sitting member of a board of supervisors from serving as a paid legislative aide during the General Assembly session in Richmond. I assume such employment is to be with the House of Delegates, not with the individual legislator.

The Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), does not prohibit a public officer, here a supervisor, from being employed by a governmental agency as a legislative aide.
Section 2.1-349(a)(2) permits contracts of salaried employment with other governmental agencies.

Section 15.1-50 prohibits a person holding the office of supervisor from holding any other office mentioned in Art. VII of the Constitution of Virginia (1971) at the same time. The position of legislative aide is neither a "public office" for the purposes of this section, nor an office mentioned in Art. VII. Therefore, § 15.1-50 does not prohibit a supervisor from serving as a legislative aide. For the same reasons, the prohibition of § 6 of Art. VII does not apply.

Accordingly, I am of the opinion that a sitting member of the board of supervisors may also serve as a paid legislative aide during the General Assembly session.

1 Certain exceptions to the stated general rule are listed in § 15.1-50, none of which apply in the instant case.
2 See 1977-1978 Report of the Attorney General at 322 for the criteria used in determining whether a position is a "public office."
3 Article VII, § 6 provides in part that "[u]nless 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."
4 This conclusion is based on the presumption that there are no State or local personnel policies that would prohibit such dual service.

PUBLIC OFFICERS. COMPATIBILITY. MEMBER OF SCHOOL BOARD MAY BE DIRECTOR OF COMMUNITY SERVICES BLOCK GRANT.

August 25, 1982

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether the newly selected State Director of the Community Services Block Grant Program may, consistent with § 22.1-30 of the Code of Virginia, continue to serve as a member of a local school board.

Section 22.1-30 provides in pertinent part:

"No State, county, city or town officer...may, during his term of office, be appointed or serve as a member of the school board for such county, city or town or as tie breaker for such school board...."

An officer is distinguished from an employee in the greater importance and independence of the position, and by the authority to direct and supervise. See 1974-1975 Report of the Attorney General at 373, 374. Also, a public office
is a position created by the constitution or statutes of the sovereign. Where the position is created by administrative action, it does not rise to the dignity of an office. Id. at 375. A frequent characteristic of a public office is a fixed term. See 1977-1978 Report of the Attorney General at 322.

The position of Director of Community Services Block Grant Program, as you have noted, is not established by constitution or statute. It is an employment position established administratively under the ultimate direction of the Secretary of Human Resources, who has management responsibility under the "Community Action Act." See § 2.1-589. The Director of the Community Services Block Grant Program is not vested with express statutory authority to direct or supervise, but is simply a classified employee of the Department of Social Services who is accountable to the Commissioner of the Department of Social Services. The Commissioner, and ultimately the Secretary of Human Resources, retains responsibility for decisions regarding the block grant program. The position, therefore, does not meet all the requirements of a public office and the person in it is not a State officer.

Inasmuch as the Director of the Community Services Block Grant Program is not a public officer she may, consistent with § 22.1-30, serve as a member of the local school board, provided that she meets the other qualifications for that membership.

PUBLIC OFFICERS. COMPATIBILITY. POLICE OFFICER MAY ALSO SERVE AS MEMBER OF RESCUE SQUAD.

August 11, 1982

The Honorable M. D. Aldridge, Jr.
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of July 30, 1982, requesting an Opinion whether a city police officer may also serve as a member of the rescue squad.

Assuming the rescue squad is a voluntary association, having no contractual relationship with the police department, the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia, would not prohibit the police officer from becoming a member of the rescue squad. The question may be governed, however, by the doctrine of incompatibility of offices. I know of no constitutional or statutory provision prohibiting holding both of these positions. Nevertheless, it is necessary to determine if the common law doctrine of incompatibility of offices may apply.

The cases and prior Opinions of this Office all speak of incompatibility of office and officers. See 1951-1952 Report of the Attorney General at 36. Therefore, a determination
must be made whether the person would be a public officer in his capacity as a member of the police force as well as in his capacity as a member of the rescue squad. In making such a determination, several criteria must be considered. One important consideration is that, to constitute a public office, the position must be created by Constitution or statute. It is a position filled by election or appointment, with a designation or title, and duties concerning the public assigned by law. A frequent characteristic of such a post is a fixed term of office. See 1977-1978 Report of the Attorney General at 322.

Section 15.1-13 authorizes cities and towns to "keep a city or town guard...." The duties of a police force which concern the public are assigned by law. However, a member of the police force is hired, rather than elected or appointed, and such member does not serve a fixed term of office.

Membership on a rescue squad has none of the characteristics of a public office. Consequently, although a member of a town police force could be designated a "public officer," a member of a rescue squad would not be deemed a public officer. Therefore, the common law doctrine of incompatibility of offices would not apply.

Accordingly, I am of the opinion that neither the Virginia Conflict of Interests Act nor the common law doctrine of incompatibility of offices would prohibit a police officer from being a member of a rescue squad.

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1See Art. 2, Ch. 3 of Title 15.1.
3For purposes of this Opinion, I am assuming that the personnel policies of neither organization prohibit such membership.

PUBLIC OFFICERS. COMPATIBILITY. TOWN COUNCILMAN MAY ALSO SERVE ON COUNTY SCHOOL BOARD SELECTION COMMISSION.

November 19, 1982

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

This is in reply to your letter of November 8, 1982, requesting an opinion whether an individual who is currently serving as an elected council member for the Town of Montross, Virginia, and is receiving remuneration for these services may also serve, by appointment of the circuit court judge, on the school board selection commission, when said appointed position also carries with it a small amount of remuneration.
Section 22.1-35 of the Code of Virginia provides for the appointment of the members of the school board selection commission. There are two prohibitions contained in this section:

1. "Members...shall not be county or State officers."

2. "No person regularly employed by the school board of the division shall be eligible to serve on or as clerk of such school board selection commission."

This Office has held that a member of a town council is not a county or State officer and, therefore, was not disqualified from serving on the school trustee electoral board.¹ In 1980, the name given to that body was changed to the school board selection commission.² There have been no other changes since the Opinion of 1967 which would change the conclusion reached in that Opinion.

The position of member of the school board selection commission is neither an office filled by the governing body of the town nor an office mentioned in Art. VII of the Constitution of Virginia (1971). Therefore, I conclude that neither Art. VII, § 6 of the Constitution, nor §§ 15.1-50 and 15.1-800 of the Code³ would prohibit a member of the town council from serving as a member of the school board selection commission of his county school division.

Accordingly, I am of the opinion that a member of the town council of Montross may serve on the school board selection commission.⁴

¹See 1966-1967 Report of the Attorney General at 263. The Opinion was based on the language of § 22-60 which was the predecessor of § 22.1-35.
³Both the constitutional and statutory provisions relate to dual officeholding by certain local officials, including councilmen.
⁴This conclusion is based on the assumption that the council member is not regularly employed by the school board of the division.

PUBLIC OFFICERS. HEALTH SERVICES COST REVIEW COMMISSION. CONSUMER MEMBERS MAY NOT SERVE ON HOSPITAL BOARDS.

October 18, 1982

The Honorable Joseph L. Fisher
Secretary of Human Resources

This is in reply to your recent letter in which you request my opinion on the composition of the Virginia Health Services Cost Review Commission (the "Commission").
Specifically, you inquire whether serving on a hospital board of directors/trustees disqualifies a person from serving on the Commission in a position required by law to be filled by a "consumer."

Section 9-157 of the Code of Virginia, which creates the Commission, specifies that five of the eleven members shall be consumers. Section 9-156(2) defines a consumer as "any person (i) whose occupation is other than the administration of health activities or the provision of health services, (ii) who has no fiduciary obligation to a health care institution or other health agency or to any organization, public or private, whose principal activity is an adjunct to the provision of health services, or (iii) who has no material financial interest in the rendering of health services." (Emphasis added.)

