OPINIONS
of the
ATTORNEY GENERAL

and

REPORT
to the
GOVERNOR OF VIRGINIA

VOLUME II

From July 1, 1982 to June 30, 1983

Commonwealth of Virginia
Office of the Attorney General
Richmond
1983
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SCHOOLS. INDEBTEDNESS. FUNDS DERIVED FROM COUNTY DISTRICT
LEY MADE FOR SPECIFIC SCHOOL PURPOSE MAY NOT BE DIVERTED TO
ANOTHER PURPOSE. WHETHER PROPOSED USE IS WITHIN PURPOSE OF
LEY MUST BE DERIVED FROM BOARD OF SUPERVISORS RECORDS OR
FROM INSTRUMENT AUTHORIZING CREATION OF DEBT OBLIGATION.

June 24, 1983

The Honorable William T. Jenkins, Jr.
Treasurer of Bath County

This is in reply to your request for my opinion whether
Bath County may expend money from a school indebtedness fund
for major renovation projects in schools in certain of Bath
County's school districts, in conjunction with federal
matching grant monies for energy conservation projects.

As I understand the factual situation expressed in your
letter, the fund presently is utilized for annual payments on
loans from the Literary Fund and bonds, which together
constitute the school capital indebtedness for the county's
three school districts. The fund has accumulated the sum of
$682,043.38, of which $120,000.00 is paid out annually on the
loans and bonds. District levies have been consolidated into
two levies, one of which has been discontinued because the
indebtedness attributable to the projects covered
by that
levy has been retired. In addition, a new levy recently was
created for school capital outlay projects and indebtedness
in those districts covered by the other remaining levy. You
ask the following questions:

"(1) May we utilize funds from the School Indebtedness
Fund for these districts (Warm and Valley Springs and
Cedar Creek districts) for major renovation projects
designed to last fifteen (15) years or more, or are
expenditures limited solely to debt retirement?

(2) If the funds have to be utilized for debt
retirement, may the county secure a commercial short
term loan to take advantage of the federal monies and
subsequently repay the loan from the School Indebtedness
Fund?"

Prior Opinions of this Office 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 or to
retire a particular school bond issue, may not be diverted to
another purpose, even temporarily, even if the fund contains
an excess over and above the amount required for annual debt
service, until such indebtedness is repaid in full. See
Opinion to the Honorable Charles K. Trible, Auditor of Public
Accounts, dated October 20, 1982, and Opinions therein cited.
The purpose of a particular levy, or the allowable use of
bond or loan proceeds, must be derived from the record of the
action of the board of supervisors or from the instrument
authorizing creation of the debt obligation. See, e.g.,
Each of your questions is premised upon a proposed expenditure from the existing school indebtedness fund to finance the local share of the costs of the renovation projects, the first being a direct outlay and the second a short term loan. I am unable to answer your questions definitively on the information available. Whether the proposed use of the monies in the fund is allowable must be determined instead from examination of the statements of purpose applicable to the levies which constitute the sources of those monies and from any instruments which subject the fund to defray existing debt in accordance with the principles discussed above.

SCHOOLS. LOCALITY MAY BE REQUIRED TO DEVOTE SALES AND USE TAX PROCEEDS TO MEET STANDARDS OF QUALITY.

August 3, 1982

The Honorable A. Willard Lester
County Attorney for Wythe County

You ask the following two questions:

1. Whether the sales tax proceeds referred to in § 58-441.48(d) of the Code of Virginia are to be considered local funds?

2. Whether a locality may use the sales tax proceeds referred to in § 58-441.48(d) for maintenance, operation, capital outlay, debts and interest payments and other expenses incident to the operation of public schools, or must these funds be used strictly for the operational costs of public schools?

Section 58-441.48(d) provides for the apportionment and disposition of State sales tax revenues to cities and counties on the basis of the number of children in each county and city shown in the most recent statewide census of school population and certified by the Department of Education. See 1977-1978 Report of the Attorney General at 451. That section further provides:
"The revenue so apportionable and distributable is hereby appropriated to the several counties and cities for maintenance, operation, capital outlays, debt and interest payments, or other expenses incurred in the operation of the public schools, which shall be considered as funds raised from local resources...." (Emphasis added.)

The revenue appropriated pursuant to § 58-441.48(d) is derived from the State portion of the State sales and use taxes. It is distinct from local general retail sales and use tax revenue which is merely collected by the Virginia Department of Taxation pursuant to § 58-441.49 and credited to a special fund for the cities and counties, and which never becomes part of the general State treasury. Revenues distributed under § 58-441.48(d) are State tax funds and are paid into the general fund of the State treasury. See 1973-1974 Report of the Attorney General at 73. Payment of the localities' share of State sales and use tax proceeds requires an appropriation, because no money may be paid out of the State treasury except by appropriation made by law. See Art. X, § 7 of the Constitution of Virginia (1971). Accordingly, although the sales tax proceeds referred to in § 58-441.48(d) are considered as "funds raised from local sources," they are "local funds" only in the limited sense that they are locally generated. Such proceeds are, nevertheless, State funds because they are raised pursuant to a State tax, paid into the State treasury, are subject by law to appropriation by the General Assembly and, in that context, may be subjected to such conditions as the General Assembly may prescribe.

Your second question concerns the relationship between § 58-441.48(d) and the provisions of Item 186, Ch. 760, Acts of Assembly of 1980 (hereafter "Appropriations Act of 1980"), which appropriates funds to localities for basic school aid payments to meet the standards of quality. See Report of the Attorney General (1980-1981) at 79. The basic school aid formula contains a "required local expenditure" to meet the standards of quality. The "required local expenditure" is:

"The locality's composite index times the excess of its basic operation cost over its revenues from the State sales and use tax returned on the basis of school age population." Item 186(A)(5), Ch. 760, Acts of Assembly of 1980. (Emphasis added.)

This statutory formula prescribed in the basic school aid formula effectively requires each locality to spend an amount equal to the State sales and use tax revenues (§ 58-441.48(d) funds) to fund items of school cost which are required by the standards of quality. The education costs referred to in the standards of quality do not include capital outlay, debts and interest payments.

To the extent that the standards of quality do not include cost items such as capital outlay listed in
§ 58-441.48(d), the Appropriations Act of 1980, which requires localities to devote an amount equal to the State sales and use tax funds to meet the standards of quality effectively controls the expenditure of the returned sales and use tax proceeds. See 1972-1973 Report of the Attorney General at 336. The Appropriations Act of 1980 provides: "All acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed." See § 4-16.00, Ch. 760, Acts of Assembly of 1980. The Appropriations Act of 1980, therefore, by its terms, effectively supersedes those provisions of § 58-441.48(d) which may be interpreted to allow State sales and use tax proceeds to be spent on capital expenses and other items not included in the standards of quality.  

You have suggested that Art. IV, § 12 may invalidate the provisions of the Appropriations Act of 1980 which repeal inconsistent acts. Article IV, § 12 states in part: "No law shall embrace more than one object, which shall be expressed in its title." It is well established that:

"[t]he constitutional provision was never intended to hamper honest legislation, nor to require that the title should be an index or digest of the various provisions of the act, and it is rare that the generality of the title is a valid objection thereto. The fact that many things of a diverse nature are authorized or required to be done in the body of the act, though not expressed in its title is not objectionable, if what is authorized by the act is germane to the object expressed in the title, or has a legitimate and natural association therewith, or is congruous therewith, the title is sufficient."

Town of Narrows v. Giles County, 128 Va. 572, 582-583, 105 S.E. 82, 85 (1920).

See State Board of Health v. Chippenham Hosp., 219 Va. 65, 70-71, 245 S.E.2d 430 (1978). It is recognized that, particularly in the instance of an appropriations bill, it is not necessary under the Constitution of Virginia to index in the title the long list of effective provisions, terms, conditions and repealers in the bill. See 1977-1978 Report of the Attorney General at 27.

1The comparable provision has been retained in the 1982 Appropriations Act. See Ch. 684, § 1-67, Item 173.
2The Appropriations Act does not require that the same funds returned from State sales and use tax be applied to the standards of quality. It merely sets forth a formula, one component of which is an amount equal to the returned revenues from State sales and use tax.
3The General Assembly is constitutionally mandated to provide a system of free public schools. See Art. VIII, § 1. It also is constitutionally empowered to revise the standards of quality and to "determine the manner in which funds are to be provided for the cost of maintaining an educational
program meeting the prescribed standards of quality, and [the
General Assembly] shall provide for the apportionment of the
cost of such program between the Commonwealth and the local
units of government comprising such school divisions." Article VII, § 2. The General Assembly may determine,
therefore, that the State sales and use tax funds, which it
appropriates from the general treasury as State funds, must
be devoted in a given biennium to the costs of meeting the
standards of quality. It is also within the prerogative of
the General Assembly to require that an amount equal to that
which it returns to a locality under § 58-441.48(d) be
devoted to the standards of quality.

SCHOOLS. REAL PROPERTY. DEEDS. STATUTORY CONSTRUCTION.
RESOLUTION OF SCHOOL BOARD NOT EFFECTIVE TO CONVEY ITS
SURPLUS REAL PROPERTY TO LOCAL GOVERNING BODY WITHOUT DEED.
STRONG PRESUMPTION AGAINST LEGISLATIVE INTENTION TO CHANGE
COMMON LAW AND EXISTING STATUTES ON CONVEYANCING WHERE NOT
EXPRESSLY STATED.

October 14, 1982

The Honorable Jeanette J. Akers, Clerk
Circuit Court for the City of Waynesboro

This is in reply to your recent letter in which you
request my opinion whether a resolution of the Waynesboro
City School Board, declaring certain school property as
surplus, effectively conveys the property in question without
being accompanied by a deed containing the legal description
of the property. In this regard, you ask my interpretation
of § 22.1-129(A) of the Code of Virginia, which states as
follows:

"Whenever a school board determines that it has no use
for some of its real property, the title to such real
property shall be conveyed to the county or city or town
comprising the school division or, if the school
division is composed of more than one county or city, to
the county or city in which the property is located. To
convey the title, the school board shall adopt a
resolution that such real property is surplus and shall
file such resolution with the clerk of the circuit court
where the deed to such property is recorded who shall
record the resolution with the deed. Upon the filing of
the resolution, the title shall vest in the appropriate
county, city or town." (Emphasis added.)

Both at common law and by statute conveyances can only
be effected by deed. Section 22.1-129(A), by its express
terms, provides for the conveyance of title to certain real
property in certain circumstances. The question presented is
whether the General Assembly intended to change the law as to
conveyances in this instance when it enacted § 22.1-129(A),
by allowing for transfers of title to school board real
property upon the mere filing of a school board resolution to that effect. In my opinion it did not.

According to accepted rules of statutory construction, there is a strong presumption against a legislative intention to repeal or change the common law or an existing statute where that intention is not expressly stated. This is particularly true where the later statute deals with a different subject. Section 22-229(A) does not in express terms change the law of conveyancing, and neither its wording nor its legislative history reasonably supports such a legislative intention.

I am constrained to resolve any ambiguity as may exist in the wording of the statute by interpreting the references to a deed therein to mean the deed which must effectuate the present conveyance of surplus property, accompanied by the resolution which is to be recorded. The school board's adoption and filing of a resolution with the deed is an additional, not a substitutionary requirement, as evidence that the school board first made the necessary determination that the property in question is surplus to school needs.

In light of the foregoing, I conclude, in answer to your question that the school board's resolution, without a deed, does not convey its surplus real property.

1 Larchmont Homes, Inc. v. Annandale Water Co., Inc., 201 Va. 178, 181, 110 S.E.2d 249 (1959), "Subject to a more particular statutory definition, the term 'conveyance' connotes a deed whereby the title to land is transferred from one person to another, both the term 'deed' in the restricted sense and the term 'conveyance' being an abbreviated form of the expression 'deed of conveyance'; Gannaway v. Federal Land Bank, 148 Va. 176, 179, 138 S.E. 564 (1927), "Title passes by the execution and delivery of the deed"; see, e.g., American Net & Twine Co. v. Mayo, 97 Va. 182, 186, 33 S.E. 523 (1899), "A deed is the method by which the title to real estate is transferred from one person to another...."

2 See § 55-2 of the Code which provides, in part, as follows: "No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will, nor shall any voluntary partition of lands by coparceners, having such an estate therein, be made, except by deed...." See, also, 2 Minor on Real Property § 1024 (2d ed. Ribble 1928). See § 55-48 as to the form of a deed, and § 55-113, et seq., as to the form of acknowledgment to deeds.

4See Smith v. Kelley, 162 Va. 645, 651, 174 S.E. 842 (1934) "'In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter, violate, repeal or limit a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act." [Citations omitted.] See, generally, 17 M.J. Statutes §§ 70, 98 (1979). Compare 1981-1982 Report of the Attorney General at 324 (recodification of a general statute does not supersede an earlier enacted specific statute).

5Section 22.1-129(A) was enacted in 1980 as part of a general recodification of the education title of the Code. See Ch. 559, Acts of Assembly of 1980. The recodification was based upon a report of the Virginia Code Commission, whose intention it was to eliminate outdated provisions and archaic and redundant language in Title 22, to simplify and clarify many of its sections, and to provide for uniformity in the school laws. See Report of the Virginia Code Commission on Revision of Title 22 (House Doc. No. 21, 1980). The Report recommends the procedure for sale of a school board's surplus real property as now provided in § 22.1-129(A), wherein title to the property is transferred to the governing body for its disposition, in statutory recognition of the fact that the funds from such a sale are subject to appropriation by the governing body. See Report of the Virginia Code Commission, supra, at 5, 71. Former § 22-161 gave a school board the same power to convey real property as that of a county, city or town under § 15.1-262, which governs the sales and exchanges of a local government's corporate property. Prior Opinions of this Office held that the procedures outlined in §§ 15.1-262, 15.1-285 and 15.1-286 must be followed in conveyances from the school board to a locality but that such transfers of property by deeds of gift or otherwise for nominal or no consideration were proper, on the basis that the proceeds from any sale of such property would go into the locality's general fund for appropriation by the governing body. See 1974-1975 Report of the Attorney General at 371; 1973-1974 Report of the Attorney General at 312; 1964-1965 Report of the Attorney General at 290; see, also, 1966-1967 Report of the Attorney General at 32. The present question as to the need for some species of deed to effectuate the conveyance, whatever the terms of the transaction, was not addressed in any of the prior Opinions on the subject.

6In my opinion, this requirement is analogous to the custom in real estate practice when corporate property is involved to require a copy of the corporate resolution authorizing the property's conveyance, an abstract of which is recorded with the deed in some circumstances. See Mazel, How to Examine a Title in Virginia, 11 U.Rich.L.Rev. 471 (1977).

SCHOOLS. RESIDENCE WITH DIVORCED NATURAL PARENT. ELIGIBILITY FOR FREE SCHOOLING.
December 15, 1982

The Honorable Alson H. Smith, Jr.
Member, House of Delegates

This is in reply to your letter of December 14, 1982, relating to residency requirements for purposes of attendance in public schools.

You ask the following questions:

1. What is the definition of legal custody?

2. If a child is living with a divorced natural parent who does not have legal custody, is that child for school purposes a resident of the locality in which that parent lives, or is the child a non-resident because the parent who has legal custody is a non-resident?

In answer to your first question, "legal custody" is defined in § 16.1-228(0) of the Code of Virginia as:

"a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities."

Your second question is governed by § 22.1-3 which, in pertinent part, provides:

"The public schools in each school division shall be free to each person of school age who resides within the school division...Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption or...a person in loco parentis...." (Emphasis added.)

Residence for the purpose of free admission to local public schools must be bona fide residence and not merely superficial residence established solely for the purpose of attending school. Section 22.1-3 establishes a legislative presumption that a child residing with a natural parent is entitled to free admission to the schools of that locality in which the natural parent lives. See Reports of the Attorney General 1979-1980 at 292; 1974-1975 at 378; 1972-1973 at 348. The fact that the other natural parent has a custody order does not, in itself, defeat the statutory presumption established by the fact that the child is residing with a natural parent, nor does it indicate that the residence is not bona fide.

I am of the opinion that a child living with a divorced natural parent is eligible for free schooling in the locality.
when that parent has established a bona fide residence in that locality.

SCHOOLS. SCHOOL BOARDS. ADOPTION OF ALTERNATIVE POLICIES AND PROCEDURES FOR EXEMPTION UNDER VIRGINIA PUBLIC PROCUREMENT ACT.

December 7, 1982

The Honorable Ray L. Garland
Member, Senate of Virginia

You ask in your letter received November 29, 1982, whether the School Board for the City of Roanoke (the "Board") may adopt alternative procurement policies and procedures pursuant to § 11-35(D) of the Code of Virginia, thereby exempting itself from all but certain mandatory provisions of the Virginia Public Procurement Act (the "Act"), §§ 11-35 through 11-80. You also ask whether such an exemption can be obtained by a resolution of the Board enacting its own policies and procedures or, in the alternative, by a resolution requesting the Roanoke City Council to include, by ordinance, the Board in a city procurement program established under § 11-35(D).

Section 11-35(D) provides as follows:

"Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply, except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town." (Emphasis added.)

Subsection (E) enumerates sections of the Act which remain applicable to counties, cities and towns which qualify for an exemption pursuant to subsection (D).

The Act applies generally to every "public body" within the Commonwealth, which § 11-37 defines as "any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty...."

As defined, "public body" encompasses the broadest spectrum of governmental entities, including school boards which are established pursuant to Art. VIII, § 7 of the Constitution of Virginia (1971). However, a school board, by definition, is a separate juristic entity and is not a
county, city or town. See 1977-1978 Report of the Attorney General at 90. "The Constitution of Virginia and the statutes of the state clearly set up the school board as an independent local agency...." Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944). School boards are not, therefore, among the entities which the General Assembly afforded an exemption under § 11-35(D).

Nevertheless, § 11-40 provides:

"Any public body may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies, or agencies of the United States, for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to § 11-35C or § 11-35D of this chapter shall comply with said alternative policies and procedures so adopted by said governing body of such county, city or town."

Under the authority of this section, a school board may participate in a cooperative procurement program with a county, city or town which has adopted alternative procedures qualifying it for an exemption under § 11-35(D), in which case the school board shall observe the same procurement practices.

I, therefore, am of the opinion that the Board may, by resolution, enter into an agreement with the City of Roanoke to participate in a cooperative procurement program whereby the Board is bound by any alternative policies and procedures which the city may adopt in compliance with § 11-35(D). The Board may not, however, independently adopt alternative policies and procedures applicable to it alone.

SCHOOLS. SCHOOL BOARDS. CANNOT ISSUE CONTINUING CONTRACTS WITHOUT APPROPRIATIONS OR ENROLLMENTS TO SUPPORT THEM.

December 21, 1982

The Honorable G. Steven Agee
Member, House of Delegates

You ask the following question:

"Is there any prohibition upon a school board granting tenure to teachers by virtue of extending a contract of reemployment and later terminating such teachers under the reduction in force provisions relating to declining enrollment."

Section 22.1-304 provides in part:

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

A school board may reduce the number of teachers, whether or not such teachers have reached continuing contract status, because of decrease in enrollment or abolition of particular subjects."

This section permits a school board to terminate probationary teachers and teachers on continuing contracts to meet declining enrollments or limited appropriations. It also withholds from the school board the power to enter into continuing contracts for any financial obligation beyond the period for which funds have been made available. See, also, § 22.1-91; 1980-1981 Report of the Attorney General at 9, 13-14.

When exercising the power to terminate teachers because of declining enrollments, it must be in a manner which is not arbitrary, or discriminatory, and not pretextual in retaliation for the teacher's exercise of a federally protected right. See Gwathmey v. Atkinson, 447 F.Supp. 1113 (E.D. Va. 1976).

I am therefore of the opinion that, subject to the qualifications noted, there is no prohibition on the school board action you describe.

SCHOOLS. SCHOOL BOARDS. EMPLOYMENT OF TEACHERS UPON OR CONTRARY TO SUPERINTENDENT'S RECOMMENDATION.

July 21, 1982

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether a local school board may employ a school teacher who is not recommended by the local superintendent of schools.

The General Assembly is singularly responsible for the provision of a system of free public education. See
Art. VIII, § 1 of the Constitution of Virginia (1971). Manifestly, the legislature may establish a general procedure for hiring teachers which promotes a quality system of education.

The local school boards are constitutionally responsible for the day-to-day supervision of the public schools. See Art. VIII, § 7. This responsibility must necessarily be exercised within the standards of quality prescribed by the State Board of Education, as revised by the General Assembly, and also within other enactments of law. See Art. VIII, §§ 2, 4.

See, also, School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Section 22.1-295 provides:

"The teachers in the public schools of a school division shall be employed and placed in appropriate schools by the school board upon recommendation of the division superintendent." (Emphasis added.)

This statutory provision furthers the goal of providing a quality educational system because it ensures consideration of a teacher-candidate by the division superintendent prior to employment by the local school board. It is notable, however, that § 22.1-295 expressly requires the recommendation of the superintendent; not the approval of the superintendent. The term "recommendation" means an advisory action non-binding in nature. See Black's Law Dictionary 1143, 1144 (5th ed. 1979). The superintendent's recommendation may be either favorable or unfavorable, but § 22.1-295 envisions some expression by the superintendent of his views regarding the teacher-candidate's employment.

This Office has previously held that if the division superintendent makes a recommendation concerning only one teacher-candidate to the local school board, the board is not required by law to adopt the recommendation. Another recommendation would have to be made by the superintendent. See 1935-1936 Report of the Attorney General at 132. Should the division superintendent decline to execute his legal responsibility and make another recommendation, the school board is free to employ a teacher without the superintendent's recommendation. See 1941-1942 Report of the Attorney General at 117. This assumes, of course, that the teacher hired by the school board fulfills the qualifications for teachers of that grade and subject as prescribed by the State Board of Education.

Accordingly, I am of the opinion that the local school board, the body which constitutionally is vested with final authority over the selection, may properly employ a candidate unfavorably recommended by the division superintendent.

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¹For the purpose of this Opinion, it is assumed that your question concerns the employment of a teacher who is new to
the school system and that your question does not involve a situation in which renewal of a teacher's contract in the school system is being considered by the school board, despite the division superintendent's recommendation of nonrenewal under § 22.1-305 of the Code of Virginia.

SCHOOLS. SCHOOL BOARDS. HAVE DISCRETION TO WAIVE GED MINIMUM AGE REQUIREMENTS.

June 28, 1983

The Honorable John M. Lohr
Commonwealth's Attorney for Highland County

You have asked several questions regarding waiver of the age requirements for a thirteen year old student to take the General Education Development (GED) test, and the extent of that student's continuing obligations under the Commonwealth's compulsory school attendance statutes. Your specific questions are:

1. What special circumstances should be considered by the local school authorities to justify waiving the current age requirement for the GED?

2. Does the Attorney General's Office have any guidelines available to assist local school authorities in making such decision?

3. Should the particular child described be allowed to take the GED tests by the local school authorities?

4. In the event that the described child is allowed to take the GED tests, would his successful completion thereof relieve him from the provisions of § 22.1-254 of the Code of Virginia requiring school attendance until the age of seventeen?

Your correspondence indicated that these questions were prompted because a thirteen year old has requested permission to take the GED. The child was tested at the age of eight and found to have an IQ of 180. For the second semester of 1980 and for the following school year, he was enrolled in a private college. For the next school year, the student was enrolled in a public institution of higher education and is presently enrolled in a master's degree course in an institution of higher education.

Your correspondence further indicates that in April 1980, after he initially enrolled in college, the child's parents requested that he be awarded a diploma from the Highland High School, which he had not attended. The Highland County School Board agreed to grant a credit for each college-level course successfully completed. Twenty-three credits are required for a high school diploma in the fields mandated by the State Board of Education, which
include Virginia and United States history, English, mathematics, laboratory sciences, government and world studies. These credits have not been attained.

The GED exam is part of the Commonwealth's general program for adult education. See § 22.1-223. The GED certificate, which is given upon passing the examination, is a high school equivalency certificate. It signifies satisfactory performance in tests in five designated subject areas. It does not mean that the holder has successfully completed high school, or that he has been through a full high school curriculum.

Generally, an applicant for the GED exam must be an adult or at least 18 years of age. See § 22.1-223. Local school authorities, however, have discretion, under the current regulations of the State Board of Education, to waive this requirement in justifiable special circumstances.

I cannot provide a definitive answer to your first question. The State Board of Education has not set forth by regulation those facts which must be considered as justifiable special circumstances for waiving the age requirement for the GED examination in all cases. This is a matter which, under the regulations, rests within the sound discretion of the local school authorities. Those individuals should consider such factors as reasonably bear upon the request for waiver, including, without limitation, the benefit, if any, to the individual and the State and the harm, if any, to the individual and the State.

In answer to your second question, this Office has not issued guidelines to the local school officials regarding their waiver of the GED age requirement. The factors that must be considered in any case are academic and social considerations of a local nature and, as indicated above, this determination is the responsibility of local school officials. This Office does not have any authority for issuing regulations in a matter of this nature.

In response to your third question, I assume that the local school authorities have not yet determined whether to waive the age requirements for the GED test for the thirteen year old child in question. Based upon the facts you present, I have no basis for concluding that a decision by the local school authorities to waive the age requirement or to refuse to waive the requirement in this case would constitute an arbitrary abuse of discretion. Under the law, unless there is a waiver of the GED age requirement by the local school authorities, the child in question cannot take the GED examination. Waiver of the age requirement is within the sole discretion of the local school authorities.

If the local school authorities decide to waive the GED age requirement for this particular child, they also may waive the requirement for compulsory school attendance imposed by § 22.1-254. That statutory provision generally
requires mandatory school attendance until the age of seventeen, regardless of the child's level of achievement. Section 22.1-257(1), however, specifically gives the local school authorities the power to make a limited exception to § 22.1-254.

There is no express provision in law for excusing children from the compulsory school attendance law simply for passing a GED test. The General Assembly has set forth in a comprehensive way the permissible exceptions from compulsory education. Passing the GED is not one of them. See §§ 22.1-256 and 22.1-257. It is my opinion, therefore, that attainment of a GED certificate does not automatically relieve a minor from the duty to attend school until his seventeenth birthday. The local school board maintains its prerogative to relieve the minor from his duty to attend school under the compulsory school attendance law. Absent the grant by the local school authorities of an exemption from the compulsory education statute, the child's parents may not unilaterally create their own acceptable program for the child's education, unless they follow one of the clearly defined avenues permitted by the statute. See Grigg v. Commonwealth, 224 Va. __, 297 S.E.2d 799 (1987).

Regulations of the Board of Education of Virginia specifically provide: "Certificates may be issued to adults who are no longer enrolled in regular day school programs and who meet the following minimum requirements: A. Age: An applicant must be at least 18 years of age. Under special circumstances, which are considered by local school authorities to be justifiable, the age limit may be lowered if an applicant is legally withdrawn from school. Notwithstanding the foregoing requirement, applicants below 18 years of age shall provide one of the following:

1. A letter from an official of the regular day school last attended stating that the applicant has been legally withdrawn from school for a period of one year; or

2. A letter from an official of the regular day school last attended stating that the applicant has been legally withdrawn from school for a period of six months; and, a letter from a director of a high school review program stating that the applicant has successfully completed the program; or

3. A letter from an employer, a recruiting officer of the armed forces, or an admissions officer of an institution of higher learning or postsecondary training institution stating that the applicant meets all requirements for employment or admissions, with the exception of a General Educational Development certificate; and, a letter from an official of the regular day school last attended recommending the applicant be tested." Regulations of the Board of Education of Virginia (1980), p. 27.
SCHOOLS. SCHOOL BOARDS. IN COUNTIES WHERE CENTRALIZED SYSTEM OF ACCOUNTING HAS BEEN ADOPTED, COUNTY ADMINISTRATOR IS PROPER OFFICIAL TO SIGN WARRANTS FOR SCHOOL BOARD EXPENDITURE.

April 22, 1983

The Honorable Charles K. Trible
Auditor of Public Accounts

You have asked who is the appropriate local official responsible for the signing of warrants representing payment for claims against the county school board pursuant to § 22.1-122 of the Code of Virginia after the adoption of a county centralized system of accounting. You further specify that the question is whether checks must be signed by the school board members or its agents, or whether such checks may be signed by the county administrator or his agent when so provided by resolution of the board of supervisors.

Section 15.1-117(17) expressly provides that upon the adoption of a centralized system of accounting by a county,

"the authorization and approval of expenditures, audit of claims and the issuance of warrants in settlement thereof for all agencies of the county, including the county school board... shall be in conformity with the procedure set forth in subsection (11) of this section when such procedures are directed by resolution of the board of supervisors, and other provisions of any section of the Code to the contrary notwithstanding." (Emphasis added.)

Section 15.1-117(11) provides in pertinent part that it shall be the general duty of the county administrator

"to issue all warrants in settlement of all such claims when such expenditures are authorized and approved by the officer and/or employee authorized to procure the services, supplies, materials or equipment accountable for such claims. Every warrant issued pursuant to... this section shall bear the date on which the executive secretary orders it to be issued and shall be made payable on demand, signed by the executive secretary, or by his designated assistant when authorized by the board of supervisors...." (Emphasis added.)

Reading these two provisions together, I am of the opinion that the appropriate local official to sign the warrants of the school board under the circumstances you have presented would be the county administrator or his agent. Any Code provisions to the contrary are clearly superseded by the final clause of § 15.1-117(17).
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1Section 15.1-117 uses the terminology "executive secretary." Pursuant to § 15.1-115, the words "executive secretary" as appearing in § 15.1-117 are to mean "county administrator."

2The signing process is ministerial in nature. The fact that the county administrator is authorized to sign warrants for the school board pursuant to §§ 15.1-117(11) and 15.1-117(17) does not in any way usurp the school board's authority over the expenditure of funds. See Art. VIII, § 7 of the Virginia Constitution (1971); 1978-1979 Report of the Attorney General at 234; 1975-1976 Report of the Attorney General at 301 (holding central purchasing procedures do not usurp school board's discretion in expenditure of school funds); see, also, 1978-1979 Report of the Attorney General at 240 (holding § 15.1-117(17) does not permit the board of social services or its director to issue warrants for salaries and administrative expenses).

3E.g., § 22.1-122.

SCHOOLS. SCHOOL BOARDS. MAY NOT CONTRACT FOR FINANCIAL OBLIGATION BEYOND FUNDS AVAILABLE.

February 17, 1983

The Honorable C. Richard Cranwell
Member, House of Delegates

You ask for clarification of two recent official Opinions of this Office. The Opinions concerned several statutory provisions of the Code of Virginia governing renewal and termination of teacher contracts. They were issued, respectively, on December 21, 1982, to Delegate G. Steven Agee, and on January 3, 1983, to James Buchholtz, Attorney for the County of Roanoke. Both Opinions which are consistent with one another, correctly respond on the law to the specific question raised therein.

Delegate Agee asked:

"Is there any prohibition upon a school board granting tenure to teachers by virtue of extending a contract of reemployment and later terminating such teacher under the reduction in force provisions relating to declining enrollment."

The Opinion responded, in part, by stating that "subject to the qualifications noted, there is no prohibition on the school board action you describe." One of the qualifications explicitly noted was that the Code of Virginia "withholds from the school board the power to enter into continuing contracts for any financial obligation beyond the period for which funds have been made available." Cited in support of this qualification was § 22.1-91. As noted, the Opinion request did not set forth any facts indicating that the
school board lacked available funds to finance the contracts. Accordingly, absent facts triggering the qualifications, the Opinion concluded that no prohibition existed.

County Attorney Buchholtz asked several questions concerning the extension of continuing contracts to teachers. He also asked:

"Can a school board issue valid and binding contracts to teachers for the next school year knowing that, because of declining enrollment and/or insufficient funding, it cannot honor these contracts?"

The Opinion to him held:

"The school board clearly cannot issue valid and binding contracts to teachers for the next school year if it does not have appropriated to it sufficient monies to fund those contracts."

Also cited in support of this holding was § 22.1-91, the same provision cited to Delegate Agee. However, in the Buchholtz Opinion, the request explicitly contemplated a lack of funding to support the contracts. As such, the Opinion aptly noted that such contracts would be invalid.

It is manifest and consistently provided in both Opinions that the school board has no power, in the absence of consent of the governing body of the locality, to enter into binding, continuing contracts for any financial obligation in excess of the funds available to it for that fiscal year.

SCHOOLS. SCHOOL BOARDS. PENALTIES FOR CONTRACTING IN EXCESS OF APPROPRIATIONS.

January 3, 1983

The Honorable James E. Buchholtz
County Attorney for the County of Roanoke

You have asked four questions prompted by a possible plan of the Roanoke County School Board to extend continuing contracts to teachers whom the school board anticipates it may not employ in the next school year. The plan may be used because the City of Salem, which in the past has participated in the Roanoke County school system, begins its own separate school system next year. I will respond to those questions in the order you asked them.

"1. Can a school board issue a continuing contract and grant continuing contract status to a teacher before the expiration of the three-year probationary term of service?"
Section 22.1-303 of the Code of Virginia provides that 
"[a probationary term of service for three years in the same 
school division shall be required before a teacher is issued 
a continuing contract." (Emphasis added.) The three year 
probationary period required by § 22.1-303 refers to school 
years as opposed to calendar years. See 1974-1975 Report of 
the Attorney General at 379. The school year for teachers is 
a minimum of 180 days a year. See § 22.1-98. The word 
"shall" as used in § 22.1-303 is a mandatory requirement. 
Continuing contracts may be issued in proposed form in April 
of each year to be effective only at the beginning of the 
ensuing school year, by which time the teacher must have 
completed the three year probationary term. Your question is 
thus answered in the negative.

"2. If a school board and a teacher execute a 
continuing contract during the present school year to 
become effective at the beginning of the next school 
year, when does the teacher achieve continuing contract 
status, during the present school year or at the 
beginning of the next school year?"

A probationary teacher attains continuing contract 
status at the beginning of the school year in which the 
continuing contract actually becomes effective, assuming the 
terms of § 22.1-303 have been met. Section 22.1-304 further 
provides that notice of contract nonrenewal must be given by 
April 15. Contracts which are awarded, or renewed, are 
subject to available appropriations. See § 22.1-91. It is 
prudent to include such a contingency expressly in each 
12-14. Therefore, a continuing contract does not become 
final and legally operative unless and until an appropriation 
is made to support it and the school year in which it 
operates begins.

"3. Can a school board issue valid and binding 
contracts to teachers for the next school year knowing 
that, because of declining enrollment and/or 
insufficient funding, it cannot honor those contracts?"

The school board clearly cannot issue valid and binding 
contracts to teachers for the next school year if it does not 
have appropriated to it sufficient monies to fund those 
General at 312-314.

Moreover, even when appropriations are anticipated but 
uncertain, proposed contracts which are issued to teachers 
should contain a clear contingency to put the faculty on 
notice that appropriations are necessary to finalize the 
12-13.

It is customary, and highly advisable, for even final 
teacher contracts to contain a provision conditioning
maintenance of the contract upon the continuing availability of revenues and adequate enrollments. See 1979-1980 Report of the Attorney General at 300; 1976-1977 Report of the Attorney General at 228. In the background information you provided, you stated that no funds were anticipated to support the contracts which may be issued should the proposed plan be used and, further, that no positions would be authorized or anticipated commensurate with those contracts. On the facts you have presented, your question must be answered in the negative.

"4. What liability or penalty will attach to school board members who vote to issue contracts under the facts set forth in question 3 above?"

The General Assembly has expressly provided that malfeasance in office may arise whenever school officials willfully contract to expend funds, in any fiscal year, in excess of available funds, without the consent of the appropriating body. See § 22.1-91; 1980-1981 Report of the Attorney General at 312-314. Also, the offending school official, be it a member of the school board or a division superintendent, may be guilty of a Class 4 misdemeanor, punishable by fine of not more than one hundred dollars. See §§ 18.2-11 and 22.1-292. Additionally, the individual may be subject to removal from office, discipline and possibly money damages. See §§ 22.1-65 and 24.1-79.6.

SCHOOLS. STANDARDS OF QUALITY SETTING MINIMUM AVERAGE SALARY INCREASES FOR TEACHERS.

February 7, 1983

The Honorable William P. Robinson, Jr. Member, House of Delegates

You ask if H.B. 832 which you introduced in the 1983 session of the General Assembly and which proposes to amend the standards of quality for the public school divisions in the Commonwealth, is constitutional. You further ask if the General Assembly may apportion the cost of implementing the above amendment between the Commonwealth and the local units of government, and if the General Assembly may require a locality to finance its share of the cost through local taxes or from other available funds as provided in the last sentence of the Bill.

House Bill 832 would establish, as a State-mandated standard of quality, a minimum ten percent average salary increase (in the aggregate) for instructional personnel in the public elementary/secondary schools of the Commonwealth.¹

The Bill requires a close examination of the delicate balance of State and local governmental authority contemplated in Art. VIII of the Constitution of Virginia (1971). That Article provides the framework for our public
school system. The provisions thereof recognize that public education in Virginia is both a State and local concern.

Article VIII, § 1 states, in pertinent part, that "[t]he General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age...and shall seek to ensure that an educational program of high quality is established and continually maintained." Article VIII, § 2 sets forth the manner in which the General Assembly may achieve the goal of quality educational programs. That section provides, "[a]standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly."

House Bill 832 is expressly worded as an amendment to the current standards of quality. In so doing, the Bill is facially within the authority of the General Assembly granted by Art. VIII, § 2. Nonetheless, in establishing the public school system, and prescribing standards of quality, the General Assembly must do so within the entire framework contemplated by Art. VIII. The exercise of legislative power must not be in derogation of constitutional powers granted local units of government, but must be harmonized therewith. Richmond School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Every word, phrase, sentence and provision in Art. VIII must be given its intended effect. County School Board of Prince Edward County v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963); Almond v. Gilmer, 188 Va. 1, 49 S.E.2d 431 (1948); Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959).

Central to your inquiry is Art. VIII, § 7 which, in pertinent part, provides "[t]he supervision of schools in each school division shall be vested in a school board...." This section manifestly ensures that those most directly affected by the public schools will be intimately involved in the local decisions of supervising the schools. A State-centralized public educational system, or "Super Board," is eschewed. However, the constitutional provision for local supervision is not plenary. In supervising the public schools, the local school board must meet the prescribed standards of quality, as well as lawful enactments of the General Assembly and regulations adopted by the State Board of Education. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977). See, also, § 22.1-79(5). Conversely, the power of the General Assembly to establish the school system, and to set standards of quality, may not be exercised in a manner that would totally emasculate the constitutional guarantee of local control. Richmond School Board v. Parham, supra.

It is noteworthy, however, that the framers of the Constitution recognized that the promulgation of standards of quality is integrally related to money. In this regard, Professor Howard observed:
"To determine standards of quality - and, even more, to attain them - requires the exercise of administrative expertise and legislative judgement. Moreover, it takes money - another legislative function...Indeed, the Constitution focuses particular responsibility on the legislative process by assigning to the General Assembly the twin tasks of being ultimately responsible for standards of educational quality in Virginia and of deciding what money should be raised, and by whom, to meet those standards." II Howard's Commentaries on the Constitution of Virginia 885 (1974).

The leading authority balancing the provisions of §§ 2 and 7 of Art. VIII is Richmond School Board v. Parham, supra, which concerned a State mandated grievance procedure culminating in binding arbitration. In Parham, the Virginia Supreme Court observed the legislative prerogative to set standards of quality may not be exercised in a manner that would absolutely divest the local school boards of indispensible and essential supervisory functions. In reaching this conclusion, the Court held that application of local policies and regulations adopted for the day-to-day management of teaching staff was reserved to the local board.

Determining whether a given function is essential and indispensible to local school board supervision necessarily requires a case by case analysis. In this case, the adoption of a standard mandating a "floor" for teacher salaries, in the aggregate, does not result in total emasculation of school board supervisory powers. A school board remains free to set individual salary increases, within a broad and general framework, and to manage its staff on a daily basis. Understandably, the implementation of any standard of quality will result in some limitation of school board supervisory power; however, such a necessary consequence does not always equate to unconstitutionality. Unlike the Parham decision, the impact on local school board powers does not result in a total divestiture of daily management responsibility. Also, in Parham, daily management authority was ultimately transferred to an independent panel. Parham did not involve the State vis a vis the locality regarding the establishment of funds needed for a quality educational system. A contrary view would permit a local school board to substitute its judgment for the legislative finding as to what is needed for a quality educational system. Such contrary view is not found in the Virginia Constitution. Accordingly, I am of the opinion that the Bill is at least facially constitutional.

In concluding that H.B. 832 does not facially conflict with § 7 of Art. VIII, I assume that the provisions of the Bill would be applied as a standard. That is, I assume that the local board would retain the authority to determine that individual teachers whose performance does not merit any increase in salary shall not receive a salary increase. In addition, although I am unaware of any legislative study correlating a ten percent salary increase with educational...
needs across the Commonwealth, I assume that there is a
genuine and credible basis for the precatory language of
H.B. 832 making such a correlation. In the absence of such a
basis, the validity of the provisions may be questionable.

Turning to your second inquiry, Art. VIII, § 2
explicitly provides that the General Assembly "shall
determine the manner in which funds are to be provided for
the cost of maintaining an educational program meeting the
prescribed standards of quality, and shall provide for the
apportionment of the cost of such program between the
Commonwealth and the local units of government comprising
such school divisions."

Accordingly, I am of the opinion that the General
Assembly must provide for the apportionment of the cost of
H.B. 832, if enacted, between the Commonwealth and the local
units of government comprising such school divisions. The
legislative determination of cost may not be based upon
arbitrary estimates with no reasonable relationship to the
actual expense; and there must be an equitable division of
cost between the State and the local governmental unit taking
into account the local ability to pay. The General Assembly
has currently in existence the Basic School Aid Formula
designed to achieve this purpose. See 1980-1981 Report of
the Attorney General at 79.

Your final inquiry is answered in the affirmative,
despite the fact that the last sentence in H.B. 832 is
ambiguous. The reference to "above the Standard of Quality
per pupil funds" is not defined in the Bill, nor in the
current funding formula. Furthermore, such reference appears
to conflict with the immediately preceding sentence to the
extent it may be interpreted to impose the total cost of the
salary increase on a locality. The constitutional standard,
and the immediately preceding sentence, require an equitable
apportionment. Once the General Assembly establishes the
local share, I am of the opinion that it may require that it
be funded from local taxes or other local resources. See
Art. VIII, § 2; such a requirement is currently codified.

1The amendatory language in H.B. 832 is set out below in
its entirety: "The General Assembly hereby finds and
declares: that the quality of education in this Commonwealth
is dependent upon the quality of the instructional personnel;
that the quality of the instructional personnel in public
education in the Commonwealth is dependent upon the salaries
offered such personnel by the school divisions of the
Commonwealth; and, that in order for the school divisions of
the Commonwealth to attract and retain instructional
personnel of high quality, the average salary of all
certified instructional personnel of each school division
must be increased substantially so that each school division
of the Commonwealth can be competitive with the other areas of the country and other professional and career opportunities. In order to insure the employment of certified instructional personnel of high quality, the average salary as determined by the Board of Education of all certified instructional personnel of each school division for the school year 1983-84 shall be increased at least ten percent above the average salary of all certified instructional personnel of that school division for the 1982-83 school year. The funds for the salaries of all certified instructional personnel, including the increased required by this Standard of Quality, shall be provided by the Commonwealth and the local units of government comprising the school divisions. All funds necessary to comply with this Standard of Quality above the Standard of Quality per pupil funds provided to each school division by the Commonwealth shall be provided by the local unit or units of government comprising that school division by local taxes or from other available funds." (Emphasis added.)

2 The existing standards are codified at Ch. 578, Acts of Assembly of 1982.

3 While Art. VIII, § 2 permits "revision" of the standards of quality and H.B. 832 is an "amendment" to them, I do not believe that there is any legal distinction between an "amendment" to the standards, and a "revision" thereof.

4 Implementing the foregoing, the General Assembly has statutorily reiterated the constitutional provision ($ 22.1-28 of the Code of Virginia), and also appropriately recognized that the school boards are empowered to hire instructional personnel ($ 22.1-295) and provide for their compensation ($ 22.1-296).

5 There are many provisions in Title 22.1 which bear directly upon the local school board's contractual relationship with its teachers: § 22.1-302 - form of teachers' contracts to be prescribed by State Board; § 22.1-298 - requirements for certification of teachers to be prescribed by State Board; § 22.1-296 - frequency of issuing pay checks for teachers prescribed by statute; §§ 22.1-304 and 22.1-305 - procedure for contracting with teachers prescribed by statute.

SCHOOLS. STUDENTS. DISCIPLINE. SCHOOL BOARD MAY REQUIRE STUDENT TO WORK AS PUNISHMENT FOR MISBEHAVIOR OR VIOLATION OF SCHOOL RULES.

June 20, 1983

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

You ask whether a local school system, through its superintendent or other persons in authority, may require students who misbehave or vandalize school property to do work for the school during or after school hours. You also ask, if the behavior of the student is such that the student is charged with violation of the law, whether a juvenile
court may require the student to "work off" his or her punishment during or after school hours. For the reasons hereinafter discussed, both questions are answered in the affirmative.

The supervision of the schools in each school division is vested in the local school board. See § 22.1-28 of the Code of Virginia. Consistent with State law, the school board shall determine "the government to be employed in the schools..." and the "proper discipline of students, including their conduct going to and returning from school. See §§ 22.1-78, 22.1-79. Accordingly, a local school board has broad authority over the discipline of its students. See 1975-1976 Report of the Attorney General at 303. In implementing that authority, the school board may establish a code of student conduct and reasonable penalties for violation thereof. It may empower the division superintendent to take such action as necessary and appropriate to maintain discipline and order in the schools, including the penalties of expulsion and suspension. See § 22.1-70 and 22.1-277.1

Accordingly, as an alternative to suspensions or expulsions of students, as part of its student disciplinary code, I am of the opinion that a school board may empower its school officials to impose a disciplinary penalty requiring the offending student to work for the school. For example, if a student is insubordinate, the student may be required to perform constructive work, such as shelving library books, repairing damaged textbooks, or picking up litter on the school grounds. Manifestly, the disciplinary "work off" must not endanger the student's health or safety, be excessive to the infraction or unreasonable under the circumstances. The reasonableness of the "work off" as a punishment can only be judged on a case-by-case basis. 2 It is both permissible and advisable for a local school board to promulgate rules which define the type of work assignments which may be imposed, the manner and time for such assignments to be performed, the school officials empowered to impose a "work off" penalty, and the procedural protections designed to avoid punishing an innocent student or subjecting a student to excessive or unreasonable penalties.

The foregoing relates to the authority vested in school officials. It should not be confused with the power of the judiciary to adjudicate fault and to impose a compensatory award, a power which is not expressly conferred on school boards nor which can be implied as indispensible to its functions. See Commonwealth v. County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960). Although a "work off" may be imposed by school authorities as a form of discipline for violations of school rules, see § 22.1-70, the General Assembly has not given school authorities the power to impose a "work off" to recoup its financial losses resulting from such rule violations without the involvement of a court of competent
jurisdiction adjudicating fault and the amount of monetary damage.3

Vandalism of a public school constitutes criminal misconduct and is ordinarily a Class 1 misdemeanor. See § 18.2-138.4 Such conduct should be reported to appropriate authorities to investigate, and in the case of juveniles, when warranted, presented to the juvenile court. The juvenile court may proceed to find the child delinquent and, in an appropriate case, require the child to make restitution or reparation for damage or loss caused by the offense for which the student is found to be delinquent. See § 16.1-279(E)(7).

This Office has previously held that a juvenile court may require a child adjudged a delinquent to participate in a public service project in an appropriate case. See 1980-1981 Report of the Attorney General at 215. This prior Opinion noted that a child may be assigned to such a project when it is rehabilitative to the child, but not solely to further the municipality's efforts to recoup its damages from vandalism. Likewise, it is my opinion that a juvenile court judge may require a delinquent child to perform work at school under reasonable conditions prescribed by the court as punishment for vandalism or damage to school property done in the course of the student's misbehavior. See § 16.1-279(E). When making this disposition, the juvenile court must necessarily exercise its discretion in determining whether such penalty is in the best interest of the juvenile. The juvenile court is not precluded, however, from requiring work which may, in an appropriate case, also result in restoration of damaged school property. See 1980-1981 Report of the Attorney General at 215.

To summarize, I am of the opinion that "work off" may be utilized as a method of discipline by school authorities in appropriate cases, and utilized by juvenile courts for punishment as well as for restitution or reparation for damages caused by juveniles.

1In addition to the broad disciplinary discretion over student conduct vested in the local school board, principals and teachers have the power, in appropriate cases, to expel or suspend students. See § 22.1-277. A principal or teacher may also administer reasonable corporal punishment on a pupil under his authority, provided he acts in good faith and the punishment is not excessive. See § 22.1-280.

2Procedural protections may be required in a given case to allow the student to meaningfully respond to the underlying charges of misconduct and to the "work off" penalty. For example, State law provides certain processes which must be followed when a student is suspended or expelled. See § 22.1-277. Where the penalty is less onerous, a hearing may not be required to meet constitutional standards, but an informal opportunity should be given the student to respond

3 The General Assembly may in the future determine that it is appropriate for school authorities to have such power. Under current statutory provisions, however, the school board is explicitly empowered only to bring a civil action against the parents of the child to recover damages resulting from vandalism up to $200 per occurrence. See § 8.01-43. (Effective July 1, 1983, this amount will be $500. See Ch. 330, Acts of Assembly of 1983.) Pupils may also be required to reimburse the school board for any actual breakage or destruction of school board property done by the pupil "in pursuit of his studies." See § 22.1-276. Whether the damage done has occurred "in pursuit of" studies must be examined on a case-by-case basis.

4 The local school board is responsible for the care, management and control of school property. See § 22.1-79(3). When its property is vandalized, the school board may seek restitution from the child's parents pursuant to § 8.01-43 or it may, through the Commonwealth's attorney, seek a remedy in juvenile court against the child. See § 16.1-279(E)(7).

SCHOOLS. TEACHERS. CONTRACTS. SCHOOL BOARD MAY USE ANNUAL OR CONTINUING CONTRACT.

November 23, 1982

The Honorable Benjamin J. Lambert, III
Member, House of Delegates

You ask several questions concerning the status of teachers employed as "long term substitute" teachers. These questions are:

1. "[U]nder what circumstances is a teacher considered to be 'temporarily employed' within the meaning of section 22.1-302?"

2. "[S]hould the years served by these teachers under the improper designation of a 'long term substitute' be counted towards a teacher's term of probationary service?"

3. "[W]ould a teacher who has completed three years as a 'long term' substitute and is similarly employed for a fourth year be considered to have achieved continuing contract status?"

4. "[S]hould a teacher serving a first, second, or third year of service as a long term substitute be treated as a probationary teacher, subject to all rights associated with that status?"

Section 22.1-299 provides that a teaching certificate from the State Board of Education is not required for one employed "temporarily as a substitute teacher to meet an
emergency." Section 22.1-302 requires written contracts for the employment of teachers by public school divisions, except for those teachers who are "temporarily employed as substitute teachers...." For the purpose of these statutes, the State Board of Education requires certification for any teacher "who teaches continuously in excess of sixty (60) days or in excess of a total of ninety (90) days in any one school year." See Certification Regulations for Teachers, p. 7, Part II, D. The answer to your first question, therefore, is that a teacher is considered to be "temporarily employed" within the meaning of § 22.1-302 if that teacher does not teach continuously in excess of sixty (60) days or in excess of a total of ninety (90) days in any one school year.

In response to your second, third and fourth questions, it must be noted that the designation "long term substitute" has no recognized meaning statutorily or under State Board of Education regulations.

The State Board of Education, pursuant to § 22.1-302, issues two written form contracts for use by school divisions. One is designated the "Continuing Contract with Professional Personnel," the other is designated the "Annual Contract with Professional Personnel." No written form contract is issued by the State Board of Education for an employment status called "long term substitute teacher." Those who are not temporarily employed as substitute teachers, but rather are annually employed on a full time basis, must be issued an annual contract for the year or portion thereof for which they are hired by the school division.

The General Assembly has provided the method for public school teachers to attain continuing contract status. Section 22.1-303 provides:

"A probationary term of service for three years in the same school division shall be required before a teacher is issued a continuing contract. Once a continuing contract status has been attained in a school division in the Commonwealth, another probationary period need not be served in any other school division unless such probationary period, not to exceed one year, is made a part of the contract of employment."

With certain specified exceptions, § 22.1-304 states, in part:

"Teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service...."

Teachers who are "temporarily employed as substitute teachers" need not be issued written contracts and, therefore, their temporary service is not counted as part of
a probationary term leading to a continuing contract. (Emphasis added.)

The continuing contract legislation contained in §§ 22.1-303 and 22.1-304 is remedial in nature and therefore, must be construed to implement the General Assembly's intent to provide procedural protection for Virginia's teachers. See Reports of the Attorney General 1975-1976 at 297; 1974-1975 at 376, 377; 1972-1973 at 347, 348. The intent of the General Assembly is that it "apply to the employment of all regularly certified professional public school personnel within this State." See Ch. 691, Acts of Assembly of 1968.

The statutory provision that a continuing contract "shall" be issued upon completion of the three year probationary period is construed as mandatory in nature. See Reports of the Attorney General 1975-1976 at 297; 1974-1975 at 376; 1971-1972 at 346. A school board may not place a teacher on probationary status for an indefinite period beyond the required three years providing the teacher maintains good behavior and competent service. See 1971-1972 Report of the Attorney General at 346. Obviously, the school board and administration cannot avoid or frustrate the clear intent of the General Assembly to establish a continuing contract system for teachers by labeling as "long term substitutes" those who are in fact probationary teachers employed on an annual contract basis.

The answers to your second, third and fourth questions must necessarily depend upon a review of the functions, term and assignments of each teacher who seeks continuing contract status on the basis of service allegedly as a "long term substitute." I do note, however, that a local school board's mere designation of a regularly employed, full time, non-temporary teacher as a "long term substitute" does not operate automatically to remove that teacher from the status or benefits of a probationary teacher.

1 It may be the practice in some jurisdictions outside Virginia to hire as "long term substitutes" teachers who have the same duties as regular teachers, are hired and evaluated in the same manner, are required to have a certificate from the State Department of Education, have the same assignment for an entire school year, are eligible for the same retirement insurance and group insurance programs as probationary teachers and in all other respects serve as teachers on annual contracts. Where such a practice exists, "long term substitutes" have been found to have the same rights as probationary teachers. See Brophy v. School Com. of Worcester, 6 Mass. App. 731, 383 N.E.2d 521 (1978).
SCHOOLS. TEACHERS. GOOD SAMARITAN LAW. TEACHER TRAINED IN EMERGENCY TECHNIQUES AND REQUIRED TO ASSIST INJURED PERSONS AT ACCIDENTS IS "PUBLIC OFFICIAL" FOR PURPOSES OF § 8.01-225(E).

January 14, 1983

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

This is in reply to your recent inquiry concerning the so-called "Good Samaritan" statute, which exempts from civil liability anyone who renders emergency care to injured persons in certain circumstances. The pertinent provisions of § 8.01-225 of the Code of Virginia state as follows:

"A. Any person who, in good faith, renders emergency care or assistance, without compensation, to any injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.

E. For the purposes of this section, the term "compensation" shall not be construed to include the salaries of police, fire or other public officials or emergency service personnel who render such emergency assistance, nor the salaries or wages of employees of a coal producer engaging in emergency medical technician service or first aid service pursuant to the provisions of § 45.1-101.1 or § 45.1-101.2." (Emphasis added.)

You ask, first, whether a public school teacher, in assisting injured students, is a "public official" as contemplated in subsection E, above, and thereby protected from civil damages by virtue of that subsection. Secondly, you inquire as to the circumstances which would bring an injured student and the assisting teacher within the ambit of subsection A, above. You note that, although each injury may arise from an accident, the incident may not be life-threatening and the injuries may range from the very minor to broken bones.

The purpose of § 8.01-225 is to protect from civil damages those who gratuitously aid injured persons at scenes of accidents or other emergencies. Being in derogation of the common law, the statute must be strictly construed, and prior Opinions of this Office have held that its protection does not extend to paid firemen and policemen, salaried medical attendants of a municipality, or working coal miners who have been certified as emergency medical care attendants. See Reports of the Attorney General 1976-1977 at 98; 1975-1976 at 147; 1974-1975 at 185. Each of those Opinions concerned persons who, in the course of their employment, routinely could be expected to be present at emergencies and
to render assistance to the injured. The salary received for his regular employment in each instance caused the person to be excluded from protection of the statute, which is directed expressly at those who offer assistance "without compensation." Those opinions were effectively overruled in 1977 when the General Assembly amended the statute to include the above occupations in the protected persons, the result being what is now § 8.01-225(E), quoted above.\footnote{1} The intent of the General Assembly apparently was to extend the protection of the statute to a class of persons whose employment might place them in a position to extend emergency care. The Office has not been called upon to construe the 1977 amendment as it may apply to "public officials."

Replying to your first question, I am of the opinion that a school teacher would be included among those "public officials" as contemplated by § 8.01-225(E).\footnote{2} A teacher who has been trained in emergency techniques and is required, by the terms of his employment, to lend assistance to injured persons at accidents or other emergencies, may be construed to be a "public official" whose compensation is excluded, for purposes of § 8.01-225, by subsection E thereof. It should be noted that a school teacher who, in good faith and without compensation, renders emergency care to injured persons at the scene of an accident, fire or life-threatening emergency, certainly would be a "person" under § 8.01-225(A) and therefore would enjoy the immunity of the statute. I am of the opinion that school teachers rendering emergency aid in good faith would have the protection of § 8.01-225.

In response to your second question, although school yard cuts, scrapes and broken bones undoubtedly arise from accidents,\footnote{3} I am of the opinion that not every such incident and injury, however minor, falls within the ambit of § 8.01-225(A). The statute does not define "accident" or otherwise specify the types of incidents to which it applies, and the meaning of that term must, again, be derived from the words and phrases accompanying it.\footnote{4} Section 8.01-225(A) is directed at "emergency care or assistance...at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office...." (Emphasis added.) Being among other words and phrases in the subsection which connote gravity and the need for immediate action to preserve life and limb,\footnote{5} I conclude that "accident" is meant to refer to serious incidents having potentially grave medical consequences which require someone's action to assist injured persons without time for deliberation. There certainly is no fixed line between the serious and the minor in these instances and whether an incident falls within § 8.01-225(A) necessarily must be judged from the circumstances of each case.

\footnote{1}{The amendments were to the predecessor statute, § 54-276.9, repealed and reenacted as § 8.01-225, and are}
SCHOOLS. TUITION. PAYMENTS FOR CERTAIN MILITARY-CONNECTED CHILDREN.

July 22, 1982

The Honorable Floyd C. Bagley
Member, House of Delegates


A free public school education in Virginia is guaranteed to "each person of school age who resides within the school division...." See § 22.1-3. Section 22.1-5 sets forth several distinct classes of persons who may be admitted into the public schools of a school division and charged tuition.2 In particular, subsection (A)(5) refers to "Persons of school age who reside on a military or naval reservation located wholly or partly within the geographical boundaries of the school division and who are not domiciled residents of the Commonwealth of Virginia; provided, however, that no person of school age residing on a military or naval reservation located wholly or partly within the geographical boundaries of the school division may be charged tuition if federal funds provided under P.L. 874 of 1950, commonly known as Impact Aid, shall fund such students at not less than fifty percent of the total per capita cost of education, exclusive of capital outlay and debt service, for
elementary or secondary pupils, as the case may be, of such school division." (Emphasis added.)

As is apparent, this legislation is triggered only if the United States Congress refuses or neglects to provide for residents of its military reservations, at least on a shared basis with the local school division. Should the federal assistance not be made available to the local school division, the school board is authorized to charge tuition in order to extend to the residents of military reservations a quality education without the resulting financial drain on the school division's limited resources.

The legislation does not deny residents of military reservations a free public education simply on the basis of military service. Military dependents who do not reside on the federal installation, and children who do reside on the installation but whose parents have declared and established Virginia as their domicile are eligible for a free public education as any other person under § 22.1-3. Section 22.1-5(A)(5) impacts only upon any resident of the federal installation who is not a Virginia domiciliary and who still chooses to send his children to the public schools. Tuition may be charged to cover the cost of their education. The tuition charge is not discriminatory in amount, and is not to exceed the actual total per capita cost of education, exclusive of capital outlay and debt service. See § 22.1-5(C).

It is important to note the substantial basis for distinguishing the class of persons described in § 22.1-5(A)(5) from residents who are admitted into the public schools free of charge. Military personnel who reside on the bases and who do not declare Virginia as their domicile are exempted by federal law from local real estate taxes and from State income taxes. Therefore, such persons, as a class, do not equally contribute to the support of the local schools as do parents who reside within the school division and are thereby subject to the full reach of State and local law. Additionally, most of the basic needs of military personnel are provided for them on the base where purchases, as a general proposition, are not subject to the State Sales and Use Tax, a privilege not equally afforded residents of the school division.

The only military personnel treated differently, for purposes of § 22.1-3, from the residents of the school division are those who have availed themselves of the opportunity afforded by federal law to avoid many of the State and local taxes levied upon Virginia residents, which taxes contribute significantly to the operation of the public schools. While residents of military reservations certainly have the right to take advantage of every federal law adopted for their benefit, those who do, in this situation, have, by their own actions, placed themselves in a substantially different situation from residents of the school division.
They are, thus, not similarly situated and may be treated differently in recognition of their different status.

Accordingly, for the foregoing reasons, I am of the view that § 22.1-5(A)(5) does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1 In Plyler, the United States Supreme Court held that Texas was required under federal law to provide a free public education to the children of Mexican parents present illegally within the state's borders. The court declared that the Equal Protection Clause required Texas to provide educational benefits to these children on the same basis as provided other children.

2 The effect of § 22.1-5(A) is to identify classes of persons who are not regarded as residents for purposes of § 22.1-3.

This is in reply to your request for my opinion whether, pursuant to State zoning enabling legislation, the Board of Supervisors of Rappahannock County can regulate property owned by the Rappahannock County School Board. You ask if the school board must apply for and obtain a special use permit, as required by the county zoning ordinance, before constructing a building for school purposes on property owned by it which lies within an agricultural zone, or if the school board is exempt from such a requirement by virtue of Art. VIII, § 7 of the Constitution of Virginia (1971)1 and §§ 22.1-127, 22.1-1313 and 22.1-1324 of the Code of Virginia.

Article VII, § 2 of the Constitution directs the General Assembly to provide by general law for the powers of counties, cities and towns, and by statute the General Assembly has authorized local governing bodies to enact local zoning ordinances. See § 15.1-486.5 Zoning is a legislative power of the Commonwealth delegated to local governments, and a local governing body is allowed wide discretion in enacting and amending a zoning ordinance. See Byrum v. Board of Supervisors of Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). Through zoning, as a valid exercise of its police
power, a locality classifies the territory under its jurisdiction and regulates the use of property therein, in the interest of promoting the public health, safety and general welfare. See §§ 15.1-486, 15.1-489; City of Norfolk v. Tiny House, Inc., 222 Va. 414, 281 S.E.2d 836 (1981).

The question presented here is whether the zoning powers of a local governing body, as applied to the property of a school board, are inconsistent with and must give way to the school board's powers over its property as derived from Art. VIII, § 7 and statutes in Title 22.1.

Article VIII, § 7, which vests supervision of the schools in local school boards, does not define the powers included thereby, and while the language of that section appears to be unqualifiedly broad in scope, the authority conferred is not unlimited. In any event, I can find nothing in that section which conflicts with a locality's exercise of properly delegated zoning powers of the Commonwealth. The same may be said for the education statutes involved. It is an accepted principle of statutory construction that legislative acts will be construed and applied so as to avoid conflicts with the Constitution, unless such a construction is unavoidable. It is also well established that full effect must be given each provision of statutory law, and apparent inconsistencies must be reconciled if reasonably possible. See City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 685, 101 S.E.2d 641 (1958).