The foregoing definition indicates only the persons who are not considered "consumers" for purposes of serving on the Commission. A person who serves as a director/trustee of a hospital board may well be engaged in some occupation unrelated to health services, and it is possible that he will not have a material financial interest in the hospital if he is paid no salary or receives no income from the hospital. Nevertheless, a member of the board of directors/trustees would have a fiduciary obligation to the corporation. While board members may not be trustees in the strict sense, it is well established that they occupy a fiduciary relation to the corporation and its stockholders. A.I.M. Percolating Corporation v. Ferrodine Chemical Corporation, et al., 139 Va. 366, 375, 124 S.E. 442 (1924); 19 Am.Jur.2d Corporations § 1272 (1965).

Accordingly, I am of the opinion that a consumer member of the Commission may not serve on a hospital board of directors/trustees and remain qualified as a "consumer" because such service would violate the requirements of § 9-156(2).
"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

If the chairman of the school board is paid an annual salary as allowed by § 22.1-32, she would be deemed to be holding an office or post of profit or emolument and would therefore be prohibited by the Constitution and the Code from serving as registrar.

Additionally, § 22.1-30 provides in pertinent part:

"No state, county, city or town officer...may, during his term of office, be appointed or serve as a member of the school board for such county, city or town...."

This Office has held that members of a county electoral board are officers of that locality. See 1981-1982 Report of the Attorney General at 301. For similar reasons, a general registrar would be deemed to be an officer of a locality.1 I am of the opinion, therefore, that a general registrar of a county is a county officer and would be prohibited under § 22.1-30 from also serving as a member of the school board for such county during the term as registrar.

In summary, both the Constitution of Virginia and the Code of Virginia prohibit one person from simultaneously serving as chairman of the school board and general registrar of Craig County.

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1See 1977-1978 Report of the Attorney General at 322 for criteria used in making a determination whether one is deemed to be a public officer.

PUBLIC OFFICERS. INCOMPATIBILITY OF OFFICE. TOWN COUNCIL MEMBER MAY NOT BE APPOINTED TO POSITION OF TOWN MANAGER.

October 13, 1982

The Honorable J. Ray Dotson
Commonwealth's Attorney for Wise County
and the City of Norton

This is in reply to your letter requesting an Opinion as to the following questions concerning the Town of Big Stone Gap:

"(1) Whether or not a Town Council member may serve as Town Manager during the term that he is serving on the Town Council."
(2) Whether or not such person could be appointed by the Town Council to the position of Director of Public Works, a post filled by the Town Council, within one year after termination of service on the Town Council."

Both questions are controlled by Art. VII, § 6 of the Constitution of Virginia (1971) and § 15.1-800 of the Code of Virginia.

Article VII, § 6 provides in part:

"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, 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."

Section 15.1-800, which is applicable to both cities and towns, provides:

"No member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment."

Because both the constitutional and statutory provisions quoted above prohibit the holding of an "office" by a member of the council, a determination must be made whether the position of town manager is a public office. In making such a determination, several criteria must be considered:

1) The position must be created by constitution or statute.

2) It is a position filled by election or appointment, as opposed to mere employment, with a designation or title.

3) It is a position for which duties concerning the public are assigned by law.

A frequent characteristic of such a post is a fixed term of office, although not essential.

Section 6-1 of the Charter of Big Stone Gap found in Ch. 99, Acts of Assembly of 1966, provides for a town manager to be appointed by the town council. Section 6-3 prescribes the duties and powers of the town manager. Section 6-7 of the charter states that the town manager "shall be appointed for an indefinite period of time and shall hold office during the pleasure of the council."

Consequently, I am of the opinion that the position of town manager is a public office which may not be held by a member of the town council during the time periods prescribed by Art. VII, § 6 and § 15.1-800.
The answer to your second question also turns on whether the position of director of public works in the Town of Big Stone Gap is a public office for the purposes of these provisions of law. As with the position of town manager, the position of director of public works must be examined in the context of the town charter and general statute. The position of director of public works in the town is not created by constitution, general statute or charter provision; nor are its duties assigned by law. I conclude, therefore, that for the Town of Big Stone Gap the position of director of public works is not a public office and Art. VII, § 6 and § 15.1-800 would not prohibit the council from appointing a former council member to such post within one year after termination of service on the council.

You also requested my opinion on the responsibility of the Commonwealth's attorney to enforce the law governing such dual officeholding.

There is no general requirement that a county's Commonwealth's attorney represent a town located within its jurisdiction. In connection with dual officeholding questions, however, the Commonwealth's attorney is charged with the duty of representing the Commonwealth in proceedings to remove a person from public office pursuant to § 24.1-79.1, et seq., or to obtain a writ of quo warranto pursuant to § 8.07-535, et seq.

I am of the opinion, therefore, that except for representation in such statutory proceedings, the county Commonwealth's attorney has no duty to advise the town council in regard to dual officeholding matters.

PUBLIC OFFICERS. STATE POLICE DISPATCHER NOT PROHIBITED BY STATE STATUTE FROM BEING CANDIDATE FOR COUNTY SHERIFF. PERSONNEL POLICIES WILL GOVERN WHETHER HE MAY HOLD BOTH POSITIONS.

May 2, 1983

The Honorable Daniel W. Bird, Jr.
Member, Senate of Virginia

This is in reply to your letter which we received on April 18, 1983, requesting an Opinion regarding a dispatcher for the Virginia State Police who wishes to become a candidate for Sheriff of Bland County. You have asked whether it would be necessary for him to resign his position with the State Police during his candidacy or if he would be permitted to take a leave of absence until the election in November.

I am unaware of any State statute which would require the dispatcher to resign his position while running for the office of sheriff. The federal Hatch Act, however, provides that, under certain limited conditions, a state or local
officer or employee may not be a candidate for public elective office in a partisan election. See 5 U.S.C. § 1502(a)(3). In general, the law covers officers or employees of a state or local agency if their principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency. The law, by its own terms does not apply to an individual who exercises no functions in connection with the federally financed activity. Thus, only if the dispatcher in question exercises functions in connection with a federally financed activity would the prohibitions of the Hatch Act appear to apply.

If the Hatch Act is found not to be applicable, then personnel policies of the State Police would dictate whether the dispatcher would be permitted to take a leave of absence until the election. If the dispatcher were elected sheriff, then Rule 9.51 of the Rules for the Administration of the Virginia Personnel Act concerning outside employment would appear to dictate that he relinquish his employment with the Virginia State Police.

1 Rule 9.5 reads as follows: "No employee shall engage in any other employment either in another agency or outside of the State service, or in any private business, or in the conduct of a profession during the hours for which he is employed to work, or outside such hours in a manner or to an extent that affects or is deemed by the employing agency as likely to affect his usefulness as an employee or that is likely to be in violation of the Virginia Conflict of Interests Act. It is incumbent on the appointing authority to see that employees are advised of this requirement and to take appropriate action to insure compliance with this rule."

PUBLIC OFFICERS. TERMS. WHEN MEMBERS WHO HAVE SERVED MAXIMUM SUCCESSIVE TERMS MAY BE REAPPOINTED TO MARY WASHINGTON COLLEGE. NO PRESCRIBED LENGTH OF TIME FOR REAPPOINTMENT.

August 20, 1982

The Honorable Prince B. Woodard, President
Mary Washington College

This is in reply to your letter of August 13, 1982, in which you ask whether a former member of the Board of Visitors of Mary Washington College, after having served for the maximum consecutive terms permitted by § 23-91.38 of the Code of Virginia, may be reappointed to the board following a lapse of time, and if so, what is the length of time which must elapse prior to a reappointment.
Section 23-91.38 reads as follows:

"No person shall be eligible to serve on the board of visitors for or during more than two successive four-year terms; but after the expiration of a term of two years or less, or after the expiration of the remainder of a term to which appointed to fill a vacancy, a member may serve two additional four-year terms if appointed thereto."