In the Richmond case just cited, supra, the court found no conflict between the statutes authorizing the county to enact a zoning ordinance and those authorizing the city to establish and operate a jail outside of its boundaries and held that the city must comply with county zoning regulations. The same principle of practical construction applies to the question presented here. Prior Opinions of this Office, when presented with the same or similar questions, have held that a school board must comply with zoning and planning requirements in the use of its property. See, e.g., 1971-1972 Report of the Attorney General at 485; 1961-1962 Report of the Attorney General at 227.

I am aware that prior Opinions of this Office have sometimes referred to the rule that, ordinarily, public property used for governmental purposes is exempt from zoning regulations. See, e.g., Reports of the Attorney General 1981-1982 at 467 (property of the county and State); 1976-1977 at 193 (county permitted recreational establishment by school board and park authority, but prohibited same by commercial owners); 1971-1972 at 103 (property of county and State).

I believe that such a rule is overly broad and cannot be reconciled with the Supreme Court's decision in City of Richmond v. Board of Supervisors of Henrico County, supra. I
adhere to the view that, absent statutory exemption, zoning and planning regulations will be construed to apply to facilities of governmental bodies of equal or lesser authority than the local government seeking to apply them, such as other political subdivisions and subordinate agencies of counties, cities and towns. See 1971-1972 Report of the Attorney General at 103, 104 (State not bound by zoning in county); 1963-1964 Report of the Attorney General at 154, 155 (location of highway by State Highway Commission).

In light of the foregoing, I am of the opinion that the school board must comply with the reasonable regulations contained in a properly enacted local zoning ordinance, including the requirement that a use permit be obtained where applicable, notwithstanding the board's power of supervision over the public schools and its control over school property conferred by the Constitution and the statutes in Title 22.1.

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1Article VIII, § 7 reads as follows: "The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

2Section 22.1-127 provides, in part, as follows: "A school board shall have the power to exercise the right of eminent domain and may condemn land or other property or any interest or estate therein, including dwellings, yards, gardens or orchards, necessary for public school purposes pursuant to the provisions of chapter 1.1 (§ 25-46.1 et seq.) of Title 25 of this Code."

3Section 22.1-131 provides, in part, as follows: "A school board may permit the use, upon such terms and conditions as it deems proper, of such school property as will not impair the efficiency of the schools. The school board may authorize the division superintendent to permit use of the school property under such conditions as it deems proper."

4Section 22.1-132 reads as follows: "Permits for the use of school property may contain, among other matters, (i) provisions limiting the use of the property while classes are in session and (ii) an undertaking by the lessee to return the property so used in as good condition as when leased, normal wear and tear excepted."

5See, also, § 15.1-491, 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..."

A "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 1976-1977 Report of the Attorney General at 332.
The general power of school boards to supervise does not necessarily include the right to deal with the labor relations of employees in any matter the boards might choose, unfettered by legislative restriction; DeFebio v. County School Board of Fairfax County, 199 Va. 511, 513, 100 S.E.2d 760 (1957), appeal dismissed, 357 U.S. 218 (1958): "The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision." See, also, Kellam v. School Board of the City of Norfolk, 202 Va. 252, 254, 117 S.E.2d 96 (1960): "School boards...constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other."

Howard clearly is distinguishable from the present situation involving a valid zoning ordinance which specifically permits property to be devoted to school uses in certain districts, under certain, presumably reasonable, conditions. Moreover, I do not believe it to be indispensable to the discharge of a school board's duty to supervise the schools that it retain discretion to ignore the local zoning ordinance in the use of its property.

The court noted that "the ordinance of the County does not take away, impair, or amend the right of the City to establish its jail beyond the limits of the City. The City may establish its jail or jail farm in the district of the County within which such institutions are permissible, or it may follow the procedure prescribed in the ordinance of the County, and request an amendment of the ordinance to permit the use of its land for the desired purpose. From arbitrary or unreasonable action by zoning officers of the County, it may apply for judicial review." 199 Va. at 686-687.

See, also, 1976-1977 Report of the Attorney General at 237, holding that § 15.1-456, which requires planning...
commission and governing body review and approval of public school sites as being in conformity with the local comprehensive plan, is not an infringement upon the powers and duties of a local school board.

SEAL OF VIRGINIA. UNAUTHORIZED USE BY PRIVATE ORGANIZATION.

September 3, 1982

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

This is in reply to your letter of August 25, 1982, requesting an Opinion whether a private organization may use a facsimile of the State seal on its membership application blanks and/or letterhead stationery.

Section 7.1-31.1 of the Code of Virginia provides in part:

"The seals of the Commonwealth shall be deemed the property of the State; and no persons shall exhibit, display or in any manner utilize the seals or any facsimile or representation of the seals of the Commonwealth for nongovernmental purposes unless such use is specifically authorized by law."

Unless the private organization will be using the facsimile for a governmental purpose or for a purpose specifically authorized by law, I am of the opinion that such private organization may not lawfully use the facsimile of the State seal on its membership applications or letterhead stationery.

1This Office has held that police agents appointed pursuant to § 56-277.1 and private security guards may not inscribe the State seal on their badge of office. See 1971-1972 Report of the Attorney General at 303 and 360.

SHERIFFS, AUTHORITY, JAILS, FUNDING PROCEDURES, RESPONSIBILITY FOR CONTROL OF JAIL OPERATING COSTS RESTS ON LOCAL GOVERNING BODY UNDER STATE "BLOCK GRANT" FUNDING. SHERIFF'S AUTHORITY TO MANAGE JAIL OPERATIONS AND RESPONSIBILITY FOR OPERATION OF SHERIFF'S DEPARTMENT UNAFFECTED.

September 20, 1982

The Honorable Gary W. Waters
Sheriff of the City of Portsmouth

This is in reply to your recent letter inquiring of the effect of changes in State funding procedures for local jails
on the operation of your office. You ask whether the newly adopted "block grant" approach to jail funding gives the city administration a veto power over your fiscal decisions, particularly those involving staffing and wage and salary administration, or, alternatively, if you are the proper party to make such decisions regarding operation of the sheriff's department.

The 1982 session of the General Assembly repealed Title 53 of the Code of Virginia, relating to prisons and other methods of correction, and enacted Title 53.1 in its place. See Ch. 636, Acts of Assembly of 1982. The recodification brings together the Code sections relating to funding of local correctional facilities and programs into one article in which, among other things, the apportionment and manner of payment of State funds for jail operating costs are substantially revised. Formerly, the Commonwealth reimbursed localities monthly for the State's proportionate share of local expenditures for jail operations, based upon certified vouchers submitted by the local governing bodies to the Director of the Department of Corrections. Under the newly enacted Title 53.1, the Department of Corrections (the "Department") is to apportion among the local correctional facilities State funds appropriated for costs of confinement of persons in such facilities. From its pre-determined share each county or city receiving the funds is to pay the "reasonable operating costs" of its facility, determined in accordance with standards prescribed by the State Board of Corrections pursuant to § 53.1-68. The Department is to pay each local facility's apportionment of State funds in quarterly installments "to the responsible local governing body or fiscal agent of such facility..." which must use the funds only for the purpose of paying the expenses of confinement of persons in the local facility. The new statutes clearly place the responsibility for control of jail operating costs on the local government, subject to the Department's guidelines for determining "reasonable operating costs" and to evaluation and audit of the locality's records of receipts and disbursements of State funds by the Department and by the Auditor of Public Accounts, respectively, to determine that the funds were expended for the proper purpose.

The recodification rendered a number of changes in statutory references to the role of local sheriffs in operating the jails and to the relationships among the sheriff, the local governing body and the Department in approving certain jail expenses. However, the changes in fiscal procedures brought about by enactment of Title 53.1 relate only to the expenses of operating the local jails as formerly addressed in Title 53, not to the sheriff's authority to manage jail operations and supervise jail personnel. In any event, Title 53.1 does not govern operation of the sheriff's department or the personnel decisions made therein. Prior Opinions of this Office consistently have held that, absent specific statutory authority to the contrary, constitutional officers, including
sheriffs, have exclusive control over the personnel policies of their offices and are not subject to the jurisdiction of local governing bodies. The salaries and expenses of sheriffs' offices are fixed by the State Compensation Board and paid by the Commonwealth in accordance with the provisions of §§ 14.1-50 through 14.1-52 and 14.1-68 through 14.1-84, which, among other things, specify the local governing body's role in the process. These statutes and the rules and regulations of the State Compensation Board are controlling as to the fixing of salaries and expenses of the sheriff's office.

Thus, in answer to your inquiries, I am of the opinion that Title 53.1 places on local governing bodies the responsibility for determining "reasonable operating costs" of local jails to be paid out of State funds, within certain guidelines, but that this responsibility does not include supervision or control over wage and salary administration or other personnel actions within the sheriff's department. Such supervision and control remains the prerogative of the sheriff.

1Title 53.1 is based upon a report of the Virginia Code Commission, in which sections of Title 53 were rewritten and combined and new sections added as necessary, toward the ends of reorganizing the Title to reflect changes in the administration of correctional services and of eliminating archaic or redundant language and out-dated provisions. See Report of the Virginia Code Commission on Revision of Title 53 (Senate Doc. No. 19, 1982).
2See Art. 3, Ch. 3, Title 53.1.
4See § 53.1-84.
5See § 53.1-85.
6Section 53.1-86.
7Id.
8Former §§ 53-168 and 53-187, referring to sheriffs and sergeants as being keepers of the jails, were deleted, as were § 53-174, concerning a sheriff's responsibility for acts of the jailer, and § 53-185, concerning the sheriff's approval of expenditures for unusual medical, hospital or dental services. Former § 53-180, concerning purchase or rental of kitchen equipment, was recodified as § 53.1-89 and was modified by deletion of the requirement that the sheriff certify the need for such equipment to the local governing body and to the Director of the Department. But, see, § 53.1-126 (former § 53-175), which places responsibility on the sheriff for purchases of food, clothing and medicine, and § 53.1-88 (former § 53-178), relating to local governing body's examination of the sheriff's invoices and accounts and issuance of warrants for payment of such purchases, which in each case is a re-enactment of the former Code section.
essentially unchanged as to the relationship between sheriff and governing body.

9See, e.g., §53.1-68 ("the sheriff shall establish minimum performance standards and management practices to govern the employees for whom the sheriff is responsible") and §14.1-84 ("the sheriff shall have supervision and control of the jail and the custody of all prisoners confined therein, any other provisions of law, general, special or local to the contrary notwithstanding").

10See, e.g., 1978-1979 Report of the Attorney General at 27 (a board of supervisors of a county does not acquire complete jurisdiction over the personnel of a constitutional officer where the officer agrees to put his personnel under the county's pay plan), and at 56 (a constitutional officer is not subject to the control and jurisdiction of the local governing body, and a board of supervisors cannot appropriate less money for compensation and expenses of the officer than is set by the State Compensation Board); 1977-1978 Report of the Attorney General at 383 (board of supervisors has no authority to impose personnel policies upon sheriff's office except in matters spelled out by statute), and at 466 (constitutional officer is not under control and jurisdiction of the local governing body and is not subject to the county personnel system and administrative requirements for advertising vacant positions and hiring employees). See, also, §15.1-7.1 and 1975-1976 Report of the Attorney General at 49 (employees of constitutional officers are expressly exempted from the classification plan and uniform pay plan of a county, city or town).

11See, e.g., §§14.1-51, 14.1-52, 14.1-70, 14.1-77, 14.1-78 and 14.1-80. Note the last paragraph of §14.1-51: "In fixing, determining and recording the salaries of the full-time deputy sheriffs mentioned in §14.1-73.1:1, the Board shall act solely with reference to establishing an aggregate allowance for personal services to the respective sheriffs for such deputy sheriffs. The annual salary of each such full-time deputy sheriff shall be determined by the sheriff in whose service he is employed and shall be reported to the Compensation Board by the sheriff at the time he files his report for the allowance of the expenses of his office as provided in §14.1-50 and at any time thereafter when the sheriff effects a change in the salary or employs a new such deputy sheriff. Such salaries as determined by the respective sheriff...shall not in the aggregate exceed the aggregate allowance by the Compensation Board for personal services to the respective sheriffs for such deputy sheriffs."


13I am advised that the sheriff's role vis-a-vis the city administration in the budgeting process for jail expenses
varies with local practice and, at any rate, is not addressed specifically either in Title 53 or Title 53.1.

SHERIFFS. DEPUTIES. HOURS OF WORK. OVERTIME. COMPENSATION BOARD. SHERIFF DETERMINES HOURS OF WORK OF DEPUTIES, SUBJECT TO STATE COMPENSATION BOARD INSTRUCTIONS AS TO OVERTIME AND OVERTIME PAY.

October 5, 1982

The Honorable Russell B. Smith, III
Sheriff of the City of Clifton Forge

This is in reply to your recent letter in which you inquire as to how many hours per week a sheriff's deputy may be required to work without receiving overtime pay.

There is no statute of which I am aware that either specifies the number of hours to be included in a normal workweek for sheriff's deputies, or distinguishes overtime hours therefrom for pay purposes. Prior Opinions of this Office consistently have held that, absent specific statutory authority to the contrary, a sheriff has the sole responsibility regarding the personnel policies of his office. See, e.g., 1977-1978 Report of the Attorney General at 383; 1974-1975 Report of the Attorney General at 408; Opinion to the Honorable Gary W. Waters, Sheriff for the City of Portsmouth, dated September 20, 1982. This responsibility includes the sheriff's authority to prescribe working hours for his employees. See 1974-1975 Report of the Attorney General at 406 and 408.

The salaries to be paid a sheriff's deputies are fixed by the State Compensation Board in accordance with the provisions of §§ 14.1-50 through 14.1-52 and 14.1-68 through 14.1-84 of the Code of Virginia. Under § 14.1-51, the State Compensation Board may issue instructions as to whether overtime will be permitted and included within the salary levels fixed. See 1974-1975 Report of the Attorney General at 881 and 538. Thus, I am of the opinion that the sheriff has the discretion to determine the hours per week a deputy must work, subject to any applicable instructions as to overtime and overtime pay which may have been issued to the sheriff by the State Compensation Board. See Waters Opinion, supra.

Note that in that Opinion the question related to the sharing of costs of overtime pay which might arise under the 1974 amendments to the Fair Labor Standards Act (the "Act") which extended the Act's minimum wage and maximum hour provisions to employees of states and their political subdivisions. See 29 U.S.C.A. § 203. The validity of these amendments was examined in National League of Cities v. Usery, 426 U.S. 833 (1976), in which the United States
Supreme Court held that the Act's provisions could not be applied to state and local public employees working in traditional governmental functions, such as police protection. See 426 U.S. at 846 and 852.

SHERIFFS. FEES. § 14.1-111 SHOULD BE INTERPRETED TO APPLY ONE UNIFORM $5 FEE TO ALL CONVICTED CRIMINAL DEFENDANTS OF TERM.

October 13, 1982

The Honorable Paul C. Garrett, Clerk
Circuit Court for the City of Charlottesville

You have asked whether it is proper for you to charge a fee of ten dollars against the first convicted criminal defendant of a judicial term to pay the sheriff for executing a writ of venire facias, and a five dollar fee to subsequent convicted defendants of that term, by virtue of § 14.1-111 of the Code of Virginia. From the information you have provided, it is the practice in the city for the sheriff to execute the writ of venire facias by calling prospective jurors prior to every trial of a term, whether it be the first or a subsequent trial in the term. It is also my understanding that you presently assess a five dollar fee against all convicted criminal defendants.

The practice of taxing costs and expenses of criminal prosecutions against a convicted defendant is authorized by § 19.2-336, whereby the clerk is directed to make up a statement of all expenses incident to the prosecution of a convicted defendant. This Office has heretofore expressed the view that the expenses incurred in compensating jurors for their service are costs which are properly chargeable to a convicted defendant who sought a trial by jury. 1978-1979 Report of the Attorney General at 63. Similarly, any other statutory costs and expenses incurred by the State in prosecuting the defendant are properly chargeable against the convicted defendant if those costs and expenses can be directly attributed to that particular prosecution.

Section 14.1-111 provides in pertinent part as follows:

"The fees and allowances of sheriffs and criers in criminal cases coming before or pending in the circuit courts shall be as follows:

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For executing the first writ of venire facias at a term, ten dollars and five dollars for executing every other writ of venire facias at the same term, provided that when an officer goes out of his city or county to execute a writ of venire facias, he shall receive ten dollars for executing the writ, and his actual necessary expenses, to be set out in a sworn account to be approved by the court."
The foregoing quoted provision clearly allows the sheriff a fee of ten dollars for executing the first writ of venire facias at a term and five dollars for every other writ of venire facias at the same term. This is not to say, however, that the cost of executing the writ, together with the actual necessary expenses of the sheriff, is to be taxed against the first defendant who is convicted at that particular term. As indicated by § 19.2-336 and prior Opinions of this Office, the convicted defendant is to be charged only the expenses incident to the prosecution. I am advised that the practice in the clerk's offices varies greatly in taxing sheriffs' fees as a part of the criminal prosecution, due to the difficulty in determining how much, if any, of the sheriff's cost in executing the writ of venire facias is to be taxed against the individual defendant. The difficulty is attributable in part to the fact that summoning of juries is now performed in many instances by telephone or mail. Additionally, sheriffs now receive salaries for their services and allowances for the necessary expenses incurred in the performance of their duties as provided in § 14.1-73. Consequently, some clerks no longer tax sheriffs' fees as a part of the cost as provided in § 14.1-111.

Despite the difficulty of application, until such time as § 14.1-111 is repealed or modified by the General Assembly, I am of the opinion that the fees and allowances accruing in connection with any criminal matter should be collected by the clerk pursuant to § 14.1-69 and paid into the treasury of the county or city for which the sheriff is elected. If it can be determined with certainty that a particular convicted defendant was responsible for such cost in the prosecution of his case, the clerk should tax such cost against the defendant, including the fee for executing the writ of venire facias. The ten dollar fee would be applicable only if the convicted defendant is the first defendant tried at a term. A fee of five dollars would be applicable to any subsequent juries summoned during the term only if the particular defendant for whom the jury is summoned is convicted.

SHERIFFS. JAILS. MAGISTRATES. BOARD OF CORRECTIONS. PERSON MAY BE HELD IN LOCK-UP FOR NO LONGER THAN TWELVE HOURS AFTER MAGISTRATE OR OTHER LOCAL OFFICIAL ISSUES APPROPRIATE WARRANT OR ORDER.

October 4, 1982

The Honorable Clay Hester
Sheriff of the City of Newport News

This is in reply to your recent letter requesting my opinion regarding the custody and care of persons under arrest. You first asked whether a prisoner may be held in a "holding cell" without a magistrate's committal. The procedures in connection with warrantless arrests are governed by § 19.2-82 of the Code of Virginia, which provides
that "a person arrested without a warrant shall be brought forthwith before a magistrate or other issuing authority having jurisdiction...." (Emphasis added.) Blacks Law Dictionary defines "forthwith" as "[i]mmediately; without delay; directly; within a reasonable time under the circumstances of the case...." Blacks Law Dictionary 588 (5th ed. 1979). Therefore, it is my opinion that, absent extraordinary circumstances, an individual may not be incarcerated in a jail or a "holding cell" without an appropriate warrant or order issued unless arrangements have been made to cause the prisoner to be brought forthwith before the magistrate.

In addition, you have asked if a prisoner can be held in a "holding cell" after a magistrate's committal has been issued, and if so, for how long. The question is governed by § 53.1-1 which provides that prisoners may be held in "lock-ups" for a period not to exceed twelve hours. For a facility to qualify as a "lock-up," it must meet the minimum standards established by the Board of Corrections pursuant to § 53.1-68. Therefore, it is my opinion that if the "holding cell" meets the State Board of Corrections' minimum standards for a "lock-up," then a prisoner may be held in such a cell for a period not to exceed twelve hours after the issuance of a magistrate's warrant.

You further ask if § 54-325.2,1 granting certain officials authority to authorize emergency medical treatment for minors, pertains to sheriffs with jails in which juveniles are incarcerated, and if so, whether such authorization can be verbal. Additionally, you ask whether the sheriff can delegate said power.

It is evident from the wording of § 54-325.2(A)(5), that the section would apply to the sheriff of a jail certified for juveniles, and there is no requirement in this section that said authorization be written. Further, the statute provides that the authority is "commensurate with that of a parent in like cases...." There is no requirement that parental consent for medical treatment be written; therefore, it is my opinion that the consent may be oral.

Section 54-325.2(A)(5) specifically states that the consent will be given by the "principal executive officer," which in the case of a jail would be the sheriff. It is significant that in the same section, § 54-325.2(A)(2) refers to the "local superintendents of public welfare or social services or their designees...." (Emphasis added.) Therefore, because of the absence of similar language in § 54-325.2(A)(5), it must be concluded that the legislature intended that the principal executive officer must personally consent to said treatment.

Finally, you have asked whether § 54-325.2 would apply to emergency psychiatric services. The authority is to give consent to "surgical or medical treatment." Because there is no limiting language attached thereto, it is my opinion that
"medical treatment" would encompass all services, including psychiatric, performed by or supervised by a licensed physician.

Section 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...."

SHERIFFS. TRANSPORTATION OF VOLUNTARY ADMISSIONS TO MENTAL HOSPITAL. WHEN REQUIRED UNDER § 37.1-71.

August 11, 1982

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

You have asked whether a sheriff may refuse to transport a person seeking voluntary admission to a State mental hospital under § 37.1-65 of the Code of Virginia, in light of the language in § 37.1-71 which mandates a sheriff to transport such a person in specific situations. You have asked this in view of paragraph one of my Opinion to the Honorable Gary W. Waters, Sheriff of the City of Portsmouth, dated July 21, 1982, in which I stated that § 37.1-78 authorizes the sheriff, upon request of a hospital director, to convey to the hospital any person who resides in his jurisdiction and who has applied for admission under § 37.1-65, but does not require him to do so.

It is a principle of statutory construction that where two statutes are in apparent conflict, they should be construed, if reasonably possible, so as to allow both to stand and to give force and effect to each. Board of Supervisors of Albemarle County v. Marshall, 215 Va.
With this principle in mind, § 37.1-78 may be construed to pertain to an individual's application for a voluntary admission under § 37.1-65, which is made to the director of a hospital and authorizes attendants to transport those persons to the hospital at the request of the director. If such transportation is impracticable, the director may request the sheriff to convey the person to the hospital, but the statute does not require him to do so. See 1976-1977 Report of the Attorney General at 260.

Section 37.1-71, on the other hand, provides in pertinent part:

"When a person has applied or has been certified for admission to a hospital under § 37.1-65 or §§ 37.1-67.1 through 37.1-67.4, such person may be delivered to the care of the sheriff of the county or city who shall forthwith on the same day deliver such person to the proper hospital or the patient may be sent for by the director...."

There is a clear distinction between an individual's application for a voluntary admission to a hospital director and one in which the person is confronted with involuntary commitment procedures under § 37.1-67.1 and subsequently requests or accepts voluntary admission and treatment pursuant to § 37.1-67.2. This distinction is reinforced by the language in § 37.1-71 pertaining to "delivery" of the person to the sheriff. Section 37.1-67.2, which requires the judge to inform the person of his right to seek voluntary admission and treatment under § 37.1-65, also specifically provides that the person is subject to the transportation provisions of § 37.1-71.

I am, therefore, of the opinion that § 37.1-71 pertains to situations where a person faced with involuntary commitment pursuant to a court proceeding applies for voluntary admission and treatment pursuant to § 37.1-67.2. In such cases, the sheriff is required to provide transportation to the hospital. When the person makes direct application to the director for admission to the hospital under § 37.1-65, however, the sheriff may refuse to provide the transportation.

SHERIFFS. TRANSPORTATION OF VOLUNTARY OR INVOLUNTARY ADMISSIONS TO MENTAL HOSPITAL. WHEN AUTHORIZED OR REQUIRED. MAY USE AMBULANCE.

July 21, 1982

The Honorable Gary W. Waters
Sheriff of the City of Portsmouth
You have asked for my opinion on several matters concerning mental patients. I shall answer your questions in the order in which they were asked.

1. "My question is whether the Sheriff is required to provide transportation for the voluntary commitment? Also if the Sheriff provides such transportation and the patient changes his mind, is he free to leave?"

Section 37.1-78 of the Code of Virginia provides that the director of a hospital may send an attendant to convey to the hospital any person who has applied for voluntary admission under § 37.1-65. When impracticable, however, the director may request the sheriff of the county or city in which the person resides to convey the person to the hospital. This Office has opined that § 37.1-78 authorizes the sheriff, upon request of the director, to convey any person who resides within his jurisdiction to the hospital, but does not require the sheriff to do so. See 1976-1977 Report of the Attorney General at 260.

A person who applies for admission under § 37.1-65 does so voluntarily. Accordingly, he is free to change his mind. If such a person does change his mind, he should be allowed to leave. In the event that the subject of a voluntary commitment changes his mind and refuses to go to the hospital, I suggest that the sheriff notify the hospital that the person will not be delivered and that the sheriff also notify the community services board or community mental health clinic in the event that commitment proceedings may be necessary.

2. "What authority requires the Sheriff to transport patients that have been committed or, are [to be evaluated at a commitment hearing]...."

Section 37.1-71 provides that once a person has been committed under § 37.1-67.3 and delivered to the care of the sheriff, the sheriff "shall forthwith on the same day deliver such person to the proper hospital...." This Office has ruled that § 37.1-71 requires the sheriff to transport patients that have been committed. See 1976-1977 Report of the Attorney General at 260. Section 37.1-67.1 provides in pertinent part that a judge or magistrate may:

"issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before the judge and, if such person cannot be conveniently brought before the judge, may issue an order of temporary detention...."

This Office has ruled that a sheriff is required to execute such an order of temporary detention. See 1979-1980 Report of the Attorney General at 314.
3. "To what extent may force be used, if any, to detain these people if they should decide to leave the court of the place of evaluation?"

A sheriff may use such reasonable force as is necessary to ensure the continued presence of a person subject to a commitment hearing. What force is reasonable will be dependent upon the particular circumstances of each case.

4. "While awaiting to be heard, can they be incarcerated in any manner, i.e. held in a witness room, holding cell, etc."

Section 37.1-74 provides as follows:

"In no case shall any sheriff or jailer confine any mentally ill person in a cell or room with prisoners charged with or convicted of crime."

This Office has ruled that such prohibition applies both prior to and subsequent to the commitment hearing. See 1971-1972 Report of the Attorney General at 264. As long as the sheriff does not violate § 37.1-74, he may restrict a person awaiting a hearing to a room as reasonably necessary to ensure the person's presence at the hearing. Additionally, this Office has ruled that § 37.1-67.1 permits the sheriff to detain a person in jail pending a hearing only when there is no other convenient and willing institution available and the judge has specifically authorized such a placement pursuant to regulations promulgated by the State Mental Health and Mental Retardation Board. See 1980-1981 Report of the Attorney General at 244.

5. "Can a member of the patient's family be transported with the patient to the hospital?"

I am not aware of any provision of State law which would prohibit you from allowing a family member to accompany the person to be transported to a hospital. It would be advisable, however, because the person to be transported has been found to be mentally ill, to consult with the judge who ordered the commitment or the psychiatrist who testified at the hearing in order to determine what effect the presence of the family member might have on the mental stability or behavior of the individual.

6. "What is the liability status when transporting a mental patient? If same is too sick to remain seated, should an ambulance be utilized?"

When transporting a mental patient, a sheriff is liable to the same extent that he is liable when lawfully transporting any other person. If the patient is so sick that he cannot remain seated or otherwise be transported safely in an ordinary passenger vehicle, it would be appropriate to use an ambulance or similar vehicle.
7. "Does the above also apply to admission for alcoholism?"

Section 37.1-1(15) defines the term "mentally ill," for the purposes of Ch. 2 of Title 37.1, which covers admission, commitment and transportation of the mentally ill, to include "any person who is a drug addict or alcoholic." Accordingly, all of the opinions expressed above apply to a person who is admitted or committed because of alcoholism.

8. "Is there a provision for funding for transportation, and other direct expenses for this service?"

Provisions to reimburse a sheriff for his expenses incurred pursuant to his duties are provided in Title 37.1. If a sheriff, at the request of a hospital director, conveys a voluntary patient to the hospital, § 37.1-78 authorizes the sheriff to receive "his necessary expenses" and requires the Department of Mental Health and Mental Retardation to pay those expenses. If a sheriff transports a person certified for admission under §§ 37.1-67.1 through 37.1-67.4, § 37.1-71 provides that the cost of care and transportation for such person "shall be paid from the State treasury from the same funds as for care in jail...." Accordingly, the sheriff would seek reimbursement in the same manner by which he now obtains reimbursement for the care of prisoners under Title 53.

SociAL SERVICES, DEPARTMENT OF. § 63.1-287(8) ALLOWS DEPARTMENT TO INTERCEDE ON BEHALF OF OBLIGEE TO COLLECT SUPPORT MONEY.

March 31, 1983

The Honorable F. Thompson Wheeler, II, Chief Judge
Juvenile and Domestic Relations District Court
for the City of Newport News

You have asked under what authority the Division of Support Enforcement Program of the Virginia Department of Social Services may intercede on behalf of an obligee, not a welfare recipient, to collect money from an obligor under an order to pay child support. You have also asked whether the exercise of such authority would constitute the unauthorized practice of law.

The statutory authority for interceding in such cases is § 63.1-287(8) of the Code of Virginia, which provides, in part, that the Virginia Department of Social Services shall "[p]rovide its services of support collection and paternity determination to any individual who is ineligible for such services as a recipient of public assistance." (Emphasis added.) This section also provides that a fee for such services shall be assessed pursuant to a fee schedule adopted by the State Board of Social Services (the "Board").
Furthermore, regulations of the Board, adopted pursuant to authority granted to it by § 63.1-287, provide that such an applicant must execute an assignment of all rights to support to the Virginia Department of Social Services, Division of Support Enforcement Program, which then pursues such support through appropriate legal proceedings.

This is not to say, of course, that non-lawyer employees may engage in the practice of law. Employees of the Division of Support Enforcement Program appearing in courtroom proceedings which involve support matters have no greater authority than any other non-lawyer to engage in the practice of law. See § 54-42. The mere appearance of these employees in courtroom proceedings does not constitute the unauthorized practice of law. See 1980-1981 Report of the Attorney General at 273. The foregoing Opinion clearly delineates the areas in which the employees may or may not act.

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 of the employees 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.

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

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(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).

Additionally, the Court has adopted Rule 3D:5, which became effective October 1, 1982, expressly authorizing non-lawyers to appear and request judgment on behalf of a plaintiff. See 1981-1982 Report of Attorney General at 24 (interpreting Rule 3D:5 prior to revision) and Opinion to the Honorable William R. Shelton, Chief Judge, Twelfth Judicial District, dated August 26, 1982, which followed the revision.

In view of the foregoing, it appears that the General Assembly and the Court have authorized employees of the
Department of Social Services to act on behalf of others, so long as they do not go beyond the limits expressly reserved for lawyers. The Manual of Policy and Procedure of the Division of Support Enforcement defines the limitations.

I am of the opinion, therefore, that the provisions of § 63.1-287(8) allow the Division of Support Enforcement Program of the Virginia Department of Social Services to pursue child support on behalf of individuals, whether or not recipients of public assistance, by acts which would not constitute the unauthorized practice of law.

Section 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.

The 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.

Of 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, supra. These activities which constitute the practice of law are not analogous to the situation which you describe, however.

Section E of Chapter 1 of the Manual contains that practice of law without a license is a misdemeanor and among the activities which constitute the practice of law are preparation or filing of legal briefs or pleadings, examination of witnesses, and presentation of legal conclusions.

SOIL CONSERVATION. SOIL EROSION AND SEDIMENT CONTROL. COUNTY ADOPTING ORDINANCE PRIOR TO JULY 1, 1975, IS RESPONSIBLE FOR ENFORCING STATE MINIMUM STANDARDS AND GUIDELINES.

August 25, 1982

The Honorable James E. Buchholtz
County Attorney for the County of Roanoke

In your letter of August 10, 1982, you asked whether Roanoke County is responsible for enforcement of the State soil erosion and sediment control program pursuant to § 21-89.5 of the Code of Virginia, in view of the fact that
the county's soil erosion and sediment control ordinance did not become effective until June 10, 1976.

Virginia's Erosion and Sediment Control Law (Art. 6.1, Title 21) was enacted in 1973. Section 21-89.4 required the Soil and Water Conservation Commission to establish minimum standards and guidelines for "the effective control of soil erosion, sediment deposition and nonagricultural runoff which must be met in any control program." Soil and water conservation districts were required to develop and adopt a soil erosion and sediment control program consistent with the State guidelines within eighteen months after the adoption of the State guidelines. See § 21-89.5(a). In those areas where there was no district, localities were required to adopt soil erosion and sediment control programs and exercise the responsibilities of a district with respect thereto. See § 21-89.5(b). Additionally, § 21-89.5(c) provides:

"Any county, city, or town that, prior to July one, nineteen hundred seventy-five, has adopted its own erosion and sediment control program which has been approved by the Commission shall be treated under this article as a county, city, or town which lies in an area where there is no district, whether or not such district in fact exists." (Emphasis added.)

Accordingly, any county, city, or town that adopted such a program under § 21-89.5(c) assumed responsibility for enforcement of the program to the same extent as a district under § 21-89.5(a) and a county, city, or town under § 21-89.5(b).

Although Roanoke County's ordinance did not become effective until June 10, 1976, I am advised that it was adopted on June 10, 1975, and approved by the Soil and Water Conservation Commission on June 27, 1975. Because the county's ordinance was adopted and approved within the time limits authorized by § 21-89.5(c), it is my opinion that Roanoke County is responsible for enforcing the State minimum standards and guidelines as reflected in its ordinance and that the Soil and Water Conservation Commission must therefore treat Roanoke County as a county lying in an area where there is no district.

1 Section 15.1-504 expressly authorizes the governing body of a county to fix an effective date for an ordinance different from the date of adoption.

2 See correspondence between Edward A. Natt, County Attorney, and Joseph B. Willson, Jr., Director, Virginia Soil and Water Conservation Commission, dated June 11, 1975 and June 27, 1975.
STATE EMPLOYEES. LABOR AND INDUSTRY, DEPARTMENT OF.

OCCUPATIONAL SAFETY REPRESENTATIVES' JOB DESCRIPTION DOES NOT

BY ITSELF QUALIFY THESE EMPLOYEES FOR EXCEPTION FROM MONTHLY

CHARGE FOR STATE VEHICLES DRIVEN HOME.

September 1, 1982

The Honorable Joseph A. Johnson
Member, House of Delegates

You have inquired whether the job descriptions for occupational safety representatives in the Department of Labor and Industry qualify these employees for exemption from the monthly charge for permanently assigned State vehicles as provided in Ch. 648, Acts of Assembly of 1982 (the Appropriations Act) at § 4-5.06(c)(2). That section provides in part:

"Employees using permanently assigned vehicles to and from the places of official employment and home shall be required to pay at least $40 per month in accordance with uniform regulations issued by the Governor setting forth mileage charges to all agencies; vehicles assigned for emergency purposes to respond to public safety and life-threatening situations are excluded from this directive." (Emphasis added.)

Executive Order 49 (81) assigns to the Central Garage Car Pool Committee the duty to "[e]stablish and enforce specific criteria for the permanent assignment of vehicles applicable to individual users...." Car pool form CP-3 promulgated by the Central Garage Car Pool Committee is the application for assignment of passenger vehicles. This form requires detailed information including the place the vehicle will be stored at night and "[a] brief description of the duties of [the] employee and specific reasons why the assignment of a pool vehicle is considered necessary."

In any particular case, the determination of the car pool committee would be entitled to a presumption of regularity in the light of the experience and specialized competence of the committee. In reviewing such a determination, the issues would be whether the committee could reasonably have found as it did, and whether the result reached by the committee could reasonably be said to be within the scope of legal authority of the agency. In short, the committee determination would have to be upheld unless it were plainly wrong.

The job description of occupational safety representatives provides that these employees are to "investigate fatalities and catastrophes." Standing alone, this description comports with the requirement that the vehicle be assigned "for emergency purposes to respond to public safety and life-threatening situations." However, I am advised that such investigations comprise only a minor part of the duties of these representatives. I am further
advised that occupational safety representatives are called out at night or on weekends to respond to public safety and life-threatening emergencies on an average of only once a year. Based on the factual determination by the car pool committee I am of the opinion that vehicles assigned to these representatives were not "assigned for emergency purposes," despite the implication to the contrary in the job description.¹

¹I note that occupational safety representatives might be excluded from the monthly charge if they did not drive the permanently assigned vehicle "to and from the place of official employment and home." The car pool committee has interpreted this requirement as excluding employees who do not report to an official place of employment more than one or two days a week. I am not advised whether the employees in question come within that factual situation.

STATE EMPLOYEES. PHYSICALLY HANDICAPPED. REDUCTION IN FORCE. STATE DISABLED VETERAN OUTREACH SPECIALISTS ENTITLED TO SPECIAL VETERANS' BENEFITS IN REDUCTION IN FORCE INCLUDING GREATER DISPLACEMENT RIGHTS.

September 14, 1982

The Honorable Ralph G. Cantrell, Commissioner
Virginia Employment Commission

You ask whether the Virginia Employment Commission ("VEC"), when processing a reduction in force ("RIF"), is required by federal law to depart from the State's RIF policy with regard to those workers who are assigned to the Disabled Veteran's Outreach Program ("DVOP") (38 U.S.C. § 2003A). Specifically, you ask whether federal law requires that DVOP workers be granted special, categorized preferences in their displacement rights, and, if so, whether these preferences grant DVOP workers displacement rights, not just in their organizational unit as would be required under the State's RIF policy, but also within the workers' "geographic area."¹ In addition, you ask whether this federally mandated change to the State RIF policy is required to be implemented immediately although the VEC has received only informal federal guidance as to the manner in which the federal program's "preferential appointment" system is to be implemented by a state contemplating a RIF program.

In 1980, Congress established a permanent, federally funded, DVOP to be administered by the states, the purpose of which is to meet the employment needs of veterans, and especially disabled veterans of the Vietnam era. 38 U.S.C. § 2003A(a)(1). The DVOP is to be staffed by "specialists" in employment problems of veterans. Appointment to these specialist positions must be made in accordance with a three-tiered system of preferential hiring. This system
ranks those persons eligible to be appointed a DVOP specialist into category one (most preferential) which includes disabled veterans of the Vietnam era; category two which includes any disabled veteran; and category three which includes any veteran. Additionally, a veteran of equal category but greater state seniority would be ranked ahead of a veteran of equal category but less state seniority.

Because the federal statute explicitly establishes the preferences to be used in appointing specialists, any reductions in force of the specialists must be carried out in accordance with the federally mandated preferences. See Senate Report 746, 96th Congress 2d Session at 103. Your question whether it is necessary to depart from the State RIF policy in order to implement the DVOP system of preferential appointments must therefore be answered in the affirmative. Article VI of the Constitution of the United States, the Supremacy Clause, requires that the laws of the United States shall be the supreme law of the land. As such, the Constitution preempts the effect of state law or policy where such laws are in conflict with federal law. Consideration must then be given to what degree of departure is required in order to comply with federal law.

A reduction in force for the DVOP which is in accordance with the system of preferential appointments must be given full effect before the State RIF policy may be applied. It is, therefore, necessary to grant affected employees an opportunity to displace lower category veterans in their "geographic area" as well as in their organizational unit. This additional privilege is mandated by the statute's command that no lower category veteran shall be appointed unless the Secretary finds that a higher category veteran "is not available." 38 U.S.C. § 2003A. Availability is dependent upon the employee's residence being within a reasonable commuting distance from the job site. "Reasonable commuting distance" is the recognized definition of the term "geographic area" (see footnote 1), and it follows that displacement for DVOP employees must be offered on that basis, if placement in the organizational unit is not available.

Your last question was whether the RIF should be implemented even though you have thus far received only informal guidelines from the federal government on the manner in which the federal program's "preferential appointment" system is to be implemented by a state contemplating a RIF program. This question is also answered in the affirmative. You have indicated that you expect no substantive change in the guidelines. Further, as indicated previously, both the applicable legislation and legislative history support the informal guidance, and, in order that Congressional policy not be frustrated by conflicting state law, any RIF action affecting the DVOP must be in accordance with the preferences established by Congress.
The Commonwealth's RIF policy grants an employee with "displacement rights" standing to displace or "bump" the least senior employee in the same job classification statewide.

Organizational Unit: "That finite group of positions located at the office or in some cases at a sub-office thereof, all of which are devoted to the same or related substantive functions as may from time-to-time be designated by the affected agency."

Geographic Area: "The normal, reasonable commuting area to the organizational unit affected as determined by traditional or current commuting patterns for the labor market... such distance not generally to exceed two (2) hours travel time round trip by reasonably available public or private transportation."

VEC RIF policy as approved by the Virginia Department of Personnel and Training.

The statute provides: "Each such specialist shall be a veteran. Preference shall be given in the appointment of such specialists to disabled veterans of the Vietnam era. If the Secretary [of Labor] finds that a disabled veteran of the Vietnam era is not available for any such appointment, preference for such appointment shall be given to other disabled veterans. If the Secretary finds that no disabled veteran is available for such appointment, such appointment may be given to any veteran...." 38 U.S.C. § 2003A.

February 7, 1983

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

This is in response to your recent letter in which you ask a question concerning compliance with §§ 11-24 and 11-25 of the Code of Virginia which control certain burial contracts.

Section 11-24 provides that it is unlawful to make "an agreement for the sale of personal property to be used in connection with the final disposition of a dead human body, or for the furnishing of professional services of a funeral director... wherein the personal property is not to be delivered or the services are not to be rendered until the occurrence of the death of the person for whose funeral, burial or other disposition such property or services are to be furnished..." unless several stated conditions are met. The fourth condition specified is that all monies paid pursuant to such an agreement must be deposited in the manner provided in § 11-25 until the obligations of the agreement are fulfilled according to its terms, or a refund is made.
Section 11-25 provides that any money paid pursuant to an agreement described in §11-24 shall be deposited in a special account in a financial institution in the name of the funeral home "for the person making the payment...and designating the person who is the subject of such contract."

In light of these provisions, you inquire whether a funeral home entering into such "pre-need funeral" contract may satisfy the requirements of §§ 11-24 and 11-25 by delivering a casket, clothing, and vault at the time of contract and depositing, in accordance with §11-25, only the amount of funds to be used for payment of the embalming and other services and items to be furnished in the future. In the example which you gave, approximately fifty-five percent of the amount of the total contract for a "pre-need funeral" was attributable to the casket, clothing and vault. If the answer to your question is in the affirmative, then the funeral home would be free to use that portion of the money attributable to the items so delivered at the time of contract in any manner of its own choosing and it would be required to deposit only the remainder.

The Code sections require that money paid in anticipation of receipt of personal property or services related to a funeral be held on deposit for the benefit of the payor until such time as the goods or services are delivered. In this regard, it is significant that §11-24 refers to "personal property" and "services" in the disjunctive. Accordingly, if a funeral home delivers personal property at the time of making a "pre-need funeral" contract, then, in my opinion, the funeral home is free to use that portion of the money attributable to the delivered goods in the manner of its choosing. The funeral home would, of course, be subject to the deposit requirements of §11-25 for that portion of the money attributable to goods or services not yet delivered.

STATUTES. IMPLIED REPEAL. ACTS SIGNED BY GOVERNOR ON SAME DAY.

July 13, 1982

The Honorable Frank L. Benser
County Attorney for Caroline County

You ask what effect is to be given to the two amendments to §58-769.8 of the Code of Virginia enacted in the 1980 session of the General Assembly. You ask if Caroline County may continue to collect a $10 fee on each annual revalidation of a land use assessment. If not, you ask whether the term "original application fee" in §58-769.8 refers to the application fee charged when the particular applicant entered the land use assessment program or the fee currently charged for initial applications at the time revalidation is sought.
Both Ch. 493 and Ch. 508, Acts of Assembly of 1980 amended and reenacted § 58-769.8. Each Act added language not contained in the other, and neither Act repeated the new language added by the other. Chapter 493, in pertinent part, added the following language to § 58-769.8: "[e]ach locality which has adopted an ordinance hereunder may provide for the imposition of a revalidation fee every sixth year. Such fee shall not exceed the original application fee." This language was not repeated in Ch. 508, and you ask whether the adoption of Ch. 508, amending and reenacting § 58-769.8 without restating the amendments contained in Ch. 493, constituted a repeal of Ch. 493.

Both Acts (Ch. 493 and Ch. 508) were approved by the Governor on April 1, 1980. When two Bills are signed by the Governor on the same day, they are to be regarded as having become "Acts" simultaneously. Mahoney v. Commonwealth, 162 Va. 846, 174 S.E. 817 (1934). Where there is no clear, necessary, positive, unavoidable, and irreconcilable conflict between two Acts, both Acts should be given force and effect. City of South Norfolk v. City of Norfolk, 190 Va. 591, 602, 58 S.E.2d 32, 37 (1950). Here, both Ch. 493 and Ch. 508 may be given effect without creating any irreconcilable conflict or repugnancy in § 58-769.8, as both Acts amended different parts of that section. Therefore, the adoption of Ch. 508, without restating the amendments contained in Ch. 493, did not constitute a repeal of Ch. 493. Accordingly, revalidation fees, not to exceed the original application fee, may only be imposed every sixth year. I am, therefore, of the opinion that Caroline County may not impose a revalidation fee of $10 each year.

You next ask whether the term "original application fee" refers to the application fee initially paid by a particular applicant or whether it refers to the current application fee in force for new applications. The last sentence of the first paragraph of § 58-769.8 states only that "[a]n application fee may be required to accompany all such applications." There is no limitation on a locality's authority to change or increase the initial application fee, and I conclude that none exists except for the rule of reasonableness. Id. I am advised that the Department of Taxation, which assists localities in the administration of the land use taxation laws, interprets the term "original application fee" to mean the fee imposed for applications in the year in which revalidation is sought. While such administrative interpretation is entitled to great weight, it does not control when the statutory language dictates a contrary interpretation.

Although "original application fee" is susceptible to two interpretations, I am of the opinion that the statute refers to the application of the owner of the particular parcel involved, not to the fee applicable to applications in general for a particular year. The latter interpretation would require reading into the statute the words "currently charged" preceding "original application fee." Had the
General Assembly so intended, it would not have used the word "original." Of the two possible interpretations, only the former gives the term a sensible meaning. Chesapeake and Ohio Railway Co. v. Hewin, 152 Va. 649, 654, 148 S.E. 794, 795 (1929); Commonwealth v. Armour & Co., 118 Va. 242, 254, 87 S.E. 610, 615 (1916), aff'd 246 U.S. 1 (1918). Consequently, I conclude that the revalidation fee which may be charged in any given year may not exceed the original application fee paid by the applicant when first applying for the special land use assessment.

1Prior to this 1980 amendment, localities were not authorized to charge a fee for the revalidation of an application for land use taxation. See Report of the Attorney General (1977-1978) at 423.

2Chapter 508 added § 58-769.8:1, which relates to removal of parcels from the program, and amended § 58-769.8 only for the purpose of making reference to § 58-769.8:1.

3No information as to the cost factors justifying the amount of the proposed application fee has been provided to this Office, and no opinion as to its reasonableness is expressed. See Johnson v. County of Goochland, 206 Va. 235, 142 S.E.2d 501 (1965); City of Charlottesville v. Marks' Shows, 179 Va. 321, 18 S.E.2d 890 (1942).

STATUTES. STATUTES DEALING WITH WORK EXPERIENCE PROGRAMS AND COMMUNITY WORK EXPERIENCE PROGRAMS CONSTRUED IN PARI MATERIA.

September 27, 1982

The Honorable William L. Lukhard, Commissioner
Virginia Department of Social Services

You have asked whether the language of § 63.1-133.12:1 of the Code of Virginia, which requires that the Department of Social Services "establish and operate no later than January 1, 1983, a program of employment opportunities [for recipients] to include a work experience program component," refers to the type of community work experience program provided for in § 63.1-133.16, et seq., and in Title IV of the federal Social Security Act (the "Act"). If so, you have then asked if recipients in a locality who are not otherwise exempt would be required to participate in the work experience component of that locality's employment opportunities program, assuming that State and/or federal funds are available.

Chapter 192, Acts of Assembly of 1982, effective July 1, 1982, added § 63.1-133.12:1. That section, which requires an employment opportunities program in each local department of welfare or social services with a work experience program component, is in Ch. 6.2 of Title 63.1 of the Code. Chapter 6.3 of Title 63.1, starting at § 63.1-133.16, et seq., provides for a community work experience program on a
demonstration basis. Title IV of the Act and, in particular, § 409 of that Act, 42 U.S.C. § 609, also provides for a community work experience program. Your initial inquiry, therefore, is whether the term work experience program component, as provided in § 63.1-133.12:1, is referring to the community work experience programs provided for in §§ 63.1-133.16, et seq., and 42 U.S.C. § 609.

The words "work experience" as found in § 63.1-133.12:1, are also used in §§ 63.1-133.16, 1 et seq., to define a community work experience program and to explain the requirements for such a program. The federal statutory basis for a community work experience program, contains almost identical language to that found in §§ 63.1-133.16, et seq., and most of the same references to the words "work experience" are contained therein. 2

It is a basic rule of statutory construction that when construing statutes on the same subject matter in pari materia, the statutes should be harmonized if possible. See 1974-1975 Report of the Attorney General at 219. In addition, weight must be given to the object of the statute and the purpose to be accomplished, and a reasonable construction of the statute must be made so that the purpose of the statute is not limited or defeated, but instead is promoted. Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961). Based on the above, it is reasonable to conclude that the provisions of § 63.1-133.12:1, requiring a work experience program component, were referring to the community work experience program provided for in §§ 63.1-133.16, et seq., and in Title IV of the Act.

You next ask if recipients not otherwise exempt would be required to participate in the work experience component. Section 63.1-133.23 states in part that "[t]o the extent permitted by federal law, recipients of public assistance referred by the Department [of Social Services] to a community work experience program shall, as a condition of receiving public assistance, participate in such program..." Such federal permission is found in 42 U.S.C. § 609(b)(1) which states "[e]ach recipient of aid under the plan who is registered under section 602(a)(19)(A) of this title shall participate...in a community work experience program..." (Emphasis added.)

I, therefore, am of the opinion that the language in § 63.1-133.12:1, which requires a "work experience program component" is referring to the community work experience program provided in Ch. 6.3 of Title 63.1 and in Title IV of the Act, 42 U.S.C. § 609, and that a recipient not otherwise exempt would be required to participate in the work experience component, assuming State and/or federal funds are available.
1See § 63.1-133.20, which defines a community work experience program as a program to provide "work experience and training for individuals..."; § 63.1-133.27, which states that the employment objective of community work experience programs is to provide for "development of employability through actual work experience and training..."; § 63.1-133.22 which states that prior training, experience and skills of a recipient shall be utilized in making appropriate work experience assignments..."; and § 63.1-133.25(6) which discusses the hours an individual can "be required to participate in work experience programs...." (Emphasis added.)

242 U.S.C. § 609. Community work experience programs. (a)(1) "Any State which chooses to do so may establish a community work experience program in accordance with this section. The purpose of the community work experience program is to provide experience and training for individuals not otherwise able to obtain employment, in order to assist them to move into regular employment. Community work experience programs shall be designed to improve the employability of participants through actual work experience and training and to enable individuals employed under community work experience programs to move promptly into regular public or private employment...To the extent possible, the prior training, experience, and skills of a recipient shall be utilized in making appropriate work experience assignments...." (Emphasis added.)

STATUTES. WHEN EFFECTIVE. STATUTE SPEAKS AS OF TIME IT TAKES EFFECT.

October 18, 1982

The Honorable Colonel D. M. Slane, Superintendent
Department of State Police

This is in response to your letter inquiring about the effects of Ch. 613, Acts of Assembly of 1977 (the "Act"), on a possible personnel reorganization within the Department of State Police (the "Department"). In pertinent part, the Act provided for the transfer of the office of Chief Arson Investigator as a division from the State Corporation Commission to the Department, including all employees and property applicable to that function. The Act was effective July 1, 1978. The Act also specified in part:

"7. That any employee transferred from one agency to another to support the changes in organization or responsibility resulting from or required by the provisions of this act shall not receive any decrease in salary. Any transferred employee whose present compensation is higher than that authorized by the Department of Personnel and Training for comparable positions shall not receive any salary increase except
those increases from which no class of employees is exempted until the employee's compensation becomes equivalent with the guidelines of the Department of Personnel and Training for persons in similar positions." (Emphasis added.)

You ask whether these requirements are still in force and effect and limit your ability to reorganize the Department and redistribute duties, with the result that some positions may be reallocated downward.

As a general rule, an act of the General Assembly speaks as of the time it takes effect. See School Board of Fairfax County v. Town of Herndon, 194 Va. 810, 75 S.E.2d 474 (1953). In this instance, the Act in question was enacted in 1977, to become effective July 1, 1978, and addressed the effect upon salaries of employees at the time of the transfer of the office of Chief Arson Investigator to the Department. While the Act prohibits any decrease in the salary of employees being transferred, there is no indication that the General Assembly intended to limit your right forever to manage the Department and to make future personnel decisions affecting the structure of the Department or the allocation of individual positions.

To read the Act as preventing any later reorganization of the Department with resulting changes in the salaries and duties of individual employees would be to produce a strained result. Moreover, the result would be inconsistent with the general State personnel requirements for the continuing review of the duties and responsibilities of all positions to assure that each is properly allocated. It is well settled that such statutory constructions are to be avoided. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

Accordingly, I am of the opinion that the above-referenced portions of the Act were intended to apply to the action of transferring the office of the Chief Arson Investigator to the Department and were not intended to limit your authority to reorganize the Department at some subsequent date, even if such reorganization would result in the redistribution of duties, or a reallocation of positions or responsibilities accompanied by a concomitant reduction in salary of the former employees of the office of the Chief Arson Investigator.

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1See Rule 5.7 of the Rules for the Administration of the Virginia Personnel Act.

SUBDIVIDED LAND SALES ACT. SUBDIVISION NOT COVERED WHERE LOTS NOT SOLD BY LAND SALES INSTALLMENT CONTRACT, PROPERTY OWNERS' ASSOCIATION NOT FORMED PRIOR TO FIRST SALE BY DEVELOPER, AND NOT ALL LOT OWNERS WERE MEMBERS OF ASSOCIATION.
The Honorable Raymond R. Guest, Jr.
Member, House of Delegates

You have asked whether Shenandoah Farms Subdivision, located in Warren and Clarke Counties, is subject to the provisions of the Subdivided Land Sales Act of 1978, §§ 55-336 through 55-350 of the Code of Virginia (the "Act").

It is my understanding that this subdivision consists of approximately 3,460 lots and was created in the early 1960's. I am further advised that the method of conveyance of all individual lots by the developer was by general warranty deed, not by land sales installment contract. Finally, I understand that the developer has transferred all title, control and maintenance responsibilities for the common areas within the subdivision and the common facilities to the property owners' association. Membership in the association is voluntary, and not all lot owners within the subdivision are members.

The Act provides for the filing of certain information with the Virginia Real Estate Commission prior to the disposition of any lots in a subdivision subject to its provisions. Section 55-339. The Act further defines "subdivision," for its purposes, in § 55-337(5) as follows:

"a. Any subdivision of land into one hundred or more lots, whether contiguous or not, where any lots therein are, from July one, nineteen hundred seventy-eight, sold or disposed of, by land sales installment contracts, and pursuant to a common promotional plan, where lot purchasers within said subdivision have use of and access to the facilities and amenities within such subdivision for which the said lot owners are assessed on a regular or special basis for the use and enjoyment thereof.

b. Any existing subdivision of land of thirty or more lots wherein the developer has concluded its sales effort for a period of six consecutive months and has transferred to the association described in § 55-344 A 1 all the title, control, and maintenance responsibilities of the common areas and common facilities."

Obviously, Shenandoah Farms Subdivision does not meet the definitional prerequisites of subsection (a) quoted above as no lots in the subdivision have been sold or disposed of by land sales installment contract. To be covered by the Act, therefore, the subject subdivision must be brought within its purview by the language contained in § 55-337(5)(b).

Reference to § 55-344(A), to which § 55-337(5)(b) specifically refers, reveals that the type of property owners' association necessary to meet the requirements of the Act is one which is "composed of lot owners within the subdivision," and which was formed "prior to the sale of the
first lot within the subdivision by the developer." Because § 55-344(F) states that each lot owner within a subdivision which falls within the definition in § 55-337(5) shall be subject to assessments for maintenance of common facilities, I believe that all lot owners must be members of the association for that association to meet the requirements of § 55-344(A). Otherwise, the association would have authority to assess lot owners for the cost of maintaining the common areas and common facilities owned by the association, without those lot owners having the ability to vote on those assessments. I do not believe that the General Assembly would have intended such an inequitable result.

Because not all of the lot owners within Shenandoah Farms Subdivision are members of the association, and because I further understand that the association was not formed prior to the sale of the first lot by the developer, I am of the opinion that Shenandoah Farms Subdivision is not covered by the Act.

November 8, 1982

The Honorable J. Edgar Pointer, Jr.
County Attorney for Gloucester County

This is in reply to your recent letter requesting my opinion whether the subdivision agent of Gloucester County may require a health department test on each lot of a subdivision as a pre-condition to approving the subdivision plat. This requirement is set forth in § 15-14 of the Gloucester County Subdivision Ordinance, which reads as follows:

"The agent shall not approve any subdivision where sanitary sewers are not provided unless the agent shall receive in writing, from the health official, a statement to the effect that the area contained in the subdivision is satisfactory for the installation of septic tanks, and that they will not create hazards to public health; and such approval by the agent is only with the understanding that where septic tanks are to be installed they must be approved on an individual lot basis by the health department."

Localities are granted powers to legislate in the areas of planning, subdivision of land and zoning in Ch. 11 of Title 15.1 of the Code of Virginia. Article 7 of that chapter "sets forth with great specificity the powers and duties of local governing bodies to provide for the subdivision and development of land." Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 118, 215 S.E.2d 453
Section 15.1-465 requires that local governing bodies adopt subdivision ordinances and § 15.1-466 specifies what those ordinances are to contain. Section 15.1-475 establishes the procedures for obtaining subdivision approval.

Although it is a proper concern of a subdivision ordinance to insure that adequate sanitary facilities, when needed, will be available to serve each subdivision as it is developed, I am of the opinion that the ordinance, in its present form, may be either unconstitutionally overly broad or arbitrary.

It is certainly possible that an owner may desire to devote certain lots in a subdivision to purposes which do not require sanitary sewer or septic facilities. By conditioning subdivision approval on the health department's approval of each lot as satisfactory for the installation of a septic tank, the ordinance necessarily restricts the uses of subdivided land to those purposes which reasonably would require septic tanks for health considerations, and it prevents other uses which would not reasonably require septic tanks. Regulation of land use in this manner is properly a function of a zoning ordinance,1 which, you advise, Gloucester County does not now have. Moreover, the condition imposed by the ordinance for plat approval, being dependent upon an affirmative finding of the health official, adds a procedural step to the subdivision approval process which is of doubtful validity. See 1977-1978 Report of the Attorney General at 285. Accordingly, I must answer your question in the negative.2

1 See §§ 15.1-486, 15.1-489. There is a significant distinction between local zoning regulations and local subdivision regulations, and the purposes they serve. See Board of Supervisors of Fairfax County, supra; 1976-1977 Report of the Attorney General at 199.

2 Compare 1969-1970 Report of the Attorney General at 140 (health officer has the legal right and the obligation to endorse a subdivision plat with specified reservations and qualifications to prevent his signature thereon from being construed as approving each lot as being suitable for the installation of a septic tank).
SUNDAY CLOSING LAW. EXEMPTION IN § 18.2-341(A)(12) ALLOWING SUNDAY SALE OF ANY ITEM ON CITY-OWNED PROPERTY DESIGNATED AS SITE OF FESTIVAL OR OTHER TYPE OF PUBLIC CELEBRATION OR GATHERING APPLIES TO "THE WATERSIDE" DEVELOPMENT IN NORFOLK.

June 20, 1983

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

This is in reply to your letter which was received June 15, 1983, in which you request my Opinion concerning the applicability of § 18.2-341 of the Code of Virginia, otherwise known as the "Sunday Closing Law," to property in the City of Norfolk known as "The Waterside." The pertinent portions of § 18.2-341 provide as follows:

"(a) On the first day of the week, commonly known and designated as Sunday, no person shall engage in work, labor or business or employ others to engage in work, labor or business except in the following industries and businesses:

    ***

(21) Sale of any item, provided such sale takes place on property owned by a county, city or town and the property on which the sale takes place has been designated by the governing body of such county, city or town, on a case-by-case basis, as the site of a festival, trade show, convention or other type of public celebration or gathering." (Emphasis added.)

You ask, specifically:

"(i) whether the property known as 'The Waterside' in the City of Norfolk is owned by said City within the intendment of paragraph 21 of Virginia Code § 18.2-341(a), and

(ii) whether the attached resolution unanimously adopted by the Council of said City on June 7, 1983, which designates said property as part of the site for festival events and public celebration, properly invokes the exemption set forth in said paragraph 21 with respect to the series of festival events which have been publicly scheduled to take place over the next several months under the auspices of organizations and/or public agencies carrying out policies and/or programs approved in principle by said Council, and similar events to be so scheduled in the future or whether 'on a case by case basis' requires a separate resolution prior to each 'event.'"

Photocopies of the essential documents describing "The Waterside," its evolution as a civic project and the relationships of the parties in creating and operating it have been provided to this Office. The site of the facility is located on the southern waterfront of the Elizabeth River
in downtown Norfolk in an urban renewal area known as the Downtown Redevelopment Project-South, Va. R-9, which, for many years, has been the target of a cooperative effort at blight removal and redevelopment among the City of Norfolk (the "City"), Norfolk Redevelopment and Housing Authority (the "Authority") and the United States Department of Housing and Urban Development. All of the property along the southern and western waterfronts of the Elizabeth River in the downtown area has been for some time in public ownership, and record ownership of the fee or lesser property interests in particular parcels has been exchanged between the City and the Authority, as necessary from time to time, to help achieve the objectives of redevelopment project plans.

Redevelopment projects by their very nature require a web of legal and practical relationships among city governments, redevelopment authorities and private developers, in which the advancement of the interests of each is consistent with and subservient to the overriding public interest of removing blight from and providing for the sound redevelopment of inner-city areas. See, e.g., Rudder v. Wise County Redevelopment and Housing Authority, 219 Va. 592, 249 S.E.2d 177 (1978). Available documents establish that The Waterside was characterized from its inception by Norfolk City authorities as the culmination of City efforts to establish in the downtown section, as part of the downtown revitalization effort, a unique enterprise which, in intimate conjunction with physical enhancement of the public area on the harborfront as a recreational amenity, would serve to attract both residents of the community and tourists on a continuing basis.

The documents show that the facility in question, which contains, inter alia, some 111 restaurants and shops purveying a variety of foods and other goods, was from the beginning and continues to be called a "festival marketplace," in which the activity of being present among numbers of other people and participating in a continuing series of "festival" events takes on a life of its own separate from, but necessarily in conjunction with, the availability of goods for sale from the restaurants and shops in the market. It is contemplated in the instruments creating the relationships among the parties that, in support of the development, the City will establish a "fully-staffed Office of Downtown Promotion," with responsibilities to "stage, in the downtown area and on the waterfront, various concerts, fairs and festivals, exhibitions, performances and similar activities...on a daily or weekly basis during the spring, summer and fall." The City also is committed to substantial capital outlays for construction of necessary supporting improvements, as well as continuing appropriations for operating expenses to ensure "extraordinarily high standards of maintenance, upkeep and security, both at The Waterside itself and in the Development Area" to accommodate "a continual series of special events drawing large crowds to The Waterside area [which] are vital to the success of the project." From the documents establishing the arrangements
among the parties and the reports of its operation since its
opening, it is clear that The Waterside "festival
marketplace" is something different from, and more than, an
ordinary shopping center.