The foregoing provision limits service on the board of visitors for or during a limited number of successive terms. The statute does not prohibit the same person being reappointed to the board following a break between terms. Consequently, your first question is answered in the affirmative.

There is no prescribed length of time between the terms for which a person may be appointed to the board of visitors. The limitation is expressed in terms, not time. Accordingly, I am of the opinion that a person who has served the maximum consecutive terms may not be reappointed to the board for a term which begins immediately following the one during which he last served; nor may he be appointed to fill a vacancy in any term which began prior to the expiration of his last term.

REAL ESTATE. TIME-SHARE ACT. PROVISIONS OF §§ 55-374 AND 55-376 APPLY TO SALES OF UNITS LOCATED OUTSIDE VIRGINIA REGARDLESS OF PROJECT CREATION DATE.

October 15, 1982

The Honorable Charles L. Waddell
Member, Senate of Virginia

This is in response to your inquiry about the Virginia Real Estate Time-Share Act, §§ 55-360 through 55-400 of the Code of Virginia, (the "Act"). Specifically, you inquire whether the provisions regarding the dissemination of the public offering statement and the requirement of a three-day rescission period apply to purchases occurring subsequent to the effective date of the Act, July 1, 1981, where the creation of the project itself predated the effective date of the Act. I am advised that the particular project about which you inquire is located outside the Commonwealth, and that the purchase at issue occurred in Virginia during February 1982.

Section 55-374 sets forth in detail the information about the time-share project that must be included in the public offering statement. Section 55-376 sets forth the purchaser's cancellation rights. This section provides, in pertinent part:
"The contract is voidable by the purchaser unless he has received the public offering statement three business days prior to signing the sales contract, until midnight of the third business day following the consummation of the transaction."

Section 55-361 specifies the time-share projects to which the Act applies. Subsection A provides that the Act applies to all projects created within Virginia after July 1, 1981, with specified sections, not including § 55-376, being applicable for limited purposes to units in Virginia prior to that date.

Section 55-361(C) provides:

"After July one, nineteen hundred eighty-one, the provisions of § 55-374 A and B, §§ 55-375, 55-376, 55-378, 55-379 and the rules and regulations promulgated by the Virginia Real Estate Commission pursuant to article 6 ($ 55-396 et seq.) apply to all dispositions of time-shares in units located outside this Commonwealth." (Emphasis added.)

Thus, where the project is outside the Commonwealth, the specific sections apply to all purchases made after July 1, 1981, not merely those in projects established subsequent to July 1, 1981.

Where, as here, a statute is unambiguous on its face, it is not subject to interpretation. See, e.g., Hampton Roads Sanitation District Commission v. City of Chesapeake, 218 Va. 696, 240 S.E.2d 819 (1978). Further, in applying an unambiguous statute, a court will not look to the motivation or wisdom of the legislature in enacting that statute. See, e.g., Chesapeake and Potomac Telephone Company of Virginia v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955).

It is, therefore, my opinion that the statutory provisions regarding applicability clearly provide that the requirement for a public offering statement and a three-day rescission period do apply to all sales after July 1, 1981, of units located outside the Commonwealth without regard to the date of the project's creation.

REAL PROPERTY. RULE AGAINST PERPETUITIES. APPLIES TO EXECUTORY OR CONTINGENT INTERESTS RATHER THAN VESTED INTERESTS.

March 31, 1983

The Honorable Robert W. Ackerman
Member, House of Delegates

This is in reply to your recent letter with which you enclosed documents pertaining to a proposed sale of property by the City of Fredericksburg. The purchaser, in turn, will
be required to execute a document which conveys an "easement" and "conservation right" to the city. You request an Opinion whether the document styled "Preservation Easement, Covenants and Protective Servitudes," is exempt from the "rule against perpetuities" under § 55-13.3 of the Code of Virginia. 1

The "rule against perpetuities" prohibits the granting of an estate which will not necessarily vest within a limited time. The rule requires that every executory limitation, in order to be valid must vest in interest, if at all, within a life or lives in being, ten months and twenty-one years thereafter. 2 It is well settled that the rule against perpetuities has reference to the time within which an interest vests, 3 i.e., the rule applies to contingent interests rather than vested interests. 4

The document about which you inquire, by its language, operates to vest the irrevocable interest in the grantee (City of Fredericksburg), being an easement and conservation right. The grantors and grantee then agree to several covenants which covenants bind all successors in title. There is no executory or contingent interest which could vest at any time thereafter. Consequently, I am of the opinion that the rule against perpetuities does not apply and would have no effect on the validity of the document. Therefore, it would not be necessary to resort to the statutory exemption for property transfers to charities, provided in § 55-13.3(C), about which you have inquired.

1 Section 55-13.3 provides in pertinent part: "A. Except as provided in paragraph C hereof, a transfer of an interest in property fails, if the interest does not vest, if it ever vests, within the period of the rule against perpetuities. *** C. If an interest in property transferred to a charity does not vest within the period of the rule against perpetuities, it fails unless it would divest a valid interest in another charity, in which case it does not fail on the ground of the rule against perpetuities, even though the divestiture does not occur within the period of the rule."

3Thomson v. Bryant, 185 Va., 845, 40 S.E.2d 487 (1946).
4See Minor on Real Property, supra, at 1051.

RECORDATION. ASSIGNMENT OF BUYERS' RIGHTS UNDER CONTRACT TO SELL. SHOULD BE RECORDED IN ALL NAMES CLEARLY AFFECTED BY ASSIGNMENT.

June 15, 1983

The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester
This is in reply to your letter relating to the indexing of an assignment which was recorded in your office. You enclosed a copy of an instrument which purports to be an assignment of rights under a contract of sale of real estate (contract not on record). The parties named are the assignors (buyers in the contract of sale), the assignee and the sellers in the contract of sale. The body of the instrument recites the existence of a contract for the purchase of real property and the desire of the purported buyers to assign their interests to the assignee. The instrument also recites that the sellers are notified by the instrument of the assignment and instructs the sellers to deed the property to the assignee at the appropriate time. Spaces are provided for signatures for the assignors and the sellers, but the instrument is signed and acknowledged only by the assignors. One of the sellers signed the instrument after writing "assignment noted."

You first ask whether the instrument should have been indexed in the names of the purported sellers, although not signed and acknowledged by both.

Section 17-79 of the Code of Virginia 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. Parham, 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, 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. See 1981-1982 Report of the Attorney General at 59.

As suggested in an earlier Opinion found in the 1937-1938 Report of the Attorney General at 21, it is manifest that the foregoing quoted provision in § 17-79 cannot be taken literally because there are frequent instances in which it would be palpably absurd to index an instrument in the names of all the persons mentioned therein who are in any sense affected by it. Consequently, I am of the opinion that the clerk should index the instrument in all the names which appear in the instrument as being clearly affected by its terms. In this case, the sellers in the purported contract of sale are obviously affected by an assignment by the buyers in that contract, and, accordingly, should have their names indexed, despite the absence of their signatures on the instrument.
You next ask if the assignment of interest in a contract of sale requires the signature of the seller in such contract as contemplated in § 55-113. That section relates to acknowledgments, not to the necessity for the signature itself. The section reads in pertinent part as follows: "Such court or clerk as is mentioned in § 55-106 shall admit any such writing to record as to any person whose name is signed thereto, except acknowledgment of contracts for the sale of real property shall require the seller or grantor of such real property to acknowledge his signature as herein provided...." Section 55-106, referred to in the foregoing quoted provision, requires the clerk to "admit to record any such writing as to any person whose name is signed thereto, except as provided in § 55-113 of the Code of Virginia, when it shall have been acknowledged by him...." The foregoing provisions must be read in light of the Statute of Frauds, § 11-1 of the Code, which provides that every contract, not in writing, made in respect to real estate shall be void, as to purchasers for value and without notice and to creditors. An assignment of an interest in a contract of sale of real estate is a contract made in respect to real estate, and therefore, must be in writing to be enforceable as to purchasers and creditors. An assignment, however, is not the instrument which obligates the seller to convey the property. That obligation is found in the contract of sale which is the subject of the assignment. Consequently, it is not necessary that the seller sign the instrument assigning the buyers' rights to a third party, nor acknowledge his signature as contemplated in §§ 55-106 and 55-113, as a condition precedent to recording the instrument.