The essential documents executed among the parties to
accomplish The Waterside development consist of (a) a letter
of intent, which describes the project and the contemplated
legal and financial relationships; (b) a disposition
agreement between the Authority and Waterside Associates, the
developer; (c) an agreement between the City of Norfolk and
the Authority under which the City provides the necessary
funding and commits to construct the necessary public
improvements; (d) a long-term lease between the Authority and
Waterside Associates; (e) a building loan agreement which
controls the manner in which public funding is made available
to Waterside Associates for development of the facility; (f)
a note and deed of trust evidencing and securing the debt
from Waterside Associates to the Authority, which administers
and disburses the public funds made available; and (g) a note
given by the Authority to participating banks, evidencing and
securing any debt of the Authority for money which may be
required from private sources to supplement the public funds
made available for development.

With the exception of parcels retained by or dedicated
back to the City, the Authority is record owner in fee simple
of The Waterside site and surrounding development area, which
includes parcels and easements deeded from the City of
Norfolk to the Authority for a nominal consideration, in
support of the development arrangements. The Authority
leases the property to the developer for a term of thirty
years, renewable for successive terms up to a total of
ninety-nine years, and lends the construction funds from
monies made available primarily from the City. The City also
agrees to construct a parking garage and other public
improvements from its own funds and to make available to the
Authority public funds for Authority constructed
improvements. The City commits to funding certain continuing
operating expenses for physical maintenance, transportation
link improvements, operation of parking facilities and public
promotions, all in support of The Waterside. Finally, in
return for the above, the City will receive from the income
flow of the project debt service payments, with interest,
against the amount of its funds made available for facility
construction until that is repaid, plus fifty percent of the
net cash flow of the project, over and above certain
deductions.

As related to your inquiry, the first question for
determination is whether, in light of the above-described
pattern of arrangements, sales at The Waterside occur on
"property owned" by the City for purposes of the industry and
business exception to the Sunday Closing Law allowed in
subsection (21) of § 18.2-341(a). There is no fixed,
statutory definition of either "property" or "ownership" as
these terms are used in the statute. Cases construing
Virginia, and other, laws point up the fact that the scope of coverage of each of those terms may expand or constrict depending upon the context in which the term is found. It has been said that it is impossible to arrive at a comprehensive definition of "property" that will satisfy all of the situations and tests to which such a definition will be subjected. "Property is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition." 1 G. Thompson Commentaries on the Modern Law of Real Property § 5, at 25-26 (1980 Repl. Vol.) "In modern legal systems, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have, in any and every thing that is the subject of ownership by man...and extending to every species of valuable right or interest in either real or personal property...." 73 C.J.S. Property § 1, at 139-140 (1951). The term "owner" generally has no definite legal meaning and is not a legal term. It has no rigid meaning, and its meaning may not be the same under all circumstances. It is not a technical term, but rather one of wide application in various connections...[I]t varies in its significance according to the context and subject matter." 73 C.J.S., supra, § 13, at 181-182. The term "owned" "means more than 'standing in the name of' and includes equitable ownership and the right to substantial enjoyment." Id.

In this instance, the terms are found in an exemption from the proscription in the Sunday Closing Law, which historically has found its justification in the police power under the rationale that its purpose is to ensure one day of rest per week for working persons and to prevent physical and moral debasement from uninterrupted labor. See Bonnie BeLo Enterprises, Inc. v. Commonwealth, 217 Va. 84, 87, 225 S.E.2d 395 (1976); Rich v. Commonwealth, 198 Va. 445, 448-449, 94 S.E.2d 549 (1956); Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S.E. 764 (1922). The statute should be given a reasonable construction in order to promote the end for which it was enacted, consistent with modern realities, and the rules of construction should be applied to give effect to legislative intent. See BeLo, supra, 217 Va. at 87; Pirkey, supra, 134 Va. at 726.

In the case of § 18.2-341(a)(21), the General Assembly has seen fit to flatly exempt from the ambit of the statute the sale of any item, provided it takes place on property owned by a county, city or town under the conditions specified. It does not undertake to define what constitutes city-owned property for these purposes or to limit the generality of the terms in any way. Clearly, the ownership and technical property interests in The Waterside are not unified in one entity but are instead distributed among the participating parties: the Authority has bare fee simple title to the land and improvements; the developer has an extended leasehold interest in the improvements, plus rights to a portion of the income flow from operation of the property; and the City has a right to the other portion of
the income flow, in repayment of its substantial financial investment in the project and as a continuing recipient of net profits derived from the enterprise. The project was conceived and developed as one means to serve the City's interest in revitalizing its downtown area, and without the City's active participation and public investment, the project would not have come into existence at all. In my opinion, the fact that the City chose to utilize the Authority as its agent and to otherwise structure its interests to enhance the prospects of success of its endeavor is not enough to defeat applicability of the exemption of § 18.2-341(a)(21) to The Waterside project.

This conclusion finds support in accepted rules of construction of penal statutes and statutes in derogation of the common law. "At common law, the legal right existed in all persons to enter into contracts, to engage in works of labor, and to prosecute generally their usual business or calling on Sunday...In order to restrict this natural right of the citizen and enforce a general observance on Sunday, or the first day of the week, as a day of rest, it was necessary for the General Assembly of the Commonwealth...to enact a statute to that end." Commonwealth v. Berson, et al., 15 Va. L. Reg. 920, 922 (1909). Being both a statute in derogation of the common law and a penal statute, § 18.2-341 should be strictly construed; it cannot be extended by implication or construction to embrace cases not within the letter of the law; and, if it is so ambiguous as to leave reasonable doubt of its meaning, it should not be construed to impose a penalty. See, e.g., Berry v. City of Chesapeake, 209 Va. 525, 526, 165 S.E.2d 291 (1969); Rich, supra, 198 Va. at 450; Hannabass v. Ryan, 164 Va. 519, 525, 180 S.E. 416 (1935); McKay v. Commonwealth, 137 Va. 826, 830, 120 S.E. 138 (1923); Wheelwright v. Commonwealth, 103 Va. 512, 519, 49 S.E. 647 (1905).

It is to be noted that what is being considered here is an exception to the statute, and it is said, generally, that "statutes which constitute an exception from a well-defined statutory policy are given a strict construction." Wheelwright, supra, 103 Va. at 519. However, as applied to penal statutes and those which restrict common law rights, the law is otherwise, in that, when read in its entirety, the penal or restrictive part is read strictly and the exception is given a liberal construction. See, e.g., New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414, 416-417 (4th Cir. 1941); State v. Cunningham, 90 W.Va. 806, 810, 111 S.E. 835 (1922). Compare Berson, supra, 15 Va. L. Reg. 920. See, also, 3 Sutherland Statutory Construction, § 59.04 (4th ed. 1974) ("The rule that penal statutes are strictly construed establishes a requirement of definiteness which must be met by the legislative draftsman.").

In light of the above, I am of the opinion that, on the facts of the present inquiry, "The Waterside" may be considered property owned by a county, city or town for purposes of the exemption contained in § 18.2-341(a)(21),
and, accordingly, your first question is answered in the affirmative.

In answer to your second question, it is my opinion that Resolution 062 of the City of Norfolk, quoted in fn. 1, supra, properly invokes the exemption in § 18.2-341(a)(21), and that repeated designations of "events" as festivals are not required. It is apparent in the records of City Council actions and in the very words of the documents bringing the project into existence, which were drafted and executed well before the present questions of applicability of the Sunday Closing Law were raised, that City authorities, including Council, intended to develop The Waterside as a special facility of a continuing "festival" nature and a site of public celebration and gathering. The Council's legislative determinations of purpose in this regard, which the General Assembly empowered it to make, are entitled to a presumption of validity. See, e.g., City of Norfolk v. Tiny House, Inc., 222 Va. 414, 419, 281 S.E.2d 836 (1981). See, also, 13B M.J. Municipal Corporations § 58 (1978). As can be noted in examination of the emphasized portions of the statute in the above quotation from its text, it is necessary only for the governing body to designate the property, on a case-by-case basis, as the site of a festival, which the Council of the City of Norfolk plainly has done in its resolution. In that the statute does not specify the mode of procedure to accomplish the designation, the Council was free to choose any reasonable means, including a properly adopted resolution. See Commonwealth v. Arlington County Board, 217 Va. 558, 574, 232 S.E.2d 30 (1977). The form of its action in so designating the property is secondary to its substance. See Perkins v. Albemarle County, 214 Va. 240, 242, 198 S.E.2d 626 (1973).

1Resolution 062 of the Council of the City of Norfolk, dated June 7, 1983, relating to "DESIGNATING A SITE FOR FESTIVAL EVENTS AND A SITE FOR PUBLIC CELEBRATION, INCLUDING THE SITE OF THE FESTIVAL MARKETPLACE, THE WATERSIDE," reads as follows: "WHEREAS, the City of Norfolk (the "City"), through the cooperation of its chosen instrumentality, the Norfolk Redevelopment and Housing Authority ("the Authority"), and as part of the Downtown South Redevelopment Project approved by the City, has caused to be erected, through various agreements with the Authority and Waterside Associates, a festival marketplace known as The Waterside, and has funded virtually the entire cost of the improvement of the site and adjoining areas; and will in the future share in certain net revenues from the operation thereof; and

WHEREAS, the property on which The Waterside is situated is titled in the name of the Authority, but is deemed by the Council of the City of Norfolk to be owned by said City for the particular purpose of Subsection 18.2-341(a)(21) of the 1950 Code of Va., as amended; and

WHEREAS, the Waterside is specifically designed and constructed to be, among other things, the site or a part of
the site, and indeed the centerpiece of, certain activities
of the kind described in said Subsection; now, therefore,
BE IT RESOLVED by the Council of the City of Norfolk:
Section 1: That the hereinafter described site is
hereby designated as a site for festival events, and a site
for public celebration, including the Festival Marketplace,
The Waterside: That area of the city bounded on the north by
Tazewell Street, on the east by Boush Street, but including
the open spaces along the east side of Boush Street, on the
east and north by the World Trade Center and the north side
of Waterside Drive, on the east by the western property line
of the Omni International Hotel, and on the south and west by
the Elizabeth River, excluding, however, the construction
area occupied by the former Boush Cold Storage Building.
Section 2: That this resolution shall be in effect from
and after its adoption. Adopted by Council June 7, 1983.
Effective June 7, 1983.''

2Note, in contrast, the following definition of "land" or
"real estate" contained in § 1-13.12, which ordinarily is
controlling for those terms, pursuant to § 1-13.12: "The
word 'land' or 'lands' and the words 'real estate' shall be
construed to include lands, tenements and hereditaments, and
all rights and appurtenances thereto and interests therein,
other than a chattel interest."

3See, e.g., Loyola Fed. Savings and Loan Assn. v. Herndon,
218 Va. 803, 805, 241 S.E.2d 752 (1978) ("owner" under
mechanics' lien statute means the fee simple owner of the
real estate and does not mean a trustee under a deed of
trust); Blanton v. Owen, 203 Va. 73, 77, 122 S.E.2d 650
(1961); Wallace v. Brumback, 177 Va. 36, 44, 12 S.E.2d 801
(1941) ("owner" under mechanics' lien statute does not
necessarily mean the holder of legal title to property, for
it is well-settled that a mechanics' lien may be perfected on
an equitable as well as a legal estate); City of Richmond v.
Mckenny, 194 Va. 427, 430, 73 S.E.2d 414 (1952), Banks v.
County of Norfolk, 191 Va. 463, 467, 62 S.E.2d 46 (1950), and
Stark v. City of Norfolk, 183 Va. 282, 287, 32 S.E.2d 59
(1944) (for taxation purposes the word "owner" includes any
person who has the usufruct, control or occupation of the
land, whether his interest in it is an absolute fee, or an
estate less than a fee); United States v. Certain Parcels of
Land in the County of Fairfax, 345 U.S. 344, 349 (1952)
(subdivision lot owners with easements or rights of use in
private sewerage system not "owners" for purposes of required
consent to condemnation of the system under the Lanham Act);
624, 626 (1961) (a flowage easement is "property," and
the government's destruction of the easement ordinarily would
constitute a taking of property within the meaning of the
Fifth Amendment); Wright v. Salisbury Club, Ltd., 632 F.2d
309, 311 (4th Cir. 1980) (for purposes of Civil Rights Act,
42 U.S.C. § 1982, club membership is "property," despite no
formal link between club membership and ownership of a home
in a subdivision).

See, also, First Charter Land Corp. v. Fitzgerald, 643
F.2d 1011, 1014-1015 (1981), relating to jurisdiction of
suits pursuant to 28 U.S.C. § 1655 to remove a cloud upon
title: "In contemporary jurisprudence, 'property' refers to both the actual physical object and the various incorporeal ownership rights in the res, such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res. Fitzgerald assumes that jurisdictional authority derives exclusively from possession of the physical object. But such is not the law. Jurisdiction is based on the authority to adjudicate property interests, not upon the fortuity of having actual possession of a res."

Section 18.2-341(b) provides that "[a]ny person violating the provisions of this section shall be guilty of a misdemeanor." Section 18.2-12 provides that "[a] misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor." The punishment for a Class 1 misdemeanor is fixed at confinement in jail for up to one year and a fine of up to $1000, or both. See Rich, supra, at 450 (violation of the Sunday Closing Law is made a criminal offense and the same rules of strict construction apply to prosecutions thereunder as to other criminal cases).

SUNDAY CLOSING LAW. SALE OF PRE-RECORDED ALBUMS AND TAPES NOT EXEMPT FROM STATUTE.

May 17, 1983

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

You have asked whether the sale of pre-recorded albums and tapes on Sundays is within the scope of the "publishing" exemption of § 18.2-341 of the Code of Virginia.

Section 18.2-341 makes it a misdemeanor for persons to engage in, or hire others to engage in work, labor or business on Sundays, except in counties or cities which have opted out of the statutory prohibition pursuant to § 18.2-342. Certain industries and businesses, however, are exempt from its coverage. One of the exemptions is "[p]ublishing, including the distribution and sale of the products thereof." See § 18.2-341(a)(3). The term "publishing" is not defined by the statute.

Statutory language is to be accorded its ordinary and everyday meaning unless a contrary meaning is clearly intended. McCarron v. Commonwealth, 169 Va. 387, 193 S.E. 509 (1937). As commonly understood, the term "publishing" connotes the business of manufacturing and distributing printed materials. See Zugalla v. International Mercantile Agency, 142 F. 927 (3rd Cir. 1906). "Publishing" is defined by Webster's Third New International Dictionary (1968) as "the business or profession of the commercial production and issuance of literature specially in book form for public distribution or sale." To consider the sale of pre-recorded albums and tapes as within the "publishing" exemption of
§ 18.2-341 would extend the interpretation of the term beyond its meaning as commonly understood and would virtually allow the exception to subsume the prohibition against working or transacting business on Sunday. I cannot ascribe such an intention to the legislature. Accordingly, I am of the opinion that the sale of pre-recorded albums and tapes is not exempt from the Sunday Closing Law in those localities in which the law is applicable.

The prohibition of § 18.2-341 states as follows: "[o]n the first day of the week, commonly known and designated as Sunday, no person shall engage in work, labor or business or employ others to engage in work, labor or business except in the following industries and businesses...."

SUNDAY CLOSING LAW. § 18.2-341 DOES NOT PROHIBIT SALE OF HANDICRAFT AND FOOD ITEMS ON SUNDAY BY NON-PROFIT ORGANIZATION SEEKING FUNDS SOLELY FOR CHARITABLE PURPOSES.

May 20, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

In your letter of May 10, 1983, you asked whether a proposed open house sale by the Cape Henry Woman's Club would violate the provisions of Art. 2, Ch. 8, Title 18.2 of the Code of Virginia. You state that the club is a non-profit organization which plans to offer handicraft and food items for sale on a Sunday to raise funds solely for its charitable purposes.

Except in counties or cities which have elected to be excluded from the prohibitions of the "Sunday Closing Law," it is illegal to engage in certain work, labor or business on Sunday. Section 18.2-341 provides "This section [listing the prohibition] shall not be applicable to works of charity conducted solely for charitable purposes by any person or organization not organized or engaged in business for a profit."

Based upon the facts presented in your letter and your characterization of the club, it is my opinion that the planned open house is an event which falls within the exception quoted above, and therefore, would not violate the Sunday Closing Law in those localities where such law applies.

SUPPORT ACT. PAYMENTS DISCHARGEABLE IN BANKRUPTCY IF DEBT NOT BASED UPON SEPARATION AGREEMENT, DIVORCE DECREES OR PROPERTY SETTLEMENT AGREEMENT. ONCE DEBT DISCHARGED, CONTEMPT PROCEEDING BY STATE COURT FOR FAILURE TO PAY SUPPORT TO STATE PROHIBITED.
April 12, 1983

The Honorable Marvin L. Garner, Judge
Juvenile and Domestic Relations District Court
Twelfth Judicial District

You have requested my opinion (1) whether an order directing the parents of a minor committed to the State Department of Corrections to pay support to the Commonwealth is a debt which may subsequently be discharged in bankruptcy and (2) whether the court can institute a contempt proceeding against the parents for failing to pay that support.

Dischargeability of debts of this nature is governed by 11 U.S.C. § 523(a)(5), a portion of the Bankruptcy Law, which excepts from the discharge of debts "maintenance for, or support of such spouse or child...." This provision applies, however, only "in connection with a separation agreement, divorce decree, or property settlement agreement...." As the support debt in the situation you present is not based upon the terms of a separation agreement, divorce decree or property settlement agreement, I am of the opinion that the support order is a dischargeable debt.

In some instances in which government provides relief, shelter, medical care, etc., statutes and ordinances provide that the government has certain rights to reimbursement from the parents. Section 16.1-290 of the Code of Virginia makes such provision. Nonetheless, under the Bankruptcy Code of 1978, debts of this type owed to the State are dischargeable. Section 523(a)(7) only excepts from discharge debts owed the state "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty...." In a prior Opinion found in the 1962-1963 Report of the Attorney General at 125, it was noted that the support obligation of a mental patient was dischargeable in bankruptcy. I am of the opinion that the debt established by the support order is also dischargeable in bankruptcy.

The issue of whether a state court may institute contempt proceedings for nonpayment of support after discharge of such debt is also controlled by the Bankruptcy Code of 1978. Section 524(a) of Title 11, U.S.C., provides that discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged...." This statute further provides that discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor...." Case law has construed this statute to include prohibition of criminal and quasi-criminal proceedings predicated upon conduct associated with the discharged debt. See Whitaker v. Lockert (In re Whitaker), 16 B.R. 917 (B.Ct.,
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M.D. Tenn. 1982); Henry v. Heyison, 4 B.R. 437 (D.Ct., E.D. Pa. 1980). This judicial interpretation is grounded in the reasoning that "[t]he purpose of § 524(a) is to accord the debtor complete relief." (Emphasis by court.) Whitaker, 16 B.R. at 921. I am of the opinion that the court is prohibited from instituting contempt proceedings for failure to comply with a support order if the underlying debt has been discharged in bankruptcy. Nothing herein is intended to express an opinion on the court's jurisdiction to entertain future awards of support.

SUPREME COURT OF VIRGINIA. RULE 3D:5. APPEARANCES BY NON-LAWYERS. EFFECT OF AMENDMENT TO RULE WHICH BECOMES EFFECTIVE OCTOBER 1, 1982.

August 26, 1982

The Honorable William R. Shelton, Chief Judge
Chesterfield General District Court

This is in reply to your letter of August 18, 1982, making reference to the Opinion of June 29, 1982, to Judge Andrew G. Conlyn interpreting Rule 3D:5, which became effective July 1, 1982, as prohibiting non-lawyers from making court appearances to move for judgment on behalf of others. You have asked the following questions:

"1.) In view of the Supreme Court amendment to rule 3D:5 effective October 1, 1982, would this amendment change your opinion of June 29, 1982?

2.) If your answer is in the negative, what is the responsibility of the presiding judge when a lay-person or employee appears and requests the Court to grant a judgment default or otherwise on behalf of a corporate employer."

The Supreme Court's revision of Rule 3D:5, which becomes effective October 1, 1982, expressly authorizes the plaintiff, his attorney, or his agent to appear and request judgment. Consequently, requests for judgment may be made by the plaintiff, his attorney, or agent in person when the amended rule becomes effective. Unquestionably, the purpose of the revision is designed to countermand the Rule which became effective July 1, 1982, to the extent that it precluded appearances by non-lawyers for the purpose of moving for judgment on behalf of others. There has been no suggestion by the Court that it disagreed with my interpretation of the Rule; hence, I am aware of no reason to change the Opinion of June 29, 1982.

With respect to your inquiry as to the responsibility of judges when a lay-person or employee appears on behalf of a corporate plaintiff prior to the effective date of the revised Rule, this Office is not in a position to advise you to disregard Rule 3D:5 which became effective July 1, 1982,
and remains effective until October 1, 1982. This Office is legally bound to interpret the law as it exists, and is not authorized to change or modify it. Accordingly, I am impelled to conclude that the courts should follow Rule 3D:5 as it currently reads until the revised Rule becomes effective on October 1, 1982.

SUPREME COURT OF VIRGINIA. RULES OF COURT. ELIGIBILITY TO PARTICIPATE IN BAR COUNCIL REPRESENTATION ELECTIONS PURSUANT TO RULE 6:12 ¶ 6, BASED ON ELECTION OF PLACE OF RESIDENCE OR PRINCIPAL PLACE OF PRACTICE.

August 10, 1982

The Honorable Joseph E. Baker, Judge
Circuit Court of the City of Norfolk

This is in response to your request for my interpretation to be given Rules of Court 6:IV:16, 216 Va. 1061, 1144 (1976), with respect to who may vote in a Bar Council representative election. Specifically, you want to know whether active members of the Bar "1) must elect which circuit they choose to participate in, and 2) whether they are eligible to vote in both the circuit in which they reside and the circuit in which they conduct their principal practice." The question would appear to be one of first impression.

The starting point in the analysis must be the language of the provision itself, for as was stated in Caminetti v. United States, 242 U.S. 470, 485 (1917), "the meaning of a statute [here a rule] must, in the first instance, be sought in the language in which the act is framed...."

Rules of Court 6:IV:16 provides in part:

"All active members in good standing who are domiciled or principally practice their profession in such circuit may vote at the meeting...."

The provision is written in the alternative because of the use of the conjunction "or." It is this drafting that gives rise to the question presented. "Or" is to be given its customary meaning, unless to do so would import a meaning generally repugnant to the general purview of the rule. See Jones v. Rhea, 130 Va. 345, 107 S.E. 814 (1921). Webster's New Collegiate Dictionary 806 (150th Anniversary ed. 1981), defines "or" in pertinent part as a conjunction that is "used as a function word to indicate an alternative." The alternative presented members is eligibility on the basis of place of domiciliary or principal place of business, but not both. This interpretation is consistent with the representational scheme of the rule.

Paragraph 5 sets forth the composition of the Council, the governing body of the Bar. That provision requires at
least one active member to come from each of the thirty-one judicial circuits. The provision further provides that as a circuit's membership increases over 300, based on domiciliary or principal place of practice, that circuit is entitled to one additional member of the Council for each additional 300 members, or major fraction thereof.

The purpose of paragraph 5 would thus appear to ensure equal representation among the circuits, based first on the circuits themselves, and then on the numbers of persons domiciled in or principally practicing in a circuit. Were the numbers artificially inflated by dual voting and representation, the equal representation purpose would be destroyed.

It is my opinion that Rule 6:IV:16 requires alternative, rather than concurrent, grounds for eligibility, and members must elect the circuit in which they choose to participate.

TAXATION. ADDITION FOR EXCESS COST RECOVERY. DEFINITION OF PROPERTY NOT QUALIFYING FOR OR EXCLUDED FROM ACCELERATED COST RECOVERY SYSTEM.

July 13, 1982

The Honorable G. Steven Agee
Member, House of Delegates

You have asked three questions with respect to §§ 58-151.013 and 58-151.013:1 of the Code of Virginia which were enacted by Ch. 633, Acts of Assembly of 1982. These amendments require taxpayers to add thirty percent of their federal Accelerated Cost Recovery System ("ACRS") deductions to federal adjusted gross income to determine Virginia taxable income. This addition must be made for taxable years 1982 and 1983 and then the total added for those two taxable years may be subtracted from federal adjusted gross income in determining Virginia taxable income for taxable years 1984 through 1988.

Your first question is whether the exception in § 58-151.013:1(A)(iii) for "[p]roperty not qualifying for, or excluded from, the Accelerated Cost Recovery System" includes federal deductions computed under I.R.C. § 168(b)(3), which permits taxpayers to elect different depreciation percentages.

The term "property not qualifying for, or excluded from [ACRS]" in § 58-151.013:1(A)(iii) refers to those types of property listed in I.R.C. § 168(e), which is captioned as "Property Excluded from Application of Section." Section 58-151.013:1(A)(iii) and I.R.C. § 168(e) exist in comparable contexts and the General Assembly intended that they have the same meaning. See § 58-151.01(a).
If an election under I.R.C. § 168(b)(3) is made, use of straight line percentages for deduction purposes is occurring as a part of the accelerated cost recovery system even though there may be no accelerated depreciation. The election itself could not be made under I.R.C. § 168(b)(3) if non-qualified or excluded property under I.R.C. § 168(e) were involved. Therefore, I am of the opinion that federal ACRS deductions computed under an I.R.C. § 168(b)(3) election will be subject to the thirty percent Virginia addition for excess cost recovery under § 58-151.013(b)(6).

Your second question concerns computations to be made under § 58-151.013(c)(10) and whether a taxpayer may forego claiming a subtraction under subsection (c)(10) even if the taxpayer has Virginia taxable income which would be offset by claiming the subtraction. Section 58-151.013:1(B) permits a taxpayer to subtract "any amount elected by the taxpayer..." subject to certain limitations. (Emphasis added.) The term "elected" is non-mandatory and permits the taxpayer to claim less than the available subtraction even if there is Virginia taxable income which could be reduced if the entire available subtraction were claimed, or, indeed, to forego claiming any subtraction.

Your third question is, if a taxpayer does elect to forego use of the entire available subtraction under § 58-151.013(c)(10), does he lose use of the "total excess cost recovery" attributable to the foregone subtraction? The answer is no.

In computing the maximum subtraction allowable for each year, an "applicable percentage" for that year is applied to the "total excess cost recovery" which is the sum of the additions made in taxable years 1982 and 1983. While the "applicable percentage" will change from year to year, the "total excess cost recovery" to which it is applied will not change. However, the amounts actually elected and claimed as a subtraction in any year will affect the available subtraction in subsequent years.

This is best illustrated by an example. Assume that the taxpayer made additions for excess cost recovery of $40,000 in 1982 and $60,000 in 1983. For 1984 and 1985 the taxpayer had substantial Virginia taxable income but elected to claim only $5,000 of the available subtraction in 1984. The subtraction for 1985 would be computed as follows:

<table>
<thead>
<tr>
<th></th>
<th>1984</th>
<th>1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total excess recovery</td>
<td>$100,000</td>
<td>$100,000</td>
</tr>
<tr>
<td>Applicable percentage</td>
<td>20%</td>
<td>40%</td>
</tr>
<tr>
<td>Maximum allowable</td>
<td>$ 20,000</td>
<td>$ 40,000</td>
</tr>
<tr>
<td>Less amounts actually claimed in prior years</td>
<td>0</td>
<td>$ 5,000</td>
</tr>
</tbody>
</table>
Available subtraction this year $20,000 $35,000
Actually claimed this year $5,000 ?

For 1985, the taxpayer may elect to claim a subtraction of any amount between $0.00 and $35,000.00

1 Certain adjustments are required by § 58-151.013:1(A) such that the ACRS deductions claimed at the federal level are not necessarily deemed to constitute "excess cost recovery," as defined.
2 Section 58-151.013:1(A) defines excess cost recovery in terms of the Accelerated Recovery Cost System and not whether a particular taxpayer has actually received an accelerated recovery (depreciation).
3 Section 58-151.013:1(C) sets forth the "[a]pplicable percentages..." for particular taxable years involved.

TAXATION. APPLICATION OF § 58-46 TO PART-TIME EMPLOYEE. PART-TIME EMPLOYEE ALSO EMPLOYED BY BOARD OF SUPERVISORS AS INTERNAL AUDITOR.

December 20, 1982

The Honorable Lois B. Chenault
Commissioner of the Revenue for Hanover County

Your inquiry concerns the following fact situation. Hanover County is currently considering a plan to hire a person who will be employed on a part-time basis in the commissioner of revenue's office as an auditor of taxpayers subject to the county's personal property and merchants' capital taxes. While working in the commissioner's office, the part-time employee will be subject to all the regulations and policies of such office, including compliance with § 58-46 of the Code of Virginia. This individual will also be employed on a part-time basis as an "internal auditor" under the direction of the board of supervisors. The internal auditor's duties include the review and audit of county transactions. While performing such duties, the internal auditor will clearly be an employee of the board.

You ask whether such an employment situation will violate § 58-46.¹

There is no provision or language in § 58-46 prohibiting the employment of part-time employees. The purpose of § 58-46 is to prohibit the dissemination or publication of information relating "to the transactions, property, income or business..." of taxpayers. This prohibition is not violated if protected information is disseminated to local tax or revenue employees for the performance of their public duties. 1974-1975 Report of the Attorney General at 524.²
Therefore, I am of the opinion that § 58-46 does not prohibit employing part-time employees.

While there is no legal prohibition to employing a part-time employee under the circumstances discussed above, I do note the possibility that this particular employee, when performing her duties as an auditor for the board, may be placed in a position incompatible with her other duties. On the one hand, the employee will work for a public officer (the commissioner of revenue) who is prohibited by § 58-46 from divulging taxpayer information to the board of supervisors. 1963-1964 Report of the Attorney General at 17(2). On the other hand, the employee will be charged with reviewing and auditing county transactions; such transactions may involve matters concerning taxpayers audited by the commissioner of revenue's office. In such situations, the part-time internal auditor/tax auditor may not be able to function on behalf of the board. Even if incompatibilities may be avoided, the appearance of such may not be avoidable.3

In conclusion, while § 58-46 does not prohibit this particular employment situation, I do note that the potential for incompatible positions exists and that matter must be seriously considered. After a complete review of the impact, in the event you decide to share the employee, safeguards to prevent such conflicts must be developed by both your office and the board of supervisors.

1Section 58-46 provides in part: "Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the Commissioner or any agent, clerk, commissioner of the revenue, treasurer, or any other State or local tax or revenue officer or employee, or any former officer or employee of any of the aforementioned offices to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties."

2You may wish to consider preparing a writing to advise your employees of the requirements of § 58-46; such an "admonition" is discussed in the cited Opinion.

3In addition, the sharing of an employee by both an administrative branch of local government and also by the legislative branch may well bring the objectivity of the internal auditor into question. While not legally binding, standards have been generated for internal auditors, and such standards require that internal auditors exercise objectivity in the performance of their duties. See Standards for the Professional Practice of Internal Auditing (Institute of Internal Auditors, Inc.) Standard No. 120.

TAXATION. ASSESSMENT. AUTOMOBILES. USE OF PRICING GUIDE METHOD COMBINED WITH ORIGINAL COST METHOD FOR AUTOMOBILES NOT COVERED IN PRICING GUIDE PERMITTED UNDER § 58-829(C).
January 21, 1983

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

This is in response to your recent inquiry in which you ask several questions concerning the practices of the City of Alexandria in assessing the value of automobiles for personal property taxation. First, you have asked whether the method outlined below to ascertain the value of automobiles violates § 58-829 of the Code of Virginia. Second, you inquire whether use of that same method to assess antique automobiles complies with the requirements of the Code. Third, you ask whether the City of Alexandria may classify antique automobiles as a separate class of personal property and apply a different rate to that class. I will answer these inquiries seriatim.

You state that the practice of the Department of Finance of the City of Alexandria in assessing the value of automobiles is as follows:

"The City's Director of Finance uses the NADA [National Automobile Dealers Association] Blue Book (Eastern Edition) to determine values for all automobile models listed therein. The NADA Blue Book generally contains prices on only eight model years and, for automobile models older than eight years (and not listed in the Blue Book), the Director of Finance determines value by taking a percentage of the value shown for the oldest model year listed in the Blue Book.

Automobiles not covered by the NADA Guide for current or former years are assessed at a declining percentage of original cost, based upon bill of sale or upon information in the records of the Department of Vehicles, using an annual depreciation figure of 10%. In other words, the assessment is 90% of original cost if purchased in 1982; 80% if purchased in 1981; 70% if purchased in 1980, and so on."

The first paragraph of § 58-829 states in part as follows:

"Tangible personal property is segregated for local taxation only. The following categories are not to be considered separate classes for rate purposes, but separate categories for valuation purposes. Methods of valuing property may differ among the separate categories listed below, so long as each method used is uniform within each category, is consistent with requirements of this section and may reasonably be expected to determine actual fair market value. Nothing herein shall be construed to prevent a commissioner of revenue from taking into account the condition of the property."
For valuation purposes, § 58-829(C) establishes a category that covers all automobiles, except antique automobiles as defined in § 46.1-1(15a), taxicabs, and vehicles with special equipment for use by the handicapped. That section also provides that the automobiles covered by the section "shall be valued by means or of a recognized pricing guide or a percentage or percentages of original cost." (Emphasis added). Your first question focuses on whether a pricing guide may be used in combination with some other method of valuation given the use of the word "or" in § 58-829(C). The NADA Blue Book, more commonly referred to simply as the "Blue Book," is a universally accepted tool used by car dealers and is, therefore, a "recognized pricing guide" within the meaning of § 58-829(C).

Pricing guides, regardless of how inclusive however, will undoubtedly exclude some makes and models of automobiles as well as some model years of other automobiles. The legislature must have been aware of this when, in 1980, it amended § 58-829, to recognize specifically the use of such pricing guides.2 Strict construction of the word "or" in § 58-829(C) would defeat the use of pricing guides and the General Assembly's intent, however, because, as stated above, such guides will inevitably omit some makes and models.3 Thus, in order to achieve implementation of the legislative intent, it is necessary to combine the use of a pricing guide with some other valuation method for those automobiles not listed in the guide. In light of the two constitutional objectives of uniformity and fair market value, I conclude that the city's practice described above does not violate either § 58-829 or the Constitution of Virginia (1971).

In order to respond to your second inquiry, it is necessary to define the term "antique" cars. Section 46.1-1(15a) defines the term as follows:

"Every motor vehicle, as herein defined, which was actually manufactured, or designated by the manufacturer as a model manufactured in a calendar year not less than twenty-five years prior to January one of each calendar year and is owned solely as a collector's item, and is used for participation in club activities, exhibits, tours, parades, and similar uses, but in no event used for general transportation, may be classified by the Commissioner as an antique motor vehicle."

You mentioned the situation where a "fully restored automobile 50 years of age and in prime operating condition would be assessed at $100" using the city's current practices.

Section 58-829(F) places antique automobiles in a separate category so that they may be valued using a different method than is used for those automobiles covered by § 58-829(C). The use of a different method is permissive and not mandatory. Consequently, in answer to your second
question, the specific language of § 58-829 does not require that the method for valuation for antique automobiles be different from that established for those automobiles covered by § 58-829(C). Notwithstanding the foregoing, the entire text of § 58-829 should be considered by the city. Section 58-829 provides that the commissioner of revenue may take into account the "condition of the property." In addition and of great importance, the methods used in each category to determine the value of the property outlined therein must "reasonably be expected to determine actual fair market value." In light of the foregoing, it is my opinion that the city's method of assessing the value of antique cars is permissible only if it reasonably ascertains fair market value. It is likely, however, that the method does not result in fair market value or anything reasonably related thereto and, therefore, would not be permissible under § 58-829.

Lastly, in response to your third inquiry, § 58-829.6 states:

"All antique automobiles, as defined in § 46.1-1, are hereby set aside as an item of taxation separate from other tangible personal property in this chapter. The governing body of any county, city or town may levy a tax on such property at a different rate than the tax on other tangible personal property; provided that the ratio of assessment and the rate of tax shall not exceed that applicable to such other tangible personal property."

It is my opinion that the city may segregate those antique automobiles defined in § 46.1-1(15a) as a separate classification of tangible personal property and apply a different tax rate to that class provided the rate limitations set in the statute are not violated.

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1 The establishment of rates for and the valuation of antique cars is considered hereinafter taking into consideration § 58-829.6.

2 The use of pricing guides may well foster uniformity which more closely approximates fair market value. Such use also removes subjectivity from the valuation process. Thus, I construe the 1980 amendment as an effort by the General Assembly to promote the use of such guides.

3 In Industrial Development Authority of City of Richmond v. LaFrance Cleaners, 216 Va. 277, 280-281, 217 S.E.2d 879 (1975), the Supreme Court recognized that courts will construe "and" in the disjunctive and "or" in the conjunctive if necessary to meet the clear intent of the legislature.
January 24, 1983

The Honorable C. B. Harrell, Jr.
Commissioner of the Revenue for the City of Newport News

You have asked two questions concerning the assessment of personal property taxes. First, you ask whether personal property is assessed to the person possessing it or to the person owning it. Second, you inquire whether the commissioner of the revenue may (a) exonerate a taxpayer and refund the taxes paid when she was mistakenly assessed and (b) then assess the proper party with the tax.

Your first question has been answered in prior Opinions of this Office. Section 58-20 of the Code of Virginia requires that the personal property of an individual be taxed to the person who owns it. Even though the property may be in the possession of another, it is assessed to the owner. See 1973-1974 Report of the Attorney General at 385. Therefore, in my opinion, the answer to your first question is that ownership, not possession, establishes the basis for determining who is liable for personal property tax.

Your second question has two parts; the first part has also been answered by prior Opinions of this Office. Exoneration of assessments by the commissioner of the revenue is governed by §§ 58-1142 and 58-1152.1. The commissioner of the revenue may correct certain assessments upon timely application of the taxpayer and "in the case of a mere clerical error or calculation," on his own initiative. This Office has opined that you do not have the authority to issue refunds absent a timely application for correction by the taxpayer except in the case of clerical errors or calculations. See Opinion to the Honorable R. Wayne Compton, Commissioner of the Revenue for the County of Roanoke, dated September 17, 1982.

On the other hand, you may, under § 58-1145, apply to the circuit court for correction of an assessment, if it is brought to your attention that any assessment is improper or based on obvious error and was made within the past three years. See, also, § 58-1153, with a one year statute of limitations.

Section 58-1164 addresses your question of whether you may go back and assess the proper party with the tax. This Office has held that this section is mandatory; therefore, you must make an assessment against any taxpayer owning property subject to tax who has not been assessed for up to three years past. See Compton Opinion, supra.

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1Section 58-1142 provides in pertinent part: "If such Commissioner of the Revenue, or other official performing the duties imposed on Commissioners of the Revenue under this title, be satisfied that he has erroneously assessed such
applicant with any such levy, as aforesaid, the Commissioner or such other official shall correct such assessment. 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."

2Section 58-1152.1 provides in pertinent part: "The governing body of any city or county may provide by ordinance for the refund of any local levies or classes of levies erroneously paid. If such ordinance be passed, and the commissioner of the revenue is satisfied that he has erroneously assessed any applicant with any local levies as provided in §§ 58-1141 and 58-1142, he shall certify to the tax-collecting officer the amount erroneously assessed. If the levies have not been paid, the applicant shall be exonerated from payment of so much thereof as is erroneous, and if such levies have been paid, the tax-collecting officer or his successor in office shall refund to the applicant the amount erroneously paid, together with any penalties and interest paid thereon."

3Section 58-1164 provides: "If the commissioner of the revenue of any county or city or the tax-assessing officer of any town ascertain that any person or property subject to local taxation or any local license tax has not been assessed for any tax year of the three years last past or that the same has been assessed at less than the law required for any one or more of such years, or that the levies or taxes for any cause have not been realized, the commissioner of the revenue or other assessing officer shall list and assess the same with levies or taxes at the rate or rates prescribed for that year, adding thereto a penalty of five per centum and interest at the rate of six per centum per annum, which shall be computed upon the taxes and penalty from the fifteenth day of December of the year in which such taxes should have been paid to the date of the assessment; and if the assessment be not paid into the local treasury within thirty days after its date, interest at the rate of six per centum shall accrue thereon from the date of such assessment until payment."

TAXATION. BUSINESS LICENSE. EXEMPTION FROM GROSS RECEIPTS OF EXCISE TAXES ON MOTOR FUELS DOES NOT INCLUDE OIL COMPANY EXCISE TAX.

January 25, 1983

The Honorable Clifton A. Woodrum
Member, House of Delegates
You have asked whether the exclusion from gross receipts, under § 58-266.1(A)(9) of the Code of Virginia, of "any federal or state excise taxes on motor fuels" includes taxes imposed under the Oil Company Excise Tax Act (the "Act"), § 58-730.7, et seq. For the reasons hereinafter discussed, I am of the opinion that this exclusion from gross receipts does not include taxes imposed on oil companies under the Act.

Among the taxes excluded from gross receipts under § 58-266.1(A)(9) is the motor fuel tax imposed in § 58-686, et seq. This tax is imposed on gallons of gasoline sold, delivered or used, at a rate of 11½ per gallon. See § 58-711. Furthermore, the amount of the tax, to be paid by dealers in motor fuel, is specifically required to be added to the price of motor fuel and may be separately stated on bills and advertisements. See § 58-690. Thus, this tax is a tax on the motor fuel itself and is separately identifiable as a tax through each step of the distribution.

On the other hand, the oil company excise tax is imposed on the petroleum revenues received by oil companies, not on the products themselves. This tax is based on a percentage of such revenues and is not, by law, an item separate from the price of the fuel sold. It is, in fact, paid by the retailer and ultimate consumer to the same extent as any other overhead which becomes part of the purchase price of goods sold.¹

Additionally, if any reasonable doubt exists, the doubt must be resolved against the exclusion. Virginia adheres to the rule of strict construction of tax exemptions. Taxation is the rule, not the exception. Therefore, tax exemption statutes are strictly construed against the taxpayer. See WTAR Radio-TV v. Commonwealth, 217 Va. 877, 234 S.E.2d 245 (1977).

In light of the foregoing, it is my opinion that because it is a tax not authorized to be specifically identified as such when paid by the retailer and is not a tax on motor fuels themselves, it is not excluded from gross receipts by § 58-266.1(A)(9).

¹Refunds provided for in § 58-730.14 are based upon the "imputed cost of the tax" in recognition of the fact that the tax is not imposed on a unit price basis and is not separately identifiable as a part of the retail price.
You have inquired as to the proper classification of peddlers at wholesale for purposes of local license taxation under § 58-266.1 of the Code of Virginia. Section 58-266.1(B) imposes rate limitations on the assessment of local license taxes and further provides that:

"The rate limitations prescribed in this section shall not be applicable to license taxes on (1) wholesalers, which shall be governed by § 58-441.49...."

As noted, under the provisions of § 58-266.1(B), rate limitations on wholesalers for purposes of local license taxation are governed by § 58-441.49. The State wholesale merchants' license taxes referred to in § 58-441.49 were imposed under former § 58-304, repealed by Ch. 151, Acts of Assembly of 1966. Under former § 58-304, a "wholesale merchant" was defined as "every merchant who sells to other persons for resale only or who sells to institutional, commercial or industrial users." Thus, I am of the opinion that the business of wholesale peddlers, to which you refer, falls within the definition of "wholesale merchant" as incorporated for purposes of the rate limitations of § 58-441.49.

The classification of wholesale peddlers as wholesale merchants subject to § 58-441.49 is supported by City of Richmond v. Richmond Dairy Co., 156 Va. 63, 157 S.E. 728 (1931). In that case, a dairy company argued that it was a peddler of goods not subject to local license tax on merchants. A specific statutory exemption precluded the company's taxation as a peddler. This exemption was similar in impact to the one set out for wholesalers in § 58-304. The Court found that a peddler was to be considered a merchant stating, in part:

"It does not need this statute to support the proposition that a peddler is also a merchant, within the common acceptation of the meaning of such words...By the express provision of the statute, the company is not taxable as a peddler on this business, and so, being a merchant, it has been and can be fairly so classified, and should be subjected to a license tax similar to that imposed upon other merchants who are not taxed as peddlers...." 156 Va. at 76-78.

In light of the foregoing, I am of the opinion that, for purposes of local license taxation, peddlers at wholesale are taxable as merchants and are to be classified as wholesalers subject to the rate limitations found in § 58-441.49.
Section 58-441.49 authorizes a local license tax on wholesaler of $0.05 per $100 of gross receipts.

TAXATION. COAL SEVERANCE. CONTRACT MINER MAY BE LIABLE FOR PAYMENT OF TAX.

June 28, 1983

The Honorable Mark K. Flynn
County Attorney for Tazewell County

This is in response to your letter in which you asked two questions concerning the imposition of the severance tax on coal authorized by § 58-266.1:1 of the Code of Virginia. That section permits counties and cities to levy a license tax on "every person engaging in the business of severing coal and gases from the earth."

You describe the factual context in which your questions arise as follows. While there are various types of underground mining operations, one common method in Tazewell County is for the coal company which owns the land or mineral rights or which owns a lease to those rights to enter into a contract with a miner (contract miner) for the actual mining of the coal. In this method of operation, the contract miner actually severs the coal from the earth and delivers it to a point designated by the owner for further processing. Often the delivery point is in an adjoining county and, on occasion, is in West Virginia. Typically, the contract miner is responsible for obtaining the necessary federal and state licenses and permits for his operation. It is clear, however, that the contract miner has no right or authority to sell the coal to third parties or to use it for his own benefit. According to your letter, the contract miner is generally an independently owned operation employing ten to twenty employees.

With these facts in mind, you have asked two questions:

1. Upon whom does § 58-266.1:1 impose the responsibility for payment of the severance tax, the contract miner who severs the coal or the company owning the coal?

2. For determination of the gross receipts upon which the severance tax is imposed, is the fair market value of the coal to be calculated solely on the price paid to the contract miner, or are additional factors required by the statute to be considered?

In response to your first question, a severance tax may not be imposed by localities except in accordance with the provisions of the Code. Section 58-266.1:1 permits the severance license tax in question to be imposed only on "every person engaging in the business of severing coal or
gases from the earth." The General Assembly did not define "the business of severing coal...." It is unclear whether the provision should be read so literally that the tax is imposed upon the individual actually doing the work (the employee of the contract miner in your description), or, alternatively, upon the company or firm retained by the owner to dig out the coal (the contract miner in your description), or still differently, upon the owner who arranges for the severance of the coal.

In a case of ambiguity, one guide in statutory construction is the interpretation given by those administrators charged with the statute's implementation. While certainly not conclusive, this aid in statutory construction is particularly helpful when the interpretation has been consistent over the years and when it began simultaneously with the adoption of the statute. See County of Henrico v. Management Recruiters of Richmond, Inc., 227 Va. 1004, 1010, 277 S.E.2d 163 (1981); 2A Sutherland Statutory Construction § 49.03 (1973).

It is my understanding from your letter that the Tazewell County officials, following Tazewell's adoption of the severance tax ordinance in 1978, have generally levied the tax upon the contract miner in those situations in which a contract miner is retained to sever the coal. This approach is apparently consistent with the industry understanding. Most importantly, it is consistent with the language of the Code. Significantly, the legislature, which has the authority to change provisions if it believes the interpretation is erroneous, has not taken action to change it. Legislative inaction following administrative interpretation for a number of years may be deemed legislative acquiescence in the interpretation. This, too, is an important aid in statutory construction. See Dan River Mills, Inc. v. Unemployment Commission, 195 Va. 997, 1002, 85 S.E.2d 620 (1954); 2A Sutherland Statutory Construction § 49.10 (1973).

Accordingly, based upon the foregoing, I am unable to conclude that this administrative interpretation apparently consistently applied over the years, has been wrong. Consistent with that interpretation, I believe that the tax may be levied upon the contract miner in those situations such as described above. Of course, this does not prevent the owner from making the actual payment on behalf of the contract miner, but the contract miner would still be legally liable to the county for the payment.

Turning to your second question concerning the method of valuation, the pertinent portion of § 58-266.1:1 provides:

"Such tax shall be at a rate not to exceed one per centum of the gross receipts from sale of coal or gases severed within such county. Such gross receipts shall be the fair market value measured at the time such coal or gases are utilized or sold for utilization in such
county or city or at the time they are placed in transit for shipment therefrom, provided that if the tax provided herein be levied, such county or city cannot enact the provisions of § 58-774 relating to a tax on gross receipts."

The answer to this question may be ascertained in a manner similar to the first question. In your letter, you state that the "majority of the taxes have been paid based on gross receipts arrived at by determining the price which the contract miner receives per ton from the lessee/owner."

As indicated above, administrative interpretation is a helpful guide in statutory construction. Moreover, this administrative interpretation is logical and consistent with the practice of imposing the assessment of severance taxes upon the contract miner. Where the contract miner pays the assessment, it is logical that its gross receipts, the basis for the tax, be measured by the amount of money which it receives from the owner. Under such circumstances, I am unable to conclude that the statute requires consideration of additional factors.

TAXATION. COLLECTION. REFUSAL TO ISSUE BUSINESS LICENSE NOT AUTHORIZED METHOD OF COLLECTING DELINQUENT PERSONAL PROPERTY TAX.

March 11, 1983

The Honorable Jack L. Setliff
Commissioner of the Revenue for the City of Danville

You have asked whether a city may legally refuse to issue local business licenses to persons, firms, or corporations that are delinquent in the payment of personal property taxes.

"[T]axes can only be levied, assessed and collected in the mode pointed out by express statute." Marye v. Diggs, 98 Va. 749, 752, 37 S.E. 315, 316 (1900); see, also, Drewry v. Baugh and Sons, Inc., et als., 150 Va. 394, 143 S.E. 713 (1928). The Code of Virginia provides numerous methods for collection of delinquent taxes. For example, § 46.1-65(c) of the Code allows a local government to deny issuance of a motor vehicle license if personal property taxes on that vehicle are not paid. Sections 58-1001, et seq., provide for collection of personal property taxes by distraint. Section 58-1010 allows an action in the nature of garnishment for the collection of taxes. Section 58-1014 states that "payment of any taxes... may... be enforced by warrant, motion for judgment at law, bill in chancery or by attachment before a [general district court or a circuit court]...."

In the case at hand, however, I find no authority in the Code or in Virginia case law providing for collection of personal property taxes in the manner you suggest.
Accordingly, it is my opinion that under general law a city may not refuse to issue local business licenses because the applicants are delinquent in the payment of personal property taxes.

TAXATION. COLLECTION OF DELINQUENT TAXES PURSUANT TO § 58-961. TREASURER MUST CREDIT PAYMENT TO MOST DELINQUENT LOCAL ACCOUNT, ABSENT LOCAL ORDINANCE TO CONTRARY OR UNLESS STATUTE OF LIMITATIONS FOR COLLECTION HAS RUN.

October 7, 1982

The Honorable Alfred C. Anderson
Treasurer of Roanoke County

You have asked three questions with respect to the relationship between §§ 58-961 and 58-983 of the Code of Virginia, which sections deal with the collection of taxes by the treasurer.

You first ask if a taxpayer, who is delinquent in the payment of more than one type of tax and also delinquent for more than one year, may direct that his partial payment of taxes be credited against a particular type of tax for a certain year.

Section 58-961 provides that:

"Unless otherwise provided by ordinance of the governing body, any payment of local levies received shall be credited first against the most delinquent local account, the collection of which is not subject to a defense of an applicable statute of limitations."

(Emphasis added.)

The taxpayer may direct the treasurer to apply a payment to a particular type of tax. 1981-1982 Report of the Attorney General at 262; 1978-1979 Report of the Attorney General at 267. Nevertheless, although the taxpayer may select the particular type tax to be credited, absent a local ordinance, he cannot dictate the year to which the payment will be credited. The treasurer is required to credit a payment to the "most delinquent local account," irrespective of the wishes or directions of the taxpayer unless a local ordinance specifically provides such rights to the taxpayer.

You next ask if § 58-961 requires the treasurer to apply payments of real estate taxes to the most delinquent accounts of the taxpayer, even though such accounts are for taxes beyond the third anniversary date. Section 58-983(b), in connection with other provisions of Title 58, provides that after the third anniversary of the payment date for real estate taxes, the treasurer may be relieved of the mandatory duty to collect such taxes in specific instances. Section 58-961 is written in mandatory terms and requires the treasurer to apply a payment of taxes to the "most delinquent
local account," unless the locality has provided otherwise by ordinance or collection of the delinquent account is barred by the statute of limitations. (See response to first inquiry.) The lien for delinquent real estate taxes is barred after the passage of twenty years. See § 58-767. No provision is made in § 58-961 for excepting from its application those real estate taxes recorded in the clerk's office pursuant to § 58-983(b). I, therefore, am of the opinion that the treasurer must apply payments of taxes to the most delinquent account of the taxpayer, even though such delinquent taxes are more than three years old. See § 58-985; 1978-1979 Report of the Attorney General at 42.

Finally, you ask if § 58-961 requires the treasurer to apply payments of personal property taxes to the most delinquent accounts of the taxpayer, even though such accounts are for taxes beyond the third anniversary date and a collector of personal property taxes has been employed by the locality. Section 58-991 permits a locality to employ a local delinquent tax collector, and Roanoke County has employed such a collector to collect delinquent personal property taxes which are more than three years old.

I am of the opinion, for the reasons stated in the response to the questions above, that § 58-961 requires the treasurer to apply payments of taxes to the most delinquent account of the taxpayer, even though such taxes are more than three years old, unless the locality has adopted an ordinance directing otherwise or collection is barred by the statute of limitations. The fact that the locality has employed a collector to collect accounts which are delinquent in excess of three years does not relieve the treasurer of his duty imposed by § 58-961 when the taxpayer tenders payment.

TAXATION. COMMISSIONER OF REVENUE. SOLE RESPONSIBILITY TO ASSESS PERSONAL PROPERTY TAXES.

January 25, 1983

The Honorable John J. Patterson
Treasurer of the City of Newport News

You have asked two questions concerning the proper party to assess for taxation of a motor vehicle. First, you have presented a situation where the commissioner of the revenue assessed a former wife for a vehicle which is titled in the former husband's name. The commissioner of the revenue assessed the former wife because this vehicle was in her possession. You wish to know if the assessment is correct. Second, you ask if you may sue the wife for the delinquent tax assessment.

With regard to your first question, it is solely the duty of the commissioner of the revenue to assess individuals for the personal property tax. If the assessment is erroneous, there is a statutory remedy for correction.
Your second question is answered in the affirmative. The treasurer has no responsibility to correct an erroneous assessment. See § 58-1142 of the Code of Virginia for authority of the commissioner of the revenue to correct erroneous assessments. See also, Opinion to the Honorable C. B. Harrell, Jr., Commissioner of the Revenue for the City of Newport News, dated January 24, 1983. The treasurer is required to collect taxes from each taxpayer assessed with taxes and levies. See §§ 58-960 and 58-965. The taxpayer may either contest the assessment of the commissioner after receiving notice of it, or he may defend himself in any legal action brought by the treasurer against him to collect the tax. Failure of the taxpayer to avail himself of these remedies is in no way the responsibility of the treasurer.

TAXATION. CONSUMER UTILITY. GRANDFATHER CLAUSE EFFECT.

November 30, 1982

The Honorable Robert C. Scott
Member, House of Delegates

You have asked for an interpretation of the clause of § 58-617.21 of the Code of Virginia which permits "any city, town or county that on July 1, 1972, imposed a utility consumer tax in excess of limits specified...[therein to] continue to impose such a tax in excess of such limits, but no more." This "grandfather clause" clearly places a ceiling on the rate of the tax and on the revenue to which the tax applies at a level no more than that in effect on July 1, 1972, where the rate or amount exceed the statutory limits. You advise that the City of Newport News had imposed a tax rate of 22% on the first $13.20 of utility bills as of July 1, 1972. This amounted to a maximum tax of $2.90. The city recently enacted an ordinance which maintained the rate of tax at 22% but increased the taxable base (revenue subject to the tax) to $14.00, resulting in increasing the maximum tax to $3.08. You wish to know whether this increase in the amount of revenue subject to tax violates the "grandfather clause" of § 58-617.2.

I am advised that the city maintains that it is in compliance with statutory limitation because it has not changed the rate of tax and the amount of revenue subject to the tax has been increased to a level less than the statutory ceiling of $15.00. This analysis fails to take into account the practical construction of the statute intended by the General Assembly to place a $3.00 ceiling upon the tax (20% of $15.00) unless that limit was exceeded on July 1, 1972.

If either the rate or the amount subject to tax was in excess of the statutory limit but the other factor was lower than the statutory limit in a corresponding degree so as to result in a tax less than the $3.00 maximum, it cannot reasonably be argued that such rate and revenue amount would be eternally frozen to prevent a jurisdiction from increasing
the lower factor to an amount which would result in a tax equivalent to the $3.00 statutory maximum. On the other hand, it would be also unreasonable to argue that a jurisdiction could raise whichever factor was lower than the statutory limit without restriction and thus achieve a subversion of the legislative intent to limit the total tax to $3.00. It is my opinion that the phrase "such limits" appearing in § 58-617.2 includes not only the rate and the amount of revenue but the product obtained by extending the rate limit upon the revenue limit so that the tax may not exceed $3.00; hence, any increase in the taxable base which results in the tax exceeding $3.00 is invalid.

1 Section 58-617.2 provides in part: "Any city or town or county may impose a tax on the consumers of the utility service or services provided by any corporation coming within the provisions of this article, which tax shall not be imposed at a rate in excess of twenty percent of revenue and shall not be applicable to any revenue in excess of fifteen dollars per month for residential customers, provided that any city, town or county that on July 1, 1972, imposed a utility consumer tax in excess of limits specified herein may continue to impose such a tax in excess of such limits, but no more."

TAXATION. CONVEYANCE FROM TRUSTEES OF TESTAMENTARY TRUST TO TRUSTEE IN BANKRUPTCY FOR BENEFICIARY IS SUBJECT TO RECORDATION TAX UNDER §§ 58-54 AND 58-54.1.

September 23, 1982

The Honorable Ulysses P. Joyner, Jr., Clerk
Circuit Court of Orange County

You have asked whether a deed of conveyance from the trustees of a testamentary trust to a trustee in bankruptcy appointed for a beneficiary of the testamentary trust is subject to recordation taxes imposed under §§ 58-54 and 58-54.1 of the Code of Virginia. The deed you enclosed recites that a beneficiary holding a vested remainder in trust property under the terms of a testamentary trust has been adjudicated a bankrupt by a federal court. The deed of conveyance is pursuant to an agreement whereby the trustee in bankruptcy agrees to accept a conveyance of property from the trust at an agreed valuation. The deed thus conveys real property directly from the trustees of the testamentary trust to the trustee in bankruptcy.

Recordation tax under § 58-54, the grantee's tax, is assessable at "fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." The tax under § 58-54 applies to all deeds of conveyance unless a specific exemption applies. Subsection (A)(12) of
$58-64 exempts certain conveyances made by trustees of a trust from the tax imposed by § 58-54.

Although the deed of conveyance in this case does not convey the property directly to the beneficiary under the trust, it nevertheless is a conveyance made by the grantor for the sole purpose of complying with a devise in the decedent's will. By conveying the property directly to the trustee in bankruptcy, the trustee under the will simply honored the agreement between the beneficiary and the trustee in bankruptcy, who stepped into the shoes of the beneficiary. Consequently, I am of the opinion that the grantee's tax imposed by § 58-54 is not applicable to this instrument.

Deeds of conveyance are also subject to a grantor's tax under § 58-54.1. Recordation tax under § 58-54.1 is imposed on

"[E]ach deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest exceeds $100...."

In this case, no money or consideration changed hands, the sole purpose of the conveyance being to discharge the trustee's duty under the will. Accordingly, I am of the opinion that no tax is assessable under § 58-54.1.

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1 Section 58-64 provides, inter alia, that the tax imposed under § 58-54 shall not apply: "When the grantor is the personal representative of a decedent's estate or trustee under a will or inter vivos trust of which the decedent was the settlor, other than a security trust defined in § 55-58.1, and the sole purpose of such transfer is to comply with a devise or bequest in the decedent's will or to transfer title to decedent's spouse or the kindred of decedent or decedent's spouse in accordance with a dispositive provision in the trust instrument." (Emphasis added.)

TAXATION. DEDUCTIBILITY OF SALARIES FOR PURPOSES OF ARLINGTON COUNTY BUSINESS LICENSE TAX.

September 24, 1982

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have asked whether in computing Arlington County's business license tax a deduction must be allowed for salaries paid. The tax in question is imposed under authority of § 58-266.1 of the Code of Virginia and is measured under
§ 11.57 of the Arlington County Code by the taxpayer's "gross receipts."

A taxpayer has suggested that the language contained in § 58-851.2 prohibiting taxes on payrolls supports his claim that his payroll should be deducted from "gross receipts." The prohibition found in § 58-851.2 against the imposition of local payroll taxes does not apply to local business license taxes assessable in accordance with § 58-266.1. Section 58-851.2 expressly exempts local business license taxes assessable under § 58-266.1 from any such limitation, stating in part:

"[N]or shall this section be deemed to prohibit or limit the imposition, levy or collection of any tax authorized to be imposed by chapter 7 (§ 58-239 et seq.) of Title 58 of the Code of Virginia."

The provisions of § 58-851.3¹ are likewise inapplicable to the Arlington County tax in that the limitations stated therein apply only to counties having the county manager form of organization as provided for in Art. 3 of Ch. 13 of Title 15.1 (§ 15.1-622, et seq.). Arlington County operates under the county manager plan of government as described in Art. 3, Ch. 14, Title 15.1 (§ 15.1-674, et seq.).

The authority granted localities to levy local business license taxes under § 58-266.1 is subject only to the conditions and limitations set forth therein. I find no provision in this statute which permits or requires that a deduction be allowed for salaries paid. In construing tax statutes it is a basic principle that no deduction from a prescribed tax measure or base, in this case "gross receipts," is allowed unless a specific statute authorizes the deduction claimed. Commonwealth v. Washinton Gaslight Co., 221 Va. 315, 269 S.E.2d 820 (1980).

In light of the foregoing, I am of the opinion that a taxpayer may not deduct salaries paid to its employees in computing "gross receipts" under Arlington County's business license tax.

¹This section provides that certain counties cannot "levy and collect directly or indirectly a tax on payrolls."
²This Opinion does not address the applicability of the provisions of § 58-851.3 to counties having a county manager form of organization as set out in Ch. 13, Art. 3 of the Code.

TAXATION. DELINQUENT. PUBLIC SERVICE CORPORATION PROPERTY SUBJECT TO STATUTE OF LIMITATIONS ON COLLECTIONS.
January 6, 1983

The Honorable Leonard F. Jones
Commonwealth's Attorney for Fluvanna County

You have asked which statute of limitation, if any, applies to the collection of real and personal property taxes by local governments on the real and tangible personal property of a public service company which sells water.

Chapter 12, Title 58 of the Code of Virginia provides generally for the taxation of property of public service corporations and, within that chapter, Art. 10 (§§ 58-602 through 58-617.2) provides for taxation of corporations furnishing water. Specifically, § 58-602 provides for local levies on the real estate and tangible personal property of corporations furnishing, among other utilities, water and § 58-605 provides that such real estate and tangible personal property shall be assessed on the valuation fixed by the State Corporation Commission. Section 58-615 provides that "[a]ll taxes and levies shall, until paid, be a lien upon the property...."

With respect to real estate taxes, Ch. 15 of Title 58 relates more generally to real estate assessments and the collection of real estate taxes. Section 58-767 provides, in part:

"No lien upon real estate for taxes and levies due...any political subdivision...which has been, or shall hereafter become, delinquent for twenty or more years shall be enforced in any proceeding at law or in equity and such lien shall be deemed to have expired and to be barred and cancelled after such time."

This broad, twenty-year limitation on liens for real estate taxes permits no exception. Accordingly, I conclude that the twenty-year statute of limitations embodied in § 58-767 is applicable to liens for real estate taxes arising by operation of law under § 58-615.