You next ask if there is a conflict in the answer given in an earlier Opinion of the Attorney General reported in the 1969-1970 Report of the Attorney General at 52. In that Opinion, the Attorney General concluded that the real estate contract signed by the seller and buyer, but not acknowledged by the seller, should be admitted to record as to the buyer by virtue of §§ 55-106 and 55-113, but indexed in the names of both seller and buyer by virtue of § 17-79.

I concur in the prior Opinion. As pointed out in that Opinion, "while as a practical matter, no distinction between admitting this contract to record as to the buyer but not to the seller will appear of record, this is not the concern of the clerk. This problem is for the party seeking protection by the filing." 1969-1970 Report of the Attorney General at 53.

Although § 17-79 goes further than § 55-106 in the requirement of indexing, both sections have been in the Code for a great number of years, without substantial change. While the provision in § 55-106 requiring the recordation of the writing as to any person whose name is signed thereto may have some significance to other parties, it is not inconsistent with the requirement in § 17-79 that any recorded instrument be indexed in the names of all persons who may be affected by it.
In summary, I am of the opinion that the instrument in question should be indexed in the names of all persons appearing to be affected thereby; namely, the assignors, assignee and the sellers in the contract which was the subject of the assignment.

RECORDATION. CERTIFICATE OF SATISFACTION AND NOTE THAT BEARS NOTATION "SATISFIED BY SURRENDER OF SECURITY PROPERTY" SHOULD BE ACCEPTED BY CLERK FOR RECORDATION PURPOSES.

July 21, 1982

The Honorable Dollie R. Noble, Clerk
Circuit Court of Prince Edward County

This is in reply to your letter inquiring whether a clerk should accept for recordation purposes a certificate of satisfaction, accompanied by a note bearing the notation "Satisfied by surrender of security property and released from liability this day of , 1982 by ." The certificate of satisfaction executed by the noteholder includes the clause "or satisfied through surrender of security property," after the words, "do hereby certify that the same has/have been paid in full."

Section 55-66.3 of the Code of Virginia provides that a valid release of an encumbrance by deed of trust is effected when the clerk attests to the creditor's signature on a certificate of satisfaction and certifies either that the note or other evidence of debt duly cancelled was presented before him or that a proper affidavit was filed in accordance with § 55-66.3. A certificate of satisfaction indicates that "payment or satisfaction" has been made of the debt. (Emphasis added.) Section 55-66.4:1 requires that a release by certificate of satisfaction "conform substantially" with the form set out in that section. The certificate of satisfaction you enclosed follows the statutory form, but adds that the note has been paid in full "or satisfied through surrender of security property." The added language does not change the fact that the noteholder acknowledges that the debt has been satisfied.

Accordingly, I am of the opinion that such instruments comply with the requirements of § 55-66.3, and should be recorded.

1 For the purposes of this Opinion, I will assume that the instrument is properly executed and acknowledged.

Section 55-66.3.

RECORDATION. CUT OFF TIME FOR RECORDATION OF INSTRUMENTS PRIOR TO CLOSING OF OFFICE NOT ILLEGAL.
June 24, 1983

The Honorable Irene W. Walker, Clerk
Circuit Court of the City of Chesapeake

This is in reply to your letter which we received on June 16, 1983, requesting an opinion as to the legality of implementing a 4:00 p.m. cutoff time for the recordation of deeds and other instruments recorded in the deed books in the clerk's office. You have advised that instruments presented after 4:00 p.m. will take priority for recordation the next morning but a judgment or lis pendens would be recorded after 4:00 p.m. in case of an emergency or hardship. You have indicated that the purpose for this cutoff time is to allow the cashier an opportunity to balance the books before the 5:00 p.m. closing time and to enable you to index, verify and merge on the computer all of the deeds put to record on that day by the close of business at 5:00 p.m.

Section 17-41 of the Code of Virginia provides, in part, that "[t]he clerk's office of every court shall be kept open on every day except Sunday, and the days provided for in § 2.1-21 of the Code of Virginia, for the transaction of business...." Section 17-41 also authorizes the judge of a circuit court to "require the clerk's office to be kept open continuously for the transaction of business during convenient hours on all the days on which it is...required to be kept open." So long as the office is kept open for transacting business as required in the foregoing statute, I am of the opinion that it is within the discretion of the clerk to make the determination on the mechanics of handling public business in the office. If the volume of transactions is too great for effectively processing recordation without a cutoff time, I consider a decision to establish such a deadline to be one within the sound discretion of the clerk.

I am, therefore, of the opinion that a clerk of a circuit court may implement a policy such as the one you have described without violating any law. I would suggest, however, that in implementing such a policy, provision should be made for exceptional circumstances and for the orderly filing of all instruments, including, but not limited to, pleadings, deeds, judgments, lis pendens, financing statements and other instruments. Additionally, provision should be made for providing adequate notice of such impending change.

1 Provision is also made in § 17-41 for the closing of the office of the clerk of the court on Saturdays and certain holidays.

SCHOOLS. APPROPRIATIONS. CAFETERIA PROFITS MUST BE INCLUDED IN BUDGET AND APPROPRIATIONS.
April 8, 1983

The Honorable W. Carlton White
County Attorney for Pittsylvania County

You have asked my opinion regarding the proper method for budgeting of county school cafeteria funds in the following situation:

The School Board of Pittsylvania County operates its school cafeteria on a "decentralized" system. Under this system, funds received from the federal government by the Commonwealth are then allocated to Pittsylvania County. The board of supervisors then appropriates these funds to the school board, which allocates the funds to the various school cafeterias in the county. Each school cafeteria sells lunches. The "profit" from these sales is placed in the discretionary fund maintained by each school for supplies, equipment and related items to be used for the cafeterias. The State Board of Education requires a monthly audit of the cafeteria funds. These audits are kept at the office of the county superintendent of schools and are available for public inspection. The system is "decentralized" in the sense that the "profits" from the sale of school lunches stay within the individual schools and are spent by them; they are not included in the county school board's estimated budget or appropriated by the county.

Based upon the foregoing facts, you ask the following questions:

1. "For budgeting and appropriation purposes, is there any difference in funds received from a school board's 'centralized' cafeteria system and the funds received from a school board's 'decentralized' cafeteria system?"

2. "Should the School Board of Pittsylvania County itemize and include the total amount of such 'decentralized' cafeteria funds in its annual budget estimate submitted to the Board of Supervisors?"

3. "Is the Board of Supervisors obligated to appropriate these decentralized cafeteria funds and include them in the total amount appropriated for public school purposes?"

The budget is prepared by the local governing body on the basis of estimates from the heads of departments, offices and agencies of the locality and is required to contain "a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing fiscal year...." (Emphasis added.) Section 15.1-160 of the Code of Virginia. On the basis of its approved budget, the local governing body fixes its tax rate for the budget year. See § 15.1-160. Approval of the budget, however, is not an
appropriation. The formal act of appropriation by the governing body actually sets aside money for a specific use. See Almond v. Day, 197 Va. 419, 426, 89 S.E.2d 851, 855 (1955). Significantly, § 15.1-162 provides, in pertinent part, that no money shall be paid out or available for expenditure unless there has been an appropriation by the governing body. See, also, § 22.1-88, et seq.