Turning to the question pertaining to delinquent personal property taxes, the collection procedure for such taxes by localities is outlined by Articles 7, 8 and 9 of Ch. 20, Title 58. Section 58-1021, in Art. 9, states in pertinent part that

"No action, suit or other proceedings at law or in equity shall be commenced in any court of this State, nor shall any other legal action be taken, by the treasurer or other officer or agent of any county, city or town, for the collection of any taxes or levies assessed under the authority of such county, city or town upon tangible personal property...after the expiration of five years from the date upon which any penalty was required by law to have been added to any such taxes...."
Because § 58-1021 was enacted subsequent to § 58-615, it reasonably may be interpreted to have amended § 58-615 by implication as far as the collection of personal property taxes by local governments is concerned. See 1A Sutherland Statutory Construction § 22.13 (4th ed. 1972). Furthermore, the lien created by § 58-615 arises by operation of law and not by any legal proceeding; therefore, unless a legal proceeding is commenced within five years, the lien imposed by § 58-615 would not be exempt from the statute of limitations under § 58-1021. In light of the foregoing, I conclude that the collection of tangible personal property taxes from a public service corporation by a local government is limited by § 58-1021.

In conclusion, I am of the opinion that, with respect to a public service corporation selling water, § 58-767 imposes a twenty-year limit on liens on the corporation's real property when the liens arise from failure to pay real property taxes and § 58-1021 imposes a five-year limitation upon liens arising solely by operation of law from the corporation's failure to pay tangible personal property taxes.

1While § 58-758 states that Ch. 15 "shall not apply to the assessment of any real estate assessable under the law by the State Corporation Commission," I believe that exemption does not include the collection of taxes on such property. Read fairly, "assessment," as used here, can only mean the determination of value and not the extension of taxes upon the property. Had the latter been the General Assembly's intent, surely it would have more broadly provided that Ch. 15 "shall not apply to the taxation of any...."

2Exempted from the five-year limitation are liens based on a judgment or decree or "any other legal proceeding." To the extent that the lien on tangible personal property has been created solely by operation of law, the exemption is inapplicable. A further possible exemption is found in § 58-1019 but that, too, is inapplicable because it relates only to limitations created in §§ 58-1014 through 58-1018, the "foregoing provisions" and not to the limitation of § 58-1021 which follows.

TAXATION. DETERMINATION OF WHETHER PARTICULAR PARCEL QUALIFIES FOR LAND USE TAXATION MUST BE MADE BY LOCAL ASSESSING OFFICIAL. OPINION MAY BE REQUESTED FROM STATE OFFICIALS DESCRIBED IN § 58-769.7(A).

July 13, 1982

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

You have asked whether an eight acre parcel of land qualifies for land use taxation under § 58-769.4, et seq., of
the Code of Virginia. You state that one acre of the property is set aside as a homesite with two additional acres used for horses and stables. The remaining five acres are devoted to growing alfalfa which is used as feed for the landowner's horses.

Section 58-769.4, et seq., enacted pursuant to Art. X, § 2 of the Constitution of Virginia (1971), permit localities to provide by ordinance for special land use valuation of real estate devoted to agricultural, horticultural, forest or open space use. "Agricultural use" as defined in § 58-769.5(a) means:

"[T]he bona fide production for sale of plants and animals useful to man under uniform standards prescribed by the Commissioner of Agriculture and Commerce...." (Emphasis added.)

Under the Standards for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural Use (effective December 15, 1978) (hereinafter the "Standard") prescribed by the Commissioner of Agriculture and Commerce under § 58-769.5, field crop production, such as the growing of alfalfa, must be "primarily for commercial uses" to qualify for agricultural use valuation under § 58-769.4, et seq. This Standard is consistent with the language of § 58-769.5(a) which requires that production be "for sale." ¹

Section 58-769.7 directs that the determination of whether a particular parcel ² meets the criteria set forth in § 58-769.5 and the Standards published by the Commissioner of Agriculture and Commerce is to be made by the local assessing officer.

The determination of whether the parcel you describe qualifies for land use taxation must be made by first making a determination of whether the combined uses of the land are primarily for commercial uses. Based on the facts presented, I am of the opinion that the land in question does not qualify as an agricultural use, and thus would not qualify for land use taxation.

¹I assume for purposes of this Opinion that the horses are not raised for commercial purposes; hence, I have not considered whether the use of the feed for commercial animals meets the test.

²The five acres devoted to growing alfalfa meets the minimum acreage required by § 58-769.7(b).

TAXATION. ERRONEOUS ASSESSMENTS. UNDER § 58-1142 REFUNDS OF TAXES BY COMMISSIONER OF REVENUE WITHOUT TAXPAYER APPLICATION ARE LIMITED TO CLERICAL ERRORS OR CALCULATIONS. THREE-YEAR STATUTORY PERIOD FOR TAXPAYER APPLICATION.
September 17, 1982

The Honorable R. Wayne Compton
Commissioner of the Revenue for the County of Roanoke

You have asked several questions about your authority to correct tax assessments and order refunds. Your letter notes that the Code of Virginia provides three-year statutes of limitations both for refunds to and assessments against taxpayers where a commissioner of the revenue determines there has been an erroneous assessment of taxes. You then ask:

1. whether the county board of supervisors determines if the three-year statutes of limitations are applicable;

2. whether the commissioner of the revenue has the authority to assess the proper amount where he ascertains that property subject to local taxation has been assessed at less than the law requires; and

3. whether the commissioner of the revenue has the authority to issue refunds of erroneously assessed and paid local levies.

As to the third question, you have advised this Office further by telephone that your inquiry relates only to your authority to issue refunds or make assessments on your own initiative, without an application for correction from the taxpayer involved.

Considering your inquiries in reverse order, the last question is governed by §§ 58-1142 and 58-1152.1. Section 58-1142 vests the commissioner with the power to correct certain assessments upon timely application of the person who has been assessed and, in the case "of a mere clerical error or calculation," upon the commissioner's own initiative without a petition from the taxpayer. This section clearly indicates that you do not have the authority to issue refunds absent a timely application for correction by the taxpayer involved except in the case of clerical errors or calculations.

Please note, in addition, that a different approach, with a similar result is possible if the County of Roanoke has adopted an ordinance pursuant to § 58-1152.1. This section permits the governing body of any city or county by ordinance to provide for the refund of local levies erroneously assessed. In relevant part § 58-1152.1 states:

"If such an ordinance be passed, and the commissioner of revenue is satisfied that he has erroneously assessed any applicant with any local levies as provided in §§ 58-1141 and 58-1142, he shall certify to the tax-collecting officer the amount erroneously assessed. If the levies have not been paid, the applicant shall be
exonerated from payment... and if such levies have been paid, the tax-collecting officer... shall refund to the applicant the amount erroneously paid..." (Emphasis added.)

The use of the term "applicant" to describe the taxpayer implies the necessity that there be a taxpayer application for this section to have effect. Amendments to this section substituting the term "applicant" for "person" show a clear legislative intent to limit refunds pursuant to § 58-1152.1 to situations where there is a taxpayer-applicant.

Because §§ 58-1142 and 58-1152.1 contain the only nonjudicial authority for the refund of local taxes, I am of the opinion that you may not issue refunds on your own initiative without a petition from the taxpayer except as provided in § 58-1142 for "a mere clerical error or calculation."

Section 58-1164 addresses your question concerning the commissioner of revenue's authority to assess a taxpayer where it is determined a prior assessment was less than the proper amount. This statute reads in part:

"If the commissioner of the revenue of any county or city... ascertain[s] that any person or property subject to local taxation or any local license tax... has been assessed at less than the law required for... [any tax year of the three last past], or that the levies or taxes for any cause have not been realized, the commissioner of the revenue... shall list and assess the same with levies or taxes at the rate or rates prescribed for that year...."

This language of § 58-1164 is mandatory. I am, therefore, of the opinion that you must make an assessment against any taxpayer where you find an assessment to be "less than the law required." Any such assessment is, of course, subject to the three-year period of limitation set forth in this provision.

Finally, your inquiry whether the Roanoke County Board of Supervisors determines if the three-year statute of limitations applies to refunds and assessments of erroneous assessments of local taxes must be answered in the negative. The authority to correct erroneous assessments is statutory. All of the statutes in question specifically impose three-year limitation periods: "three years after the last day of the tax year for which such taxes were assessed" in the case of §§ 58-1142 and 58-1152.111 and three years prior to the current tax year in the case of § 58-1164. I am aware of no provision of law which would permit the board to authorize a refund or assessment outside of these statutorily prescribed periods. See 1971-1972 Report of the Attorney General at 388.
The terminology "issue refunds" is used broadly to encompass any act in the refunding process. E.g., § 58-1142 of the Code of Virginia grants to commissioners of the revenue the power to correct certain assessments and to exonerate those assessments exceeding the proper amount and remaining unpaid. If such assessments are paid, however, this section merely authorizes the commissioner to begin the refund process via a certificate that the assessment was erroneous. Thereafter, the involvement of other local officials is required. In pertinent part, § 58-1142 reads: "If the assessment exceeds the proper amount... and if paid, the governing body of the county or city shall, upon the certificate of the Commissioner... 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...." (Emphasis added.)

A commissioner of revenue is a constitutional officer. His duties are regulated and defined by statute. See Art. VII, § 4 of the Constitution of Virginia (1971).

See, also, Commonwealth v. Cross, 196 Va. 375, 378, 83 S.E.2d 722 (1954), wherein the court states "[t]he right to apply for the correction of an assessment and for a refund is purely a statutory right..." and 18 M.J. Taxation § 65 (1974) stating: "No assessment, however erroneous, can be corrected except by virtue of some statute. There is no common-law remedy by which to obtain a refund of taxes."


A 1982 amendment to § 58-1142 grants the commissioner of the revenue authority to correct assessments which are due to mere clerical error or calculation and made in connection with conducting general reassessments of real estate even if the error was made by others. See 1982 H.B. 372. Prior to this amendment, only mathematical errors made by a commissioner or others performing duties imposed upon a commissioner versus the board of assessors could be corrected pursuant to § 58-1142.

This amendment does not change the result of prior Opinions of this Office to the effect that "the commissioner of the revenue is not authorized under § 58-1142 to correct an error in valuation of real estate made by the board of assessors during the last general reassessment." 1978-1979 Report of the Attorney General at 262, 263. (Emphasis added.)

You have not indicated whether the County of Roanoke has adopted such an ordinance.

See, also, 1980-1981 Report of the Attorney General at 64, 65, which, in reference to refunds and §§ 58-1141, 58-1142 and 58-1152.1, concludes that "[i]f the taxpayer does not make such application, there does not appear to be any requirement that the refund be made."
TAXATION. EXEMPTION. PROPERTY OF AN ORGANIZATION WHICH HAS BEEN SPECIFICALLY EXEMPTED FROM TAXATION BY GENERAL ASSEMBLY MAY NOT AVAIL ITSELF OF EXEMPTION UNTIL JANUARY 1 OF FOLLOWING YEAR.

June 6, 1983

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You have asked when a tax exemption for property owned by Hope in Northern Virginia, Inc. takes effect under Ch. 23, Acts of Assembly of 1983 (H.B. 24). The exemption has been granted by the General Assembly under the authority of Art. X, § 6(a)(6) of the Constitution of Virginia (1971). You wish to know if the exemption takes effect on July 1, 1983, at the time the act becomes law thereby requiring proration of taxes on the property for the balance of the year, or, if it is only effective for tax years beginning on and after January 1, 1984.
Section 58-796 of the Code of Virginia provides that real property taxes are assessed as of January one. The status of the owner, as well as of the property, is fixed on that day. Sections 58-818 through 58-828 provide for proration of real property taxes under certain circumstances, including the transfer of the property to the United States, the State, a political subdivision or a church or religious body. There is no provision of the Code for proration of property in the circumstances you have described. Consequently, the taxable status of the property and its owner for the entire tax year 1983 was established on January 1, 1983. In my opinion, the taxpayer may not avail itself of the new tax exemption until January 1, 1984. See 1972-1973 Report of the Attorney General at 417(2).

TAXATION. EXEMPTION. PROPERTY TAX. ART. X, § 6(F) OF CONSTITUTION OF VIRGINIA CONTINUES EXEMPT STATUS OF CLASSES OF PROPERTY LISTED IN § 58-12.

August 3, 1982

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

You have asked two questions with respect to property tax exemptions under § 58-12 of the Code of Virginia. The first question is whether the commissioner of the revenue has the authority to determine if a particular organization qualifies for exemption under § 58-12(7) or whether in the absence of specific reference to such organization in § 58-12(7), exempt status must be conferred by the General Assembly under Art. X, § 6(a)(6) of the Constitution of Virginia (1971). Your second question, assuming that such organization's property is exempt from local property taxes, is whether exempt status will be retroactively granted or whether taxes will continue to accrue until such time as the determination was made that the organization was entitled to exempt status.

Section 58-12(7) exempts from local property taxes the property of certain named organizations and also the property of "any corporation organized to establish and maintain a museum or museums...."1 This exemption preceded the adoption of the "new" Constitution of Virginia in 1971. Article X, § 6(f) of the new Constitution provides "that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly...." In the 1972 session immediately following the adoption of the new Constitution, the General Assembly interpreted Art. X, § 6(f), referred to as the "grandfather clause," by amending the first paragraph of § 58-12 to read as follows:

"The following classes of property, exempt from State and local taxation on July one, nineteen hundred seventy-one, shall continue to be exempt from taxation,
State and local, including inheritance taxes, under the rules of statutory construction applicable to this section prior to July one, nineteen hundred seventy-one. (Emphasis added.)

Under the rules of statutory construction, the grandfather clause continues those exempt classifications of § 58-12 which were constitutionally permitted prior to July 1, 1971. 1971-1972 Report of the Attorney General at 412(2); see, also, Manassas Lodge v. Prince William Co., 218 Va. 220, 223, 237 S.E.2d 102, 104-105 (1977). "Included within the classes so exempted is property belonging to..." museums operated on a not for profit basis. Id., 218 Va. 223. (Emphasis added.) I would further note that in the Manassas Lodge case the Virginia Supreme Court was construing § 58-12(6), a subsection which did not exempt any organization by name, but rather by classification only.

Therefore, I am of the opinion that an organization may be exempt under § 58-12(7) as a "museum," if it satisfies the requirements contained therein, without regard to whether it is specifically named in such subsection. Furthermore, I am of the opinion that the determination of whether an organization qualifies for the exemption granted by § 58-12(7) is initially one to be made by the commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue under Title 58, subject, of course, to review by the courts under § 58-1145. See §§ 58-14.1, 58-760, 58-796, 58-837, 58-867, 58-1141, and 58-1142; see, also, Reports of the Attorney General 1974-1975 at 491 and 510(2); 1973-1974 at 361, 390-391, and 396(2); 1972-1973 at 390(2); 1971-1972 at 392; 1970-1971 at 366; 1960-1961 at 297; 1956-1957 at 252.

I am also of the opinion that an organization is entitled to receive the benefits of the exemption for the entire period of time in which it satisfied the requirements of § 58-12(7). Manassas Lodge, 218 Va. 223-224. Of course, such an entitlement may be circumscribed by the limitations period contained in §§ 58-1141, 58-1142, and 58-1145. See University of Richmond v. County of Goochland, 218 Va. 801, 241 S.E.2d 751 (1978).

1 Exempt status is also conditioned upon the museum operating on a not for profit basis.

2 Property "belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association..."

3 If the organization acquired its real estate from a taxable entity, there will be no abatement or proration of real estate taxes in the year of acquisition. Cf. §§ 58-818 to 58-828 (which authorizes abatement of taxes upon real estate acquired by the United States, the Commonwealth of Virginia, political subdivisions of the State, churches, or religious bodies).
The Honorable Alma Leitch
Commissioner of the Revenue for the City of Fredericksburg

You have asked two questions concerning the deferral of property tax for real estate "owned [by] and occupied as the sole dwelling of a person or persons not less than sixty-five years of age" or "permanently and totally disabled," as authorized by § 58-760.1 of the Code of Virginia and by an ordinance of the City of Fredericksburg. Specifically, you ask (1) whether property which consists of a store and four unit apartment building, one unit of which is occupied by the owner and his wife, qualifies for exemption as "a dwelling" and (2) whether the intent of § 58-760.1 is to limit occupancy of properties qualifying for deferral to the owner, owner's spouse and their relatives.

In my opinion, for the reasons hereinafter discussed, such a property would not qualify for the exemption from real property tax provided by § 58-760.1.

Section 58-760.1 is authorized by Art. X, § 6(b) of the Constitution of Virginia (1971) which provides that

"The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate and personal property designed for continuous cohabitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said property in relation to their income and financial worth."

The exemption is limited to real estate owned and occupied as a "dwelling." While neither the Constitution nor the statute contain an applicable definition of "dwelling," it has been defined by the Virginia Fair Housing Law to be a building "occupied as, or designed or intended for occupancy as a residence...." Section 36-87. Black's Law Dictionary 454 (5th ed. 1979) defines "dwelling " as "a residence."

Furthermore, the Constitutional Debates contain continual references to "residence" (see Proceedings and Debates of the Senate of Virginia Pertaining to the Amendment of the Constitution, April 11, 1969, at 448), and support the conclusion that the purpose of the exemption was to provide assistance for "the person...who has a home, a dwelling house
solely occupied for that purpose...." Id., March 28, 1969 at 156. Consequently, a building used also for commercial purposes would not be exempt under this section.

It should also be noted that Art. X, § 6(f) provides that "[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed...." Thus, exemptions under § 58-760.1 are to be narrowly construed and in the instance at hand, resolved against the application of the exemption. See, also, Department of Taxation v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975); Commonwealth v. Community Motor Bus Company, Incorporated, 214 Va. 155, 198 S.E.2d 619 (1973). Accordingly, your first question is answered in the negative.

Use of a property as an apartment house could also, in my opinion, render the exemption inapplicable unless it can be shown the persons occupying the other units are relatives of the owner and have an income less than the statutory amount set out in § 58-760.1(a)(2). Section 58-760.1(a)(1) conditions the exemption on certain income limitations on all sources of income "of the owners of the dwelling living therein and of the owners' relatives living in the dwelling...." No reference is made which permits those other than relatives to reside in the dwelling. Furthermore, an intent to exclude property occupied by those other than relatives may be implied by § 58-760.1(a)(3), which states that

"The fact that persons who are otherwise qualified for tax exemption or deferral by an ordinance promulgated pursuant to this section are residing in hospitals, nursing homes, convalescent homes or other facilities for physical or mental care for extended periods of time shall not be construed to mean that the real estate for which tax exemption or deferral is sought does not continue to be the sole dwelling of such persons during such extended periods of other residence so long as such real estate is not used by or leased to others for consideration."

Finally, use of the premises as rental apartments would not be use by the owner as a residence, but also would constitute a business use, which is not permitted by the language of the Constitution or statute. Accordingly, your second question is answered in the affirmative.

1Section 58-760.1 provides in part that "[t]he governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemption from and deferral of taxation of real estate and mobile homes as defined in § 36-71(4), or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe, owned by, and occupied as the sole dwelling of a person or persons not less than sixty-five
years of age, and may also provide the same exemption or deferral for such property of a person who is determined to be permanently and totally disabled as defined in subsection (e) of this section.

Section 58-760.1(a)(1) provides in part "[t]hat the total combined income, excluding at the option of the local government, the first $5,000 or any portion thereof, of any income received by an owner as permanent disability compensation, during the immediately preceding calendar year from all sources of the owners of the dwelling living therein and of the owners' relatives living in the dwelling does not exceed $18,000, provided that the first $4,000 of income of each relative, other than spouse, of the owner, or owners, who is living in the dwelling shall not be included in such total, and further provided that the county, city or town may by ordinance specify lower income figures."

TAXATION. EXEMPTION. SERVICE CHARGE. PROPERTY OF EDUCATIONAL AND CHARITABLE ORGANIZATIONS EXEMPT FROM SERVICE CHARGE ONLY IF USED EXCLUSIVELY FOR EDUCATIONAL OR CHARITABLE PURPOSES.

April 20, 1983

The Honorable Victor J. Smith
Commissioner of the Revenue for the City of Harrisonburg

You have stated that the City of Harrisonburg has adopted an ordinance, pursuant to § 58-16.2 of the Code of Virginia, which levies a "Service Charge on Exempt Real Property." You have asked whether the city may levy a service charge under the ordinance on the property owned by the following entities: Eastern Mennonite College, Eastern Mennonite High School, Inc., The Mennonite Home, Inc. (housing for elderly), Mennonite Board of Missions and Charities, Mennonite Charities, Inc., and Park Village, Inc. (detached individual housing). By focusing your inquiry on the exemption contained in § 58-16.2(A)(ii), I presume you have already determined that these properties are not exempt from the service charge as property owned by churches or religious bodies and used exclusively for religious worship or the residence of a minister.

Section 58-16.2 provides, in part, that:

"[T]he governing body of any county, town or city is authorized to impose and collect a service charge upon the owners of all real estate within its jurisdiction which is exempted from property taxation under subsection (1), except property owned by the Commonwealth, subsections (3), (4), (6), (8), and (10)-(17) of § 58-12, and such sections of the Code of Virginia. Buildings with land they actually occupy, together with the additional adjacent land reasonably necessary for the convenient use of any such building located within such county, city or town shall also be
exempt from the service charge provided herein if the buildings are: (i) lawfully owned and held by churches or religious bodies and wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body or for use as a religious convent, nunnery, monastery, cloister or abbey, or (ii) used or operated exclusively for private educational or charitable purposes and not for profit other than faculty and staff housing of any such educational institution." (Emphasis added.)

Whether a specific property qualifies for exemption from taxation is a determination of fact, which is the responsibility of the office of the commissioner of the revenue. 1977-1978 Report of the Attorney General at 415; 1974-1975 Report of the Attorney General at 510. The following discussion may be used as guidance in making such a determination.

This Office has previously opined that the exemption from service charge provisions of § 58-16.2(A)(i), which tracks the language of § 58-12(2), should be interpreted by using the same principles which are used to determine if property is used exclusively for religious purposes. 1972-1973 Report of the Attorney General at 444. It follows that similar guidelines may be used to determine if property is used exclusively for educational or charitable purposes under § 58-16.2(A)(ii).

In order to be exempt, the property must satisfy not only the ownership requirement but also the use requirement. Thus, the properties of the educational and charitable organizations listed in your letter will be exempt from the service charge only so long as they are used exclusively for educational or charitable purposes and, with respect to educational institutions, are not used for faculty and staff housing.

Property owned by educational institutions is exempt from the service charge if the property is used exclusively for educational purposes except for property which is used for faculty and staff housing. 1981-1982 Report of the Attorney General at 381. With respect to charitable property, an exclusive charitable purpose may be more difficult to define, but it has been held to require that the institution be organized and conducted to perform some service of public good or welfare and that the property be used for such purpose. Manassas Lodge v. Prince William, 218 Va. 220, 237 S.E.2d 102 (1977); 1977-1978 Report of the Attorney General at 415.

Some of the organizations on your list apparently own property which is either leased or sold to individuals for private housing (The Mennonite Home, Inc., Park Village, Inc.). Land which has been subdivided and sold was not eligible for exemption under § 183(b) of the Constitution of Virginia (1902) (now Art. X, § 6 of the Constitution of

On the other hand, exempt property does not lose its exempt status because the owner receives fees for occasional nonexempt use, unless the owner derives substantial net profit from such use. See 1974-1975 Report of the Attorney General at 452. Consequently, the uses of such properties must be carefully scrutinized to determine if they are used exclusively for either educational or charitable purposes.

You have also asked about the effect of §§ 58-12.24 and 58-12.25 on the service charge. Both sections specify property which is determined to be tax exempt. Property exempted under these sections is nevertheless subject to the service charge, unless it meets the exemption requirements of §§ 58-16.2(A)(i) and 58-16.2(A)(ii), as outlined above.

TAXATION. EXEMPTION FOR FARM MACHINERY UNDER § 58-829.1:1(A)(7).

November 30, 1982

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

You have asked whether certain storage tanks used in a farm winery operation constitute "farm machinery" under § 58-829.1:1(A)(7) of the Code of Virginia. If such storage tanks constitute farm machinery, they are exempt from local property taxes as your jurisdiction has adopted an ordinance pursuant to § 58-829.1:1(B).

The salient facts, as stated in your letter to this Office and in your telephone conversation with a member of my staff, are as follows. The business in question is a "farm winery" as defined in § 4-2(10a), and as such qualifies for certain tax benefits under § 4-25.1. A farm winery operation includes both a producing vineyard and fermenting and bottling facilities on the premises "where the owner... manufactures wine predominately from fresh fruits or other agricultural products grown or produced on such farm...." (Emphasis added.) See § 4-2(10a).

The grapes are picked by hand by migrant or local workers, as available. These workers carry the grapes to a machine which separates the grapes from the stems. From there, the grapes are pressed and then transferred to various stainless steel tanks for storage, where the juice may age for up to three years. Further storage and aging occur in
certain wooden vats; thereafter, some of the wine is bottled, while the remainder is shipped to other wineries.

The farm winery concedes that the press, the machine which separates the grapes from the stems, and the capper are taxable. However, the farm winery insists that the stainless steel tanks are exempt from local property taxes as farm machinery and farm implements under § 58-829.1:1(A)(7). These tanks are removable; that is, they sit on four legs and are not permanently affixed.\(^1\)

It is clear that the growing and harvesting of grapes is farming; however, your inquiry does not involve equipment or implements used to grow or harvest grapes. Instead, the equipment at issue stores grape juice until it becomes wine and before it can be bottled.

In resolving questions involving the applicability of tax exemptions, the Supreme Court of Virginia has followed the rule of strict construction; that is, "'[s]tatutes granting tax exemptions are construed strictly against the taxpayer.'" Solite Corp. v. King George Co., 220 Va. 661, 662, 261 S.E.2d 535, 536 (1980), citing from Commonwealth v. Community Motor Bus, 214 Va. 155, 157, 198 S.E.2d 619, 620-621 (1973). The question then becomes, when does farming end and manufacturing begin?

Manufacturing involves the change or transformation of the original raw material "into an article or product of substantially different character...." Prentice v. City of Richmond, 197 Va. 724, 731, 90 S.E.2d 839, 843 (1956). Grape juice has little resemblance to the original raw material (here grapes) and is substantially different in "form, appearance, taste and use..." than the original raw material. City of Richmond v. Richmond Dairy Co., 156 Va. 63, 75, 157 S.E. 728, 732 (1931); see also, Commonwealth v. Meyer, 180 Va. 466, 473, 23 S.E.2d 353, 356 (1942). Therefore, the pressing of grapes is a manufacturing activity which occurs after the cessation of farming. Equipment used after the end of farming cannot be considered farm machinery or farm implements. Applying the rule of strict construction, I conclude that equipment used after the end of farming and during manufacturing (the storage tanks) does not qualify for the exemption permitted under § 58-829.1:1(A)(7).\(^2\)

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1There is no contention that the storage tanks in question are taxable as real estate.
2Compare § 58-829.1:1(A)(7a) wherein the General Assembly has extended the terms "farm machinery and farm implements" to include equipment used by farmers and farm cooperatives to manufacture industrial ethanol under certain circumstances.
The Honorable Elmon T. Gray  
Member, Senate of Virginia

You have asked whether the power of the General Assembly to classify property for purposes of taxation will permit it to declare the roadway and track of a railroad company, which are affixed to the realty, to be tangible personal property subject to local taxation at the tangible personal property rate. As your letter correctly notes, the common law of fixtures holds that the roadway and tracks are real property. For the reasons and authorities which follow, I am of the opinion that the Constitution of Virginia and federal law prohibit the General Assembly from classifying the real property of railroads as tangible personal property subject to the higher tax levy for tangible personal property.

The General Assembly has broad authority under State law to identify and separate different classes of property for purposes of State and local taxation. Article X, § 1 of the Constitution of Virginia (1971) requires that all taxes be uniform upon the same class of subjects and specifically reposes in the General Assembly the authority to classify subjects for State and local taxation. This provision, together with Art. X, § 4 has been construed as granting to the General Assembly the authority to classify and segregate property for purposes of State taxation in a manner other than that which would normally follow definitions established by common law.

In City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948), the Court sustained the General Assembly’s authority to classify and assess the real estate and tangible personal property of railroads and other public service corporations separately. In that opinion, the Court found no violation of the equal protection or due process clauses of the Fourteenth Amendment to the United States Constitution, nor any violation of the uniformity requirements of Art. X, § 1 of the Virginia Constitution. The authority of the General Assembly to classify subjects for taxation was recently confirmed in Southern Railway Co. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970), wherein it was noted that:

"'It is everywhere agreed that neither the Fourteenth Amendment to the Federal Constitution nor the equality and uniformity requirements of the state constitutions prohibit the making of classifications in state legislation relating to taxation. The power of a state to make reasonable and natural classifications for purposes of taxation, it has been said, is clear and not questioned. Such classifications may be made with respect to the subjects of taxation generally, the kinds
of property to be taxed, the rates to be levied or the amounts to be raised, or the methods of assessment, valuation, and collection. Granting the power of a state to make classifications in tax matters, it has been said, we must then grant the right to select the differences upon which the classification shall be based." 211 Va. at 219-220 citing City of Richmond v. Commonwealth, supra, and quoting from 51 Am.Jur. Taxation § 173 at 230-231.

Under the above authority, I am of the opinion that the General Assembly has authority under State law to classify and segregate the roadway and track of a railroad company as a separate class for purposes of State and local taxation. However, this is not to say that what is real property may be classified as tangible personal property.

The only reported Virginia case which addresses the power of the General Assembly to classify one kind of property as though it were another kind of property is the case of City of Roanoke v. James W. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942). The Court found that the capital of certain businesses which was in fact tangible personal property could be taxed by the General Assembly as intangible personal property. A careful reading of the decision reveals that the Court did not hold that result to follow from the General Assembly's power to classify. After completing a painstaking analysis of the history leading to the constitutional provisions at issue, the Court concluded that the term "tangible personal property" was not used in its common law sense, but rather, it "is a restricted or technical term and was not intended to include capital used in business." 180 Va. at 152; see also, A. Howard, Commentaries on the Constitution of Virginia, at 1064 (1974). The City of Roanoke had argued that if the General Assembly had the power to classify one type of property as though it were another type of property, the General Assembly could then classify real property as intangible personal property. Id., at 153. The Court rejected the argument because real property "has been specifically excluded from the classification of capital invested in business." Id.

Thus, I conclude that where the term "real estate" has not been used in the Constitution in a "restricted or technical" sense, it must be assigned its ordinary common law meaning. There was no intent on the part of the framers of Art. X, §§ 1 through 4 of the 1971 Constitution to change anything in §§ 168 through 172 of the 1902 Constitution, as revised in 1928, relating to the power to classify and segregate property for taxation. Report of the Commission on Constitutional Revision, at 295-301 (1969). Furthermore, I am aware of no such historical restriction or technical meaning which was added by the General Assembly. Accordingly, it is my opinion that the Constitution does not permit the General Assembly to define and classify the roadbed and tracks of railroads, which are real property, as tangible personal property.
I am of the further opinion that such a classification of the railroad roadway and tracks would be prohibited under preemptive federal law which forbids any classification which results in the valuation or assessment of railway property in a manner other than that applied for other like kind commercial or industrial property within the same assessment jurisdiction. In 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act (4-R Act), Pub.L. No. 94-210, 90 Stat. 31, 94th Cong., 2nd Sess., § 306 of which is now codified as 49 U.S.C. § 11503. Subsection (b) of 49 U.S.C. § 11503 prohibits the states from enacting legislation which assesses "rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property" or which levies "an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." "Rail transportation property" as defined by the statute and by Rule of the Interstate Commerce Commission includes "all property and other assets... that comprise the entire operating unit devoted to rail transportation service." This same regulatory definition includes "road and equipment property" of a railroad company under the preemptive federal act. "Commercial and industrial property" is defined by 49 U.S.C. § 11503(a)(4) to mean "property...devoted to a commercial or industrial use and subject to a property tax levy." (Emphasis added.) This definition originally included the words "real or personal" immediately following the word "property." The words were omitted as surplusage by § 4(b) of Pub.L. No. 95-473. Thus, the real versus personal property distinction is preserved in the 4-R Act.