In making their estimates to the local governing body, the superintendent and school board must report all estimated revenues. See § 15.1-160. These revenues consist of funds available for school purposes, and include: "State funds appropriated for public school purposes and apportioned to the school board, local funds appropriated to the school board by a local governing body or such funds as shall be raised by local levy as authorized by law, donations or the income arising therefrom, and any other funds that may be set apart for public school purposes." Section 22.1-88.

There is no statutory, legal distinction between "centralized" and "decentralized" funds which would limit the above cited statutory requirements to "centralized" funds only. This Office has in the past held that revenues generated by the operation of a school cafeteria are subject to appropriation by the local governing body. See 1959-1960 Report of the Attorney General at 66, 71. A similar holding has been made concerning textbook rental revenues. See Opinion to the Honorable Charles K. Trible, Auditor of Public Accounts, dated September 16, 1982.

I am, therefore, of the opinion that your first question must be answered in the negative and questions two and three are answered in the affirmative.

SCHOOLS. BUDGET ESTIMATES. MUST BE SET UP BY MAJOR CLASSIFICATION PRESCRIBED BY BOARD OF EDUCATION. GOVERNING BODY MUST APPROPRIATE IN TOTAL AMOUNT OR BY MAJOR CLASSIFICATION; MAY NOT SUBSTANTIALLY REVISE SCHOOL BOARD BUDGET. GOVERNING BODY MAY REQUIRE ADDITIONAL FINANCIAL INFORMATION OF SCHOOL BOARD.

August 25, 1982

The Honorable L. Cleaves Manning
Member, House of Delegates

This is in reply to your recent letter in which you ask three questions concerning the scope of a local governing body's control over the local school board's budget submission in the annual budgeting process. In light of § 22.1-92 of the Code of Virginia, you ask, in your first question, whether § 15.1-163 empowers the governing body to require the school board to submit its annual budget in the format required of other local agencies pursuant to § 15.1-161. Assuming that the school budget format is controlled by statutes in Title 22.1, the Education title,
you ask whether the local government is authorized by statutes in Title 15.1 to require the school board to prepare additional financial information for the governing body's use. You also ask whether the local governing body's apparent duty to supervise local school expenses extends to it the authority "to revise substantially the local school board's budget."

I will answer the first two questions together. Section 22.1-92 imposes a duty on the school superintendent to prepare an annual estimate of the amount of money deemed necessary to support the division's public schools for the following fiscal year for submission to the governing body after approval by the school board. This is the only budgetary process required of the school board, and, as the last sentence of the statute provides, the estimate must be set up on the basis of the major classifications for educational program needs prescribed by the State Board of Education. See 1980-1981 Report of the Attorney General at 9 and 1977-1978 Report of the Attorney General at 54.

Section 15.1-161, to which you refer, specifies what must be shown in the overall annual budget for the locality which the governing body must prepare and approve, for informative and fiscal planning purposes, based upon estimates of money needs submitted by local officers and heads of departments, offices, divisions, boards, commissions and agencies. See § 15.1-160. The governing body also must prepare and approve an annual budget for educational purposes. See § 22.1-93. No particular format is specified for the departmental estimates in § 15.1-160, but, as noted above, the school board's estimate must comply with § 22.1-92.

Although the school board's estimate is controlled by § 22.1-92, the governing body need not retain the exact form or content of this submission in its process of preparing and approving the educational budget pursuant to § 22.1-93. See 1980-1981 Report of the Attorney General at 33 and 1976-1977 Report of the Attorney General at 228. Pursuant to § 15.1-163, the governing body also may require the school board to furnish such additional information as may be necessary for it, the governing body, to prepare the educational budget in the format it desires. See 1967-1968 Report of the Attorney General at 28. However, the governing body's appropriation for the public schools must be in an amount related to a total only or to the major classifications prescribed by the Board of Education. See § 22.1-94.

Turning to your remaining question, while the governing body has the power and responsibility to supervise school expenses through the budget preparation and approval process, as indicated above, it has the obligation to appropriate funds, either in a total amount for school purposes or by major classifications designated by the Board of Education. Those appropriations must be sufficient in amount to cover
the cost apportioned to the locality by law for maintaining an educational program meeting State standards of quality. See §§ 22.1-94, 22.1-97. These statutes limit the governing body's authority to revise the school board's budget. Thus, prior Opinions of this Office consistently have held that the governing body may not increase, decrease or delete individual line items in the budget as it appropriates funds for educational purposes. See 1980-1981 Report of the Attorney General at 9, 33; 1979-1980 Report of the Attorney General at 300; 1975-1976 Report of the Attorney General at 22, 296; 1973-1974 Report of the Attorney General at 317; 1971-1972 Report of the Attorney General at 25, 332; 1967-1968 Report of the Attorney General at 19. As you will note from an examination of these Opinions, the governing body has power to affect educational expenses, within the limitations cited, in a number of ways: it may make appropriations on a periodic basis; it may appropriate school funds to meet the standards of quality while establishing a contingency fund for expenditures above that level; or it may, in its appropriation, increase or decrease the budgeted amounts for major classifications proposed by the school board provided, at a minimum, it meets its portion of the funding required by the standards of quality. The answer to your question, therefore, is that, although it would be too broad a statement to say that a local governing body has the power to "revise substantively" the school board's budget, through the actions just described it may achieve an effect on school expenditures consistent with the law.

\[\text{Section 22.1-92 reads as follows: }\]

"It shall be the duty of each division superintendent to prepare, with the approval of the school board, and submit to the governing body or bodies appropriating funds for the school division, by the date specified in § 15.1-160, the estimate of the amount of money deemed to be needed during the next fiscal year for the support of the public schools of the school division. The estimate shall set up the amount of money deemed to be needed for each major classification prescribed by the Board of Education and such other headings or items as may be necessary."

SCHOOLS. COMMERCIAL PHOTOGRAPHERS. CHARACTERIZATION OF PAYMENT BY SUPPLIER TO SCHOOL AS FUND RAISING ACTIVITY INSUFFICIENT STANDING ALONE TO CURE VIOLATION OF VIRGINIA ANTITRUST ACT.

September 15, 1982

The Honorable Kevin G. Miller
Member, House of Delegates

In your letter of August 31, 1982, you indicate that some confusion exists concerning the employment of commercial photographers by public school systems. You have requested
my review of a previous Opinion on this topic rendered by the Attorney General on September 22, 1976 (1976-1977 Report of the Attorney General at 229), (hereafter referred to as "the 1976 Opinion") and my opinion on the following questions:

(1) "Whether the designation of the photographs as a fund raising project permits the school to simply award the contract to the highest bidder without any other requirements?"

(2) "Whether the money tendered by the commercial photographer for the use of the school facilities or the assistance of school employees must bear a direct relationship to the value of those services or the reasonable value for the use of such facilities?"

(3) "Whether a student is permitted to use his own personal photograph in the yearbook as opposed to the one supplied by the commercial photographer under contract with the particular school?"

(4) "Whether public schools are required to advise their pupils through a written disclosure that they are not obligated to purchase photographs from the commercial photographer who has entered into a contractual relationship with the school for the sole purpose of supplying student portraits for the yearbook?"

Your inquiry focuses upon the procedure by which schools obtain photographs of students to be included in the class sections of high school yearbooks. Typically, the school will contract with a publisher for the printing of the yearbook. The school agrees to see that proper pictures of the students are submitted to the publisher for inclusion in the yearbook. Whether a student's picture is included is usually left up to the student. To facilitate the gathering of current pictures, the school will contract with a photographer to permit the photographer to take photographs of students which will be used in the printing of the yearbook. In the usual situation, the photographer will attempt to sell additional copies of the photographs to the students and their families. To obtain this opportunity, the photographer is usually willing to pay the school for the privilege of taking the students' photographs.

In contracting with the photographer, the school, through its principal or other designated representative, is an intermediary acting on behalf of pupils and their parents. In such a situation, the school "must place the interests of those who purchase merchandise above its own interests of making money for school projects." 1976-1977 Report of the Attorney General at 229, 231. As noted in that Opinion, any payment made to a school to influence its choice of a supplier for its pupils may violate the prohibition against commercial bribery contained in § 59.1-9.7(c) of the Code of Virginia. Any payment to the school must be "a bona fide approximation of the cost of services rendered..." by the
school. Id. Such services might include use of the school premises by the photographer or use of school employees to collect money or distribute the goods sold.

Your first question, regarding designation of school photography as a "fund raising project," assumes a situation in which the "highest bidder" receives a contract for providing photographic services. The term "highest bidder" is not defined in your question. For purposes of this Opinion, I assume that the "highest bidder" is the photographer willing to contribute the largest sum of money to the school. This situation, in and of itself, suggests conduct potentially violative of § 59.1-9.7(c), because such a payment might tend to induce the school to award a contract based on the size of the "contribution" by the photographer. Moreover, the schools, like all public institutions, should strive to base the award of contracts on an optimal combination of high quality and low price. See Virginia Public Procurement Act, § 11-35, et seq. (stating the Commonwealth's policy that public bodies should strive for high quality and reasonable cost).

The mere designation of a photography contract as a "fund raising project" is not sufficient, standing alone, to cure a situation which otherwise violates the laws against commercial bribery. As the 1976 Opinion stated, the school's motive in selecting a particular supplier is a question of fact, and all circumstances surrounding the transaction should be considered. Designation of the contract as a mode of fund raising would be merely one factor in determining whether the payment was made to influence the choice of photographer. Accordingly, I must answer your first question in the negative.

Your second question relates to the relationship between money tendered by a photographer and the value of services provided by the school. I reaffirm the view stated in the 1976 Opinion that payments tendered to an intermediary by a bidder must bear a reasonable relationship to the value of the services rendered by the intermediary. The value of such services will vary depending on the circumstances of the case. See Burge v. Bryant Public School District of Saline County, 1981-1982 Trade Cases (CCH) ¶ 64,276 (8th Cir. 1981).

Your third question involves a student's use of his own personal photograph in a yearbook as opposed to one supplied by the commercial photographer under contract with the school. This question is not presented in a specific factual context, therefore, I base my response on two factual assumptions. The first assumption is that yearbook companies have certain specifications regarding the size and quality of photographs and a timetable which must be met if the photograph is to be reproduced properly. The second assumption is that the yearbook company and the photographer are separate commercial entities. With those assumptions stated, I conclude that any photograph meeting the yearbook company's standards tendered by or on behalf of a student...
should be accepted by the yearbook company regardless of its
source.

Your final question concerns disclosure requirements
which may be imposed upon the public schools. The first part
of your question assumes that the photographer "has entered
into a contractual relationship with the school for the sole
purpose of supplying student portraits for the yearbook," and
asks whether the public schools must make written disclosure
to pupils that there is no obligation to purchase photographs
from the yearbook photographer.3 Again, the nature of the
relationship between the school and the student controls the
outcome. The school is an intermediary, acting on behalf of
the pupils and their parents in choosing a photographer.
Although this relationship places a duty on the school to act
in the best commercial interest of the students and parents,
it does not give rise to a duty to make written disclosure in
regard to what the contract does not require. The student or
parent has not agreed to be bound and is not, in fact, bound
by the actions of the school. I am, therefore, of the
opinion that no agency or fiduciary relationship exists which
requires the school to make the type of disclosure
contemplated by your question.

Having concluded that there is no legal requirement to
make disclosure, I shall attempt to clarify the significance
of the disclosure issue. Since the Attorney General's
Opinion of September 22, 1976, the school photography
question has been addressed informally by several Assistant
Attorneys General. Many of those discussions have resulted
in constructive suggestions. At least one, however, has
indicated that disclosure that the photographer was
contributing money to the school, combined with disclosure of
the fact that the student was not obligated to use the
photographer, would avoid the prohibitions contained in
§ 59.1-9.7(c). I do not agree that public disclosure of an
otherwise improper arrangement makes, in this context, that
arrangement legally permissible.

1The 1976 Opinion also held that a payment "made for the
purpose and with intent of influencing the decision of the
school in choosing a supplier..." may violate § 18.2-447.
2Conceivably, a yearbook company might utilize a process
which specifies a sole source of yearbook photography. In
appropriate circumstances a sole source requirement might be
justified, but this Opinion is premised upon the absence of
such a requirement.
3Your question correctly assumes that it would be improper
to coerce students into buying additional photographs from a
yearbook photographer. Under proper circumstances, such
activity might violate § 59.1-9.5, which prohibits tying
arrangements.
WIDOW OF SCHOOL BOARD MEMBER’S DECEASED BROTHER IS NOT “SISTER-IN-LAW” WHOSE EMPLOYMENT IS PROHIBITED BY § 2.1-349.1.

October 4, 1982

The Honorable William F. Green
Member, House of Delegates

You have inquired whether the widow of a school board member's deceased brother is the member's "sister-in-law" as used in § 2.1-349.1 of the Code of Virginia for the purposes of the Virginia Conflict of Interests Act.

Section 2.1-349.1 constitutes a part of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358, (the "Act"), and generally prohibits a school board from employing any person who is the "father, mother, brother, sister, spouse, son, daughter, son-in-law or daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board." The statute does not define the term "sister-in-law"; however, it is generally defined as the wife of one's brother. See 1966-1967 Report of the Attorney General at 256.

Although there is no universally accepted rule which determines whether the relationship based on marriage continues as one based on blood, I am persuaded that the more logical view is that a relationship by affinity terminates upon the dissolution of the marriage that created it. As stated in Blodget v. Brinsmaid, 9 Vt. 27 (1837) at 30:

"The relationship, by consanguinity, is, in its nature, incapable of dissolution, but the relationship, by affinity, ceases with the dissolution of the marriage, which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet upon the death of his wife, he may lawfully marry her sister."

I believe the prohibition against employment of a school board member's sister-in-law applies only in cases in which the brother is living. If the General Assembly had intended that the prohibition survive the dissolution of the marriage, it could have so provided.1 I am, therefore, of the opinion that § 2.1-349.1 would not prohibit the school board's employment of the widow of a school board member's deceased brother.

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1"Affinity" is defined as the "[r]elation which one spouse because of marriage has to blood relatives of the other." Black's Law Dictionary 54 (5th ed. 1979).

2See § 20-39. That section provides that where the basis for the prohibition [of a marriage] "is founded on a marriage, the prohibition shall continue in force,
SCHOOLS. EMANCIPATED MINOR FOR TUTITION FREE EDUCATION.

November 5, 1982

The Honorable Alson H. Smith, Jr.
Member, House of Delegates

You ask for a definition of the term "emancipated minor" for purposes of entitlement to a free education in the public elementary and/or secondary schools of the Commonwealth.

Section 22.1-3 of the Code of Virginia guarantees a free public education to each child of school age who is a bona fide resident of the school division. See 1976-1977 Report of the Attorney General at 240. In pertinent part § 22.1-3 provides:

"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, or when the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who (i) resides in the school division and (ii) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the school division not solely for school purposes, as an emancipated minor." (Emphasis added.)

No statutory definition of the term "emancipated minor" is contained in the Code of Virginia. However, the term has a well-defined meaning at common law which controls the statutory reference.

A minor continues to be subject to the care and direction of his or her parents until reaching the eighteenth birthday, or upon emancipation prior to that age. Emancipation occurs when there is a complete severance of the parent and child relationship so that the parents recognize no responsibility for the care and support of the child and the child does not rely on the parents for care or support. It is the "freeing of the child for all the period of its minority from the care, custody, control and service of its parents, conferring on the child the right to its own earnings and terminating the parents' legal obligation to support it." (Emphasis added.) Brumfield v. Brumfield, 194 Va. 577, 580, 581, 74 S.E.2d 170 (1953).

Emancipation does not arise merely because the child is living away from his or her parents, and the child also provides for his or her support. Nor does it arise when a
child runs away from home, but the parents continue to recognize their parental responsibility to the child. With the exception of marriage, a minor is not emancipated until the parents clearly manifest that the child is completely free from their custody and control and the child is free to act independently of his or her parents' wishes, according to his or her own principles as if an adult. Buxton v. Bishop, 185 Va. 1, 37 S.E.2d 755 (1946).

A minor also becomes emancipated from his or her parents upon marriage. The fact that the marriage is voidable (as opposed to void) due to the lack of parental consent as may be required by law, does not change the result. Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943); Lawson v. Brown, 349 F.Supp. 203 (W.D. Va. 1972).

Accordingly, except in the case of a valid or voidable marriage of a minor, a minor who claims emancipation must prove more than self-support. There must be proof that his or her parents do not provide, and will not provide during minority, for the care and support of the child (for example: food, shelter, clothing, medical expenses) and further that the parents recognize that the child is free to act independently of them as if the child were an adult, with no desire to supervise or control the future direction of their child.

A determination of emancipation must be made on a case-by-case basis. However, emancipation is never presumed, nor is parental consent to such a status lightly inferred. The student has the heavy burden of proving his or her claim through the presentation of credible facts to local school authorities. Emancipation must be "clearly proven" to the satisfaction of school authorities. Brumfield, supra.3

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1 Section 22.1-5 sets forth several classes of persons who are not guaranteed a free public education. Section 22.1-3 must be read in conjunction with § 22.1-5 when determining a person's entitlement to a free public education in Virginia.

2 Section 1-13.42 defines a "minor" as anyone under the age of eighteen.

3 The emancipated minor must also provide that he or she is a bona fide resident of the school division; that is, not residing in the school division solely to attend its schools. See § 22.1-3.

SCHOOLS. EMPLOYEES. METHODS OF DISCIPLINE.

January 11, 1983

The Honorable Adelard L. Brault
Member, Senate of Virginia
You have asked several questions concerning the disciplinary authority of a local school board over teachers and other employees. I will answer the questions in the order in which they were posed.

"1. Sections 22.1-313 and 22.1-315 authorize local school systems to suspend teachers; Section 22.1-307 authorizes a range of disciplinary actions in regard to teachers. Do these sections, or any other sections of the Virginia Code, permit a local school system to suspend a teacher as a disciplinary measure?"

Article VIII, § 7 of the Constitution of Virginia (1971) vests in the local school board the power to supervise the schools in each school division. To this end, the local school board is empowered to determine, consistent with State statutes and the regulations of the Board of Education, the "methods of teaching and the government to be employed in the schools." See § 22.1-79(5) of the Code of Virginia. The school board has the power to employ teachers, determine their pay, and to manage the affairs and operations of the school division. See §§ 22.1-295, 22.1-296, 22.1-306.

Section 22.1-315 by its terms limits the circumstances in which suspension of a teacher may occur. The statute does not prohibit the school board from using suspension as a disciplinary measure. Under that statute, suspension may be used by a school board as a disciplinary or a precautionary measure, so long as the suspension is:

"for good and just cause when the safety or welfare of the school division or the students therein is threatened or when the teacher has been charged by summons, warrant, indictment or information with the commission of a felony or a crime of moral turpitude." Section 22.1-315(A).

Further, § 22.1-315(E) specifies that the statutory provision for suspension of a teacher in these circumstances does not limit the authority of the local school board in a proper case to dismiss or place a teacher on probation. Your first question is, therefore, answered in the affirmative. A local school board may suspend a teacher as a disciplinary measure within the limits prescribed by law.

You next ask:

"2. Assuming the local school system has the authority to suspend a teacher as a disciplinary measure, may the division superintendent or his designee exercise that authority in regard to suspensions of five or fewer days, without providing for a presuspension hearing before the school board pursuant to Section 22.1-315?"
Section 22.1-315(A) provides, in pertinent part:

"Except when a teacher is suspended because of being charged by summons, warrant, indictment or information with the commission of a felony or a crime of moral turpitude, a division superintendent or appropriate central office designee shall not suspend a teacher for longer than sixty days and shall not suspend a teacher for a period in excess of five days unless such teacher is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313."

Sections 22.1-311 and 22.1-313 provide that a teacher who requests a hearing before the school board must be given such a hearing within thirty days of the request. These sections do not require that the hearing before the school board in any case occur prior to the effective date of the suspension, or that there be any hearing before the school board where the suspension is with pay and for five days or less. See 1977-1978 Report of the Attorney General at 361, 362. Moreover, the grievance procedure described in § 22.1-308 for resolving teacher disputes and complaints is not available where the suspension of a teacher is involved. See § 22.1-306(1).


Where even a short-term interference with what may be characterized as a protected property or liberty interest is imposed, "some kind of notice and some kind of hearing" must be afforded. See Goss v. Lopez, 419 U.S. 565, 579, 42 L.Ed.2d 725 (1975), in which the United States Supreme Court found that students disciplined by suspension for ten days were constitutionally entitled to notice and hearing. Such notice and hearing, however, need not be elaborate. It is sufficient that the reason for the suspension be effectively communicated by the disciplining supervisor to the disciplined person. The person subject to discipline then should be given an opportunity to attempt to explain his action in order to make sure that injustice is not done. Goss, supra, at 580. Trial type procedures generally are not required. Id. at 583. See, also, § 22.1-277 which codifies the notice and hearing requirements for the disciplinary suspension of students.

Accordingly, the answer to your second question is that the division superintendent or his designee may, in a proper case under § 22.1-315, suspend a teacher for five or fewer days, with pay, without providing a prior hearing before the school board to such suspension. I do recommend, however,
that the superintendent or his designee, where possible, provide the teacher with some measure of notice and an opportunity to be heard prior to taking action.

In your third question you ask:

"3. Assuming the local school system has the authority to suspend a teacher as a disciplinary measure, may it suspend without pay? Assuming the answer is yes, what notice or hearing requirements, if any, are required for suspensions of five or fewer days?"

Section 22.1-315(A) provides generally that a teacher who is suspended "shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise." See § 22.1-315(A). This means that the school system has the authority in an appropriate case to suspend without pay provided there is first a hearing before the school board. The exception is in the case where a teacher is suspended because of being charged by summons, warrant, information or indictment with a felony or a crime of moral turpitude. In such a case, the teacher may be suspended without pay prior to a hearing before the board. See § 22.1-315(B).

As to the notice and hearing requirements prior to suspension without pay, the notice should state the reasons why the disciplinary action is being taken, and advise the teacher when a hearing will be held concerning those reasons. That hearing procedure should be in conformity with the terms of §§ 22.1-311 and 22.1-313, the two statutory provisions which govern hearings before the school board in instances where the suspension is for more than five days.

In your fourth question, you ask:

"4. Does Section 22.1-313, or any other section of the Virginia Code, authorize the local school system to suspend, as a disciplinary measure, employees other than teachers?"

Section 22.1-313(A) provides:

"The school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals, suspensions and placing on probation." (Emphasis added.)

This statutory provision restates the supervisory power over the local public school system which is vested in the local school board. See Art. VIII, § 7, Constitution of Virginia; §§ 22.1-8 and 22.1-28; School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Section 22.1-306 states unequivocally: "Each school board shall have the exclusive right to manage the affairs and operations of the school division."
The grievance procedures for teachers do not restrict a school board's plenary power to discipline non-teacher employees. Moreover, school board employees are not governed by grievance procedures and personnel systems established by local boards of supervisors and city councils for their employees. See § 15.1-7.1. In the absence of statutory procedures governing the discipline and grievances of such employees, the local school board is at liberty to exercise its authority over such non-teacher employees according to whatever plan it deems necessary, consistent with due process and with its duty to take care that the public schools in the school division are conducted according to law and with the utmost efficiency. See § 22.1-79(2); Kersey v. Shipley, 673 F.2d 730 (4th Cir. 1981). In the discipline of non-teacher employees, just as in the discipline of teachers, the local school board may not, of course, act in an arbitrary, biased or capricious manner; its actions must also be non-discriminatory. See Gwathmey v. Atkinson, 447 F.Supp. 1113 (E.D. Va. 1976).

Your fourth question is, therefore, answered in the affirmative. A local school board may, as a disciplinary measure, suspend employees who are not teachers.

In your fifth question, you ask:

"5. Assuming the answer to question number 4 is yes, does the school system have authority to suspend non-teaching employees without pay as a disciplinary measure? May the school system suspend such non-teaching employees without providing for a presuspension hearing before the school board?"

Assuming that a local school division does not violate any policy which it may have established for its employees concerning suspension of those non-teacher employees, there is no statutory provision prohibiting the school system from suspending such employees without pay. In doing so, of course, the school administration may not act arbitrarily or discriminatorily.

There is no statutory requirement, in the case of non-teacher personnel, for a presuspension hearing before the school board where the employee's pay is being suspended. The fundamental requirements of constitutional due process, however, should be observed by affording the employee deprived of pay, some notice and informal hearing. Finally, because the school board has ultimate authority over all school system employees, the action of an administrator in discipline of such employees does not deprive the school board of final disciplinary authority should the school board decide to reverse the administrator's determination. Accordingly, while there is no requirement that the school board provide a hearing for a non-teacher employee, there is also no prohibition against the board's so doing.
Disciplinary action in the form of dismissal or probation may be taken on grounds of the teacher's incompetency, immorality, noncompliance with school laws and regulations, medical disability, or conviction of a crime of moral turpitude or other good and just cause. See § 22.1-307.

Section 22.1-315(B) further states: "In the event a teacher is suspended without pay, an amount equal to the teacher's salary while on suspended status shall be placed in an interest-bearing demand escrow account. Upon being found not guilty of a crime of moral turpitude or upon the dismissal or nolle prosequi of the charge, such teacher shall be reinstated with all unpaid salary and accrued interest from the escrow account, less any earnings received by the teacher during the period of suspension, but in no event shall such payment exceed one year's salary."

Section 22.1-315(C) states: "In the event a teacher is found guilty by an appropriate court of a felony or a crime of moral turpitude and, after all available appeals have been exhausted and such conviction is upheld, all funds in the escrow account shall be repaid to the school board."

Finally, § 22.1-315(D) provides that in no event may the teacher's insurance benefits be discontinued during a suspension.

SCHOOLS. HANDICAPPED. SCHOOL DIVISION OF LEGAL RESIDENCE IS RESPONSIBLE FOR PROVIDING FREE, APPROPRIATE EDUCATION TO HANDICAPPED CHILDREN.

November 29, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

You ask which school division has the responsibility for providing special education assistance when a child resides in a county, but is enrolled in school in a neighboring city. You have stated that it was the parents' decision to enroll the child in the city school system and that they currently are paying nonresident tuition to the city. You further stated that neither school system will provide a free education to the child.

Assuming that the child is handicapped within the meaning of federal and State law, under the facts you present, the child is entitled to a free, appropriate education in the county schools because the parents are legal residents of the county. Section 22.1-215 of the Code of Virginia. Absent an agreement with the parents or other public agencies, the city school in which the child is enrolled has no legal obligation to provide the nonresident child with free special education services. See § 22.1-5(A)(2).
Accordingly, the voluntary placement made by the parents in the city schools does not create an obligation on the city to provide the child with a free education. Moreover, neither federal nor State law requires the school division of residence to assume financial responsibility for special education provided by another school division unless the school division of residence has determined that it has no appropriate placement for the child and/or has agreed to an alternative placement through the development of an individualized education program (I.E.P.) for the child. 34 C.F.R. § 300.552; State Board of Education Regulations at 155. The parents are entitled to participate directly in the formulation of the I.E.P. See 34 C.F.R. §§ 300.345; 22.1-215; State Board of Education Regulations at 156.

As a result, the parents may seek special education and related services from the county school officials who are obligated by law to provide the child with a free, appropriate education in county schools. If such an education is not available in the county, the child must be placed in alternate schools outside the county in accordance with the I.E.P. developed for the child, in which case the county is required to assume financial responsibility for the special education.

SCHOOLS. HANDICAPPED. SCHOOL DIVISION OF LEGAL RESIDENCE MUST PROVIDE FULLY APPROPRIATE EDUCATION TO ITS HANDICAPPED CHILDREN.

November 29, 1982

The Honorable Mitchell Van Yahres
Member, House of Delegates

You state that a child is in the custody of the Charlottesville Department of Social Services, which has placed the child in an approved foster home in Orange County. The information you provided indicates that the child was previously enrolled in the Charlottesville public school system. You ask which school system, that of Orange County or the City of Charlottesville, is responsible for providing the child with a free and appropriate education and which school system has the financial responsibility for this education.

Section 22.1-215 of the Code of Virginia explicitly provides that "[e]ach school division shall provide free and appropriate education, including special education, for the handicapped children residing within its jurisdiction...." (Emphasis added.) Under the facts you present, the child is a legal resident of the City of Charlottesville. See § 22.1-3. As a result, the city school system is responsible for developing an individualized educational program (I.E.P.) and providing a free and appropriate education for the child. See, also, 34 C.F.R. § 300.341. Officials of the city department of social services must therefore coordinate
closely with the city school personnel before placing the child in another jurisdiction. The child may be able to receive an appropriate education in the city schools and avoid the costs of alternative education. If the city is unable to provide such an appropriate education in the city schools, the city school system is responsible for formulating an I.E.P. which places the child in an alternative placement. The city school system would then be responsible for the necessary and reasonable expenses of the alternative education.¹

If Orange County is unable to provide the child with the requisite education, it is the responsibility of both the city school and social services officials to arrange for the proper education of the child in its schools, or in another jurisdiction. Absent agreement of county officials, the county is not obligated to provide a free, appropriate education to the nonresident child. See §§ 22.1-5(A)(2) and 22.1-215. By necessity, city school officials and social services personnel should closely coordinate their efforts in the interest of the child before placing the child outside the city for foster care to ensure that the required education can be provided. Prior arrangements with school officials in the intended jurisdiction of foster care are likewise necessary.

Accordingly, in summation, it is the city's overall responsibility to provide for the education of the child. If the city is unable to provide such education itself, and the welfare department must place the child in foster care in Orange County because no appropriate foster home may be found in the city, the city remains responsible for the cost of the education provided in the county. As the interests of the child involve both the educators and welfare department of the city, the welfare department must coordinate its activity with the school system.

¹Both the stepparent and legal custodian of the child (the social services agency) are residents of the city. See § 63.1-56. The city cannot escape its educational and financial obligations by placing the child in another jurisdiction. The State Board of Education has adopted a regulation which is consistent with this Opinion. See Superintendent Memorandum No. 7, March 31, 1978. This regulation obligates the school division of legal residence (in this case, the city) to pay to the host school division (in this case, the county) the necessary expenses incurred by the county in providing the child with the required education in excess of the State and federal funds paid to the county.

²The city school board is not responsible for the cost of noneducational services that may be provided the child apart from the individualized placement program. Such costs are the responsibility of the local social services agency. See 1980-1981 Report of the Attorney General at 272.