A federal Court of Appeals recently applied the 4-R Act to the North Dakota property classification scheme for ad valorem taxes in the case of Ogilvie v. State Board of Equalization of the State of North Dakota, 657 F.2d 204, cert. denied 102 S.Ct. 644 (1981). The court found that the taxation of railroad tangible personal property when all commercial and industrial tangible personal property was exempt from taxation violated 49 U.S.C. § 11503. Ogilvie, 657 F.2d at 210. By simple analogy, taxation of real property of railroads consisting of roadway and tracks at tangible personal property rates, a rate higher than the real property rate, would also violate 49 U.S.C. § 11503.

The preemptive effect of 49 U.S.C. § 11503 on the states' systems of taxation has been sustained in the few reported decisions to date. See State of Arizona v. Atchison, T. & S. F. R. Co., 656 F.2d 398 (1981) and Ogilvie, supra. Accordingly, I am of the opinion that, while the General Assembly has the authority under State law to classify subjects for State and local taxation, such classification may not result in the valuation or assessment of rail transportation property in excess of that imposed
upon other like kind commercial and industrial property in the same assessment jurisdiction.

1Railroad property, including real estate and tangible personal property, is currently taxed at the prevailing rates for real estate. See § 58-514.2:2 of the Code of Virginia.

2Article X, § 1 states in pertinent part: "All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax...The General Assembly may define and classify taxable subjects. Except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes, may be levied."

3Article X, § 4 states: "Real estate, coal and other mineral lands, and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed for local taxation in such manner and at such times as the General Assembly may prescribe by general law."

4The Court also concluded that the separate methods of assessment set forth in Art. X, § 2 of the Virginia Constitution established railroad and other public service corporation property as a separate tax classification.


TAXATION. LAND USE. ANNEXATION. CITY MAY REQUIRE LANDOWNERS IN ANNEXED AREA TO APPLY UNDER CITY ORDINANCE AND PAY APPLICATION FEE.

March 10, 1983

The Honorable Victor J. Smith
Commissioner of the Revenue for the City of Harrisonburg

You have asked several questions concerning the administration by the City of Harrisonburg of a land use assessment ordinance on land annexed from an adjoining county which had a land use ordinance in effect prior to annexation. The annexation decree required the city to adopt such an ordinance but does not address its administration. Preferably, the problem presented by administering this
program in the city should be referred to the annexation court, which is subject to being reconvened in the manner provided by law at anytime during a period of ten years from the effective date of the order of annexation. However, in an effort to assist your office, I will express my opinion on the questions you have presented.

First, you ask whether taxpayers who were under land use taxation in the county must be accepted as such by the city without making application or whether the city may require such taxpayers to make application and pay the application fee.

Section 58-769.8 of the Code of Virginia requires property owners to submit an initial application to "the local assessing officer...." Section 58-769.6:11 states that "[a]ll of the provisions of this [the land-use taxation] article shall be applicable to...." a city land use ordinance except that if the annexed land was a part of a county which had in operation a land use ordinance, the city may adopt its land use ordinance for the tax year prior to April first and "applications from landowners may be received at any time within thirty days of the adoption of the ordinance...." (Emphasis added.) Read together, these sections contemplate that applications will be made to the city's assessing officer, under the city's new ordinance, regardless of the status of the land when it was in another taxing jurisdiction.

It is my opinion that an application under a new ordinance submitted to a new taxing authority is a "new" application. The city assessing authority is under no duty, absent agreement or order, to accept without application or fee the classifications created by the county for parcels enrolled in its land use taxation program. In fact, the valuation of land may be different under each jurisdiction (although the eligibility should not) because each assessing officer is required to use his "personal knowledge, judgment and experience" as to the value of the real estate, as well as the recommendation of the State Land Evaluation Advisory Committee. See § 58-769.9(a). Furthermore, the taxpayer may be required to pay an application fee with his application. See § 58-769.8. Thus, in answer to your first question, I conclude that the city may require landowners to submit applications and pay the prescribed fee. This appears to be a harsh result, but no other provision has been made to administer the program.

In your next question, you have inquired whether an application fee may be required for each parcel on the land book, even if such parcels are in common ownership and are contiguous. This Office has opined that if the parcels are separately assessed on the land book, a separate application is required for each parcel. See 1979-1980 Report of the Attorney General at 339; 1974-1975 Report of the Attorney General at 456. Because § 58-769.8 permits a fee to be charged for "all such applications," it is my opinion that a
separate fee may be charged for each parcel of land for which a separate application is required to be made, regardless of contiguity. However, the locality is not required by § 58-769.8 to charge such fees and it is my opinion that the land use taxation ordinance may provide for one fee for more than one application covering contiguous parcels.

You next inquire whether, if a taxpayer has the right to request that his contiguous parcels be combined into one parcel, the request must be formal and include a plat or if it may be an oral request. This Office has previously stated that an owner of contiguous tracts may petition the commissioner of the revenue to consolidate such tracts into one line in the land book. See 1979-1980 Report of the Attorney General, supra; 1958-T959 Report of the Attorney General at 277. There is no statutory procedure established for this process. However, I note that § 58-804(e) requires that "[w]henever a tract of land has been subdivided into lots under any provision of general law and plats thereof have been recorded, each lot in such subdivision shall be assessed and shown separately upon the books." Consequently, if a plat for the separate parcels is on record, then it appears that a plat showing the parcels combined as one must subsequently be recorded in order for the commissioner of the revenue to assess and show such parcels as one. In that case a plat must be submitted; however, where no such subdivision plat was formally recorded, there appears to be no reason to require such formality when parcels are to be combined.

You next ask whether such a request to combine contiguous parcels is effective for the current tax year or whether it is to be treated as a land transfer and given effect in the year following the year of the request.

For the purposes of land use taxation, the landowner is required to make application prior to November first in order to be so assessed during the subsequent tax year. Real property is generally assessed against its owner on January first. See § 58-796; 1974-1975 Report of the Attorney General at 527. The petition for consolidation must be made and approved prior to the application; then when the application is made, it will take effect the following tax year (or in the case of annexed property, pursuant to § 58-769.6:1, for that tax year). A consolidation request made subsequent to the date that the application for land use assessment must be made cannot, of course, affect the application process. Because no change in ownership is involved, the act of consolidation has no effect on the assessment date of January first. Therefore, in my opinion, a timely request for consolidation of separate parcels takes effect as soon as it is approved by the commissioner of the revenue and is shown in the land books. If that occurs prior to the date an application for land use assessment must be and is made, then one application may be made for the combined parcel, for the relevant tax year.
You next ask three questions concerning the administration of roll-back taxes on land in the annexed area.

In your first question, you set out the following factual situation: assume a parcel of land was under the county's land use ordinance for four years, then under the city's for one year, and a change in use subjects it to the roll-back tax while under city jurisdiction. Based on these facts, you ask whether the city is entitled to assess and collect the roll-back taxes for the entire five years. In my opinion, the answer to that question is no.

Because the roll-back is a tax under § 58-769.10, it subjects the real estate to a lien, pursuant to § 58-762. The roll-back tax is considered to be a deferred tax according to § 58-769.15(A) and would constitute an inchoate lien in the years prior to a change in use. See 1976-1977 Report of the Attorney General at 299. That lien runs in favor of the authority to which taxes are owed. For the years it was under county jurisdiction, that was the county. Furthermore, § 15.1-1041 provides that "[a]ll taxes assessed in the territory annexed for the year at the end of which annexation becomes effective and for all prior years shall be paid to the county." Consequently, in my opinion, the city is not entitled to the roll-back tax for years when the land was under county jurisdiction.

If the city is not entitled to the entire five years of roll-back, you ask on what basis is the roll-back tax to be computed. Section 58-769.10(B) provides that "[i]n determining roll-back taxes chargeable on real estate which has changed in use, the treasurer shall extend the real estate tax rates for the current and next preceding five years, or such lesser number of years as the property may have been taxed on its use value, upon the difference between the value determined under § 58-769.9(d) and the use value determined under § 58-769.9(a) for each such year." Because there were no city assessed values and tax rates applicable to such land during the years under county jurisdiction, then clearly, the county valuations and rates must apply for those years.

Finally, you ask if the city must compute the roll-back for the time the parcel was in the city and notify the county of the change in use and have the county compute and bill the landowner with its share of roll-back taxes or, alternatively, must the city do all the roll-back computations and billing and share the proceeds with the county on a pro rata basis.

There is no clear statutory guidance here. This question emphasizes the desirability of reconvening the annexation court for clarification. Of course, in absence of court direction, there is no reason why an agreement may not be made between the city and county with respect to any step in the collection of roll-back taxes, and particularly, with
respect to notification to the county of a change in use. In the absence of an agreement or provision in the annexation decree, however, there is no statutory duty on the city to collect such taxes for the county.

1The September 9, 1982, order of the Supreme Court affirming the order of the three-judge annexation court was not entered soon enough for the city, under § 58-769.6, to ordain land use taxation prior to June 30, 1982, so that the entire city would come under the ordinance for tax year 1983. Section 58-769.6:1, therefore, places two restrictions on the city land use ordinance adopted November 23, 1982: (1) the city's land use ordinance applies to only the real estate in the area newly annexed, and (2) the ordinance is effective only for the 1983 tax year. A new ordinance must be adopted prior to June 30, 1983, to be effective for the tax years 1984 and thereafter.

2In the case of annexed property, there is a grace period provided by § 58-769.6:1.

3The land use assessment application process will have taken place prior to the time the commissioner of the revenue has prepared and delivered the land book to the treasurer after which time "no alteration shall be made therein by him affecting the taxes or levies for that year." See § 58-807.

TAXATION. LAND USE. ASSESSMENT PROGRAM. PERSONAL LIABILITY FOR ROLL-BACK TAXES.

September 28, 1982

The Honorable G. M. Weems
Treasurer of Hanover County

You have requested my opinion regarding liability for back taxes when "land use assessment" is changed. Your inquiry involves a fact situation where the owner of real estate, which real estate qualifies for forestal use value assessment and taxation,1 conveys 16.2 acres of such real estate to a purchaser. Because twenty (20) acres is the minimum acreage required for qualification for forestal use value assessment and taxation, it is clear that such conveyed parcel no longer qualifies for use value assessment and taxation. Moreover, the split-off parcel in this instance, is subject to roll-back taxes pursuant to § 58-769.13(a). 1979-1980 Report of the Attorney General at 339. You ask whether the seller or the purchaser is liable for the roll-back tax liability.

Of course, the land itself is subject to a lien for such roll-back taxes. 1976-1977 Report of the Attorney General at 299 and 1972-1973 Report of the Attorney General at 423. Insofar as personal liability is concerned, § 58-769.13(a) states that:
"Separation or split-off of lots, pieces or parcels of land from the real estate which is being valued, assessed and taxed under an ordinance adopted pursuant to this article, either by conveyance or other action of the owner of such real estate shall subject the real estate so separated to liability for the roll-back taxes applicable thereto...." (Emphasis added.)

Therefore, it is the action of the seller of the real estate which triggers the roll-back tax liability.

This Office has previously opined that "the owner of the land who makes the change which disqualifies the land from the land use assessment program should be billed for the roll-back taxes..." in construing an earlier version of § 58-769.10.2 1976-1977 Report of the Attorney General at 299. I am of the opinion that the same result should obtain here; that is, the owner of the land whose action triggered the roll-back tax liability should be billed for such liability. In the fact situation you have posited, such owner of the land is the seller. This result places the tax burden upon the landowner whose action caused the liability to attach and who enjoyed the benefits of participation in the land use assessment program.

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1Section 58-769.7 of the Code of Virginia requires a minimum of twenty acres for assessment as "real estate devoted to...forest use...."

2The action which results in roll-back tax liability is the separation or split-off of land under use value assessment and taxation, by conveyance or other action of the owner, which separated land fails to meet the minimum acreage requirements of § 58-769.7(b).

TAXATION. LAND USE. ASSESSMENTS MADE BY COMMISSIONER OF REVENUE IN ABSENCE OF APPOINTED LOCAL ASSESSING AUTHORITY.

February 7, 1983

The Honorable Robert B. Fox
Commonwealth's Attorney for Westmoreland County

You have asked whether the commissioner of the revenue may be empowered to assess real estate parcels on their land use value pursuant to an ordinance adopted in accordance with § 58-769.6 of the Code of Virginia for tax years beginning on and after January 1, 1983. You advise that until December 31, 1982, Westmoreland County had been operating under an ordinance requiring biennial assessments, as provided for in §§ 58-778.1 and 58-769.2, and had appointed a full-time real estate appraiser under § 58-769.3(B). The county now proposes to rescind the ordinance for biennial assessments, having just completed such an assessment prior to December 31, 1982. With the
abolition of the appraiser's office incident to the repeal of the biennial assessment ordinance and there being no other local assessing authority appointed, you are uncertain whether the commissioner of the revenue is permitted by the Code to fulfill the role of the local assessing officer of real estate qualifying for land use taxation.

The uncertainty arises because § 58-769.15(A) incorporates into the land use statutes all the provisions relating to real estate assessments found in Title 58 and makes them "applicable to assessments and taxation hereunder mutatis mutandis...." The general law provisions of Title 58 pertaining to real estate reassessments provide that four-year, general reassessments are performed by an authority other than the commissioner of the revenue under § 58-787 and that annual or biennial reassessments may be required to be performed by the commissioner of the revenue but only with his consent, according to § 58-769.2. There is no general statutory authority for the commissioner of the revenue to reassess the value of real property, such as exists for tangible personal property under § 58-864.1

Conversely, throughout Ch. 15 of Title 58, governing matters pertaining to real estate assessments, there are a number of instances where the commissioner of the revenue is required to reassess the value of real estate apart from general, biennial or annual reassessments, based upon changed circumstances.2

Section 58-769.9(a), which pertains to valuation of real estate under a land use taxation ordinance, expressly refers to the "commissioner of the revenue or duly appointed assessor..." as the individual responsible for valuation.3 Similarly, § 58-769.10(C) provides that when liability for roll-back taxes attaches, the "commissioner shall forthwith determine and assess the roll-back tax...." In my opinion, the commissioner of the revenue is the "local assessing officer" for purposes of Art. 1.1, Ch. 15, Title 58, in the absence of other appointed assessing officers and, therefore, is authorized to perform the assessments.

1But, see, § 58-774 (assessment of mineral lands).
2See §§ 58-764 (easement affecting value); 58-772 (subdividing land into lots); 58-772.1 (reclassification or exception by zoning authorities); 58-810 (omitted properties); 58-811.1 (new construction); and 58-813 (destroyed or damaged buildings).
3Section 58-769.9 provides in pertinent part: "In valuing real estate for purposes of taxation by any county, city or town which has adopted an ordinance pursuant to this article, the commissioner of the revenue or duly appointed assessor shall consider only those indicia of value which such real estate has for agricultural, horticultural, forest or open space use and real estate taxes for such jurisdiction shall be extended upon the value so determined."
TAXATION. LAND USE. CHANGE IN OWNERSHIP DOES NOT AFFECT CONTINUATION OF USE VALUE ASSESSMENT SO LONG AS USE DOES NOT CHANGE.

February 10, 1983

The Honorable John Watkins
Member, House of Delegates

You have asked two questions concerning use value assessment of real property. First, you ask whether a locality may remove a parcel of real estate from a use value assessment program merely because the ownership changed from individual ownership to a partnership consisting of the same owners. Second, you inquire whether a locality may require a survey of the real estate to accompany an application for use value assessment as a prerequisite for eligibility.

The answer to your first question is provided by § 58-769.8 of the Code of Virginia, which states, in part, as follows:

"Continuation of valuation, assessment and taxation under an ordinance adopted pursuant to this article shall depend on continuance of the real estate in the use for which classification is granted, continued payment of taxes as referred to in § 58-769.8:1, and compliance with the other requirements of this article and the ordinance and not upon continuance in the same owner of title to the land."

In my opinion, a parcel may continue in a use value assessment program despite a complete change in ownership, so long as the actual use of the land does not change and the other prerequisites of § 58-769.8 are satisfied.

In answer to your second question, I find no basis for permitting a locality to automatically require every application for use value assessment to be accompanied by a survey. Section 58-769.8 requires property owners wishing to qualify for use value assessment to submit an application on forms prepared by the State Tax Commissioner. In addition, an application fee may be required by the locality. No other specific application requirements are set out.

In determining whether a parcel qualifies for use value assessment, the local assessing officer must make certain factual determinations. Among these are minimum acreage requirements. If a question should arise whether the parcel meets these minimum acreage requirements, it may be necessary for the applicant to produce evidence which will qualify the parcel for the minimum acreage. Although such evidence may include a survey, the locality should consider all facts that are relevant on the question whether the property meets the use requirements.
The corollary to this section is § 58-769.10, which provides for imposition of a roll-back tax if the use does change to a nonqualifying use. That section provides, in subsection (C), that "[l]iability to the roll-back taxes shall attach when a change in use occurs but not when a change in ownership of the title takes place if the new owner continues the real estate in the use for which it is classified...." See 1980-1981 Report of the Attorney General at 355.

Section 58-769.7(b) sets the following minimums: (1) agricultural or horticultural use - 5 acres; (2) forest use - 20 acres; (3) open-space use - 5 acres (2 acres in certain cities).

**TAXATION. LAND USE. ROLL-BACK TAXES ARE IMPOSED ONLY FOR THOSE YEARS DURING FIVE PRECEDING TAX YEARS THAT PARCEL WAS UNDER LAND USE.**

March 31, 1983

The Honorable N. Duval Flora
Treasurer for the City of Chesapeake

You have asked for an interpretation of the provision in § 58-769.10(A) of the Code of Virginia which provides that "real estate shall be subject to roll-back taxes for such of the five years immediately preceding in which the real estate was valued, assessed and taxed under such ordinance." You wish to know if such years encompass any five preceding years in which the parcel was under land use. For example, would a parcel under land use only in 1976, and on which the use was changed six years later in 1982, be subject to roll-back taxes for the year 1976.

It is my opinion that the language used throughout § 58-769.10 clearly evidences an intent to impose roll-back taxes only on the five years immediately preceding the year of change in use. The first sentence of § 58-769.10(A) states:

"When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to this article, and the use by which it qualified changes, to a non-qualifying use, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes, in an amount equal to the amount, if any, by which the taxes paid or payable on the basis of the valuation, assessment and taxation under such ordinance were exceeded by the taxes that would have been paid or payable on the basis of the valuation, assessment or taxation of other real estate in the taxing locality in the year of the change and in each of the five years immediately preceding the year of the change...." (Emphasis added.)
Thus, the general rule for imposition of the roll-back tax is that it encompasses the five tax years immediately preceding the year of the change as well as the year of the change. If the parcel was not under land use for all five previous tax years, then the roll-back tax is imposed only for those years, during the five years, that the parcel was under land use. This is evident from § 58-769.10(B), which provides for extending the real estate tax rates for the current and next preceding five years, "or such lesser number of years as the property may have been taxed on its use value...." Therefore, in determining the roll-back liability, the treasurer must look to the current year and the immediately preceding five years and impose the tax only on such of those years in which the land was taxed on its use value.

In the example stated, the land was not in the land use program during any of the five years immediately preceding the year of changing the use; hence, the roll-back assessment would not be applicable.

TAXATION. LAND USE. ROLL-BACK TAXES MAY BE IMPOSED UPON CHANGE TO NONQUALIFYING USE EVEN THOUGH CATEGORY OF USE UNDER ORDINANCE HAS BEEN REPEALED.

June 10, 1983

The Honorable P. Warren Anderson, Jr.
Commissioner of the Revenue for Amelia County

You advise that Amelia County withdrew forestry from the land use tax program in 1980, effective in the 1981 tax year. Thereafter, forestal land no longer qualified for special tax assessment based on land use under § 58-769.4, et seq., of the Code of Virginia.

You have asked which years are to be considered in applying roll-back taxes pursuant to § 58-769.10 if a parcel's use is subsequently changed from forestal use to a nonqualifying use, now that the county has deleted the particular category from use value assessment under which the parcel had been qualified. I assume that the parcel was not assessed at use value in 1981 because forestal use was no longer an eligible category and that the new use was not an eligible use under the ordinance. (Other eligible uses would include agricultural, horticultural and open-space. See § 58-769.5.)

Section 58-769.10(A) provides that:

"When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to this article, and the use by which it qualified pursuant to this article, and the use by which it qualified changes, to a nonqualifying use, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes, in an amount equal to the amount, if any, by
which the taxes paid or payable on the basis of the valuation, assessment and taxation under such ordinance were exceeded by the taxes that would have been paid or payable on the basis of the valuation, assessment or taxation of other real estate in the taxing locality in the year of the change and in each of the five years immediately preceding the year of the change, plus simple interest on such roll-back taxes at the same interest rate applicable to delinquent taxes in such locality, pursuant to § 58-847 or § 58-964. If in the tax year in which the change of use occurs, the real estate was not valued, assessed and taxed under such ordinance, the real estate shall be subject to roll-back taxes for such of the five years immediately preceding in which the real estate was valued, assessed and taxed under such ordinance." (Emphasis added.)

Turning to your specific question of which years are to be included in the roll-back when the land use changes, the answer depends upon which year the use changes. If the use had changed in 1980 or any preceding year, the first sentence in § 58-769.10(A) would apply; thus, the roll-back would apply for 1980 (the year of the change) and the five years preceding 1980 in which the land was assessed at the land use rate. On the other hand, based on the assumption that the change in use occurred after 1980, the last sentence above quoted will be applicable. Therefore, when the land use changes, roll-back taxes may be imposed for the years, not exceeding five of the immediately preceding years, in which the county provided for use value assessment of forestal land and in which the land was assessed based on its forestal use. The year 1980 was the last year in which the ordinance applied to forestal use, and thus would be the latest year to be counted when applying the roll-back.¹

¹ For example, if the use first changes in 1983 to a nonqualifying use, the roll-back tax would be imposed for the years 1978, 1979 and 1980 (the three years of the preceding five years in which the land was taxed at the use rate).

TAXATION. LAND USE. ROLL-BACK TAXES NOT ASSESSED WHEN PARCEL REMOVED FROM PROGRAM BECAUSE OF DELINQUENT TAXES.

May 26, 1983

The Honorable Dabney H. Bowles
Commissioner of the Revenue for Louisa County

You have asked whether you are required to assess a landowner with roll-back taxes when lands assessed under the land use program have been removed from the use value assessment program for failure to pay taxes.
In my opinion, the roll-back tax should not be assessed in such a case.

Section 58-769.8:1 of the Code of Virginia provides:

"If on June one of any year the taxes for any prior year on any parcel of real property which has a special assessment as provided for in this article are delinquent, the appropriate county, city or town treasurer shall forthwith send notice of that fact and the general provisions of this section to the property owner by first-class mail. If after sending such notice, such delinquent taxes remain unpaid on November one, the treasurer shall notify the appropriate commissioner of the revenue who shall remove such parcel from the land use program."

Roll-back taxes are imposed by § 58-769.10(A), which states in part:

"When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to this article, and the use by which it qualified changes, to a nonqualifying use, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes...." (Emphasis added.)

Sections 58-769.10(C) and 58-769.13(a) further define "a nonqualifying use" to make it clear that roll-back taxes are imposed only when the actual use of the land changes to a nonqualifying use or the acreage changes to an amount less than the minimum requirement. The mere fact that the parcel has been removed from the use value assessment program does not, of itself, subject such land to roll-back taxes.

In prior Opinions, this Office has pointed out situations where removal of a parcel from land use assessment does not subject it to roll-back taxes. For example, a change in use of a portion of a parcel subjects only that portion to the roll-back tax, and not the portion remaining in a qualifying use. However, while failure to report the change in use to the commissioner of the revenue may result in disqualification of the entire parcel from continuation in the use assessment program, it does not subject the unaltered acreage to roll-back taxes. 1980-1981 Report of the Attorney General at 355.

In another Opinion it was noted that while a change in the statutory criteria for use valuation might remove a parcel from the program, the roll-back taxes would not be imposed in the absence of an actual change in the parcel's use. 1972-1973 Report of the Attorney General at 426. Therefore, unless the parcels have changed to a nonqualifying use or size, removal from land use valuation because of delinquency of taxes would not subject them to the roll-back tax.
Although the land will no longer be qualified for the land use assessment for future years, § 58-769.10 does not require the imposition of the additional taxes for the past years until the actual use of the land changes.

TAXATION. LAND USE. SLUDGE LAGOON NOT QUALIFIED AS AGRICULTURAL USE EVEN THOUGH FERTILIZER IS BY-PRODUCT.

May 23, 1983

The Honorable Alice Jane Childs
Commissioner of the Revenue for the County of Fauquier

You have asked whether a sludge lagoon on land leased by a farmer qualifies for the special assessment available under Title 58, Ch. 15, Art. 1.1 of the Code of Virginia.

You advise that the lagoon was built by a private processor on the farmer's land. You have stated further that the owner/farmer and other farmers will use the sludge as fertilizer on their farms. I assume that Fauquier County has adopted an ordinance pursuant to § 58-769.6 providing for special use assessment. From your statement of the facts, I also assume that you are asking particularly whether the land in question qualifies for the special classification labeled "[r]eal estate devoted to agricultural use" defined in § 58-769.5(a).

The applicable portion of § 58-769.5(a) establishes a special classification for real estate "when devoted to the bona fide production for sale of plants and animals useful to man under uniform standards prescribed by the Commissioner of Agriculture and Commerce...."

According to Webster's Seventh New Collegiate Dictionary (1972), sludge is "precipitated solid matter produced by water and sewage treatment processes." The land in question is used for storage of sludge, rather than for the "bona fide production for sale of plants...." The fact that fertilizer used in farming is a by-product of the treatment processes does not alter the fact that the direct use of the land is not for agricultural purposes.

Based on the foregoing, it is my opinion that a sludge lagoon built by a private firm on land leased to it by a farmer does not qualify for the special assessment available for land devoted to agricultural use under § 58-769.5(a).

TAXATION. LICENSE. COMMISSION MERCHANTS SELLING BY SAMPLE, CIRCULAR OR CATALOGUE.
August 10, 1982

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

You have asked several questions concerning imposition of local business license tax under § 58-266.1 of the Code of Virginia on persons selling and distributing goods and products within your jurisdiction. In one of the circumstances which you describe a merchant purchases a sample case from a manufacturer, demonstrates the manufacturer's product to retail customers and takes orders from the customers. These orders are forwarded to the manufacturer who fills them by shipping the goods to the local merchant. The merchant then conveys them to the retail customer. The merchant collects a commission which is the difference between the wholesale price billed to him by the manufacturer and the retail price at which the goods are sold to the customer.

Section 58-266.1 permits localities by ordinance to levy local license tax on "businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city, town or county, whether any license tax be imposed thereon by the Commonwealth or not..." within certain described limitations. This language is broad enough to encompass the activities of the merchant which you describe. Thus, I am of the opinion that the City of Martinsville may require such persons to obtain a business license if such activities are carried on within the city's taxing jurisdiction. See § 58-266.5.

You have also asked whether such persons are to be classified as wholesale, retail or commission merchants for purposes of local license tax. Persons engaged in the selling of merchandise in the manner which you describe are classified as commission merchants under subparagraph B of § 58-266.1. That subparagraph provides, in part:

"Any person engaged in the business of selling merchandise on commission by sample, circular, or catalogue for a regularly established retailer, who has no stock or inventory under his control other than floor samples held for demonstration or sale and owned by the principal retailer, shall be classified as a commission merchant and taxed only on commission income as provided for [in] category B4 above. Such person engaged in such business shall not be subject to tax on total gross receipts from such sales."

Accordingly, I am of the opinion that the persons you describe are to be classified as commission merchants for purposes of local business license tax under § 58-266.1.

You also inquire as to the proper classification of distributors who purchase goods from a manufacturer, stock supplies at their home or elsewhere, and then sell the goods
at wholesale to merchants for resale to customers. Section 58-266.1 does not separately classify such persons for purposes of local license tax.

However, persons conducting such a business would be considered wholesalers and subject to local license tax only where a definite place of business or store is maintained within the jurisdiction seeking to impose the local tax. Subparagraph (A)(6) of § 58-266.1 limits imposition of local license tax and states:

"No city, town or county shall levy a tax upon a wholesaler for the privilege of selling goods, wares and merchandise to other persons for resale unless such wholesaler has a definite place of business or store in such city, town or county, but the foregoing shall not be construed as prohibiting any city, town or county from imposing a local license tax on a peddler at wholesale who is subject to a state license tax under Article 10 (§ 58-346 et seq.) of this chapter."

Under the circumstances you describe, the distributor does not peddle goods, wares or merchandise at other than a definite place of business operated by the seller and would not be classified for State license tax purposes as a peddler under § 58-346, et seq. Caffee v. City of Portsmouth, 203 Va. 928, 128 S.E.2d 421 (1962). Therefore, the distributor could not be subject to local license tax as a peddler and the situs limitations in subparagraph (A)(6) of § 58-266.1 would apply.

In light of the foregoing, I am of the opinion that, for purposes of local business license taxation under § 58-266.1, a distributor of goods such as you describe would be classified as a wholesaler and would be subject to local business license tax only if such wholesaler maintains a definite place of business or store within your jurisdiction. You have indicated that these wholesalers operate out of their homes. I am of the further opinion that a home-based, wholesale operation constitutes a definite place of business. See Commonwealth ex rel. Morrissett v. Manzer, 207 Va. 996, 154 S.E.2d 185 (1967); Opinion to the Honorable N. Everette Carmichael, Commissioner of the Revenue for Chesterfield County, dated May 13, 1982.

For purposes of State, but not local, license tax such persons are defined either as brokers or commission merchants. See § 58-293 effective until January 1, 1983.

TAXATION. LICENSE. CONTRACTORS WHOSE PRINCIPAL OFFICE OR BRANCH OFFICES ARE LOCATED ELSEWHERE MUST PAY BUSINESS LICENSE TAX ON ENTIRE GROSS RECEIPTS EARNED WHERE GROSS RECEIPTS IN SECOND JURISDICTION EXCEED $25,000.
October 13, 1982

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

You have asked for an interpretation of § 58-299 of the Code of Virginia concerning the authority of cities, towns and counties to impose a business license tax on contractors. According to your letter, a contractor has paid a contractor's license tax in the city, town or county in which its principal office or branch office is located. This same contractor then goes to a different Virginia locality and performs contracting work for which he receives gross receipts in excess of $25,000. As you have noted, such a contractor will be subject to a license tax in the second jurisdiction. You wish to know whether the measure of the tax in the second jurisdiction is based upon the entire gross receipts earned in that jurisdiction or only on gross receipts earned in that jurisdiction in excess of $25,000.

The question you have asked has been answered by a prior Opinion of this Office found in the 1969-1970 Report of the Attorney General at 264. According to that Opinion, once the gross receipts in the second jurisdiction exceed $25,000, the exemption is lost and the contractor is required to pay the license tax of the second jurisdiction on the entire gross receipts earned in that second city, town or county. The contractor may then deduct the amount of business done in the second locality upon which he has paid a license tax from the gross revenue reported to the city, town or county in which his principal or branch office is located. See 1974-1975 Report of the Attorney General at 526.

Your letter also takes note of the fact that § 58-299 was amended by the 1982 General Assembly, the amended version to become effective January 1, 1983. The amendment, Ch. 633, Acts of Assembly of 1982, did not change the result of the earlier Opinions of this Office. Its only effect was to eliminate the reference to the State license tax on contractors which is repealed by the same act effective January 1, 1983.

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1Section 58-299. (Effective January 1, 1983.) -- "When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have paid any local license required by the city, town or county in which his principal office and any branch office or offices may be located, no further license shall be required by any other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of $25,000 in any year, such other city, town or county may require of such contractor a local license, and the amount of business done in such other city, town or county in which a license tax is paid may be deducted by the contractor from
the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located."

TAXATION. LICENSE. ITINERANT MERCHANT DEFINITION.

August 3, 1982

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

You have asked whether a merchant who sells relics from the War Between the States and other related items from a truck on weekend trips to different locations within your jurisdiction is subject to State license tax under § 58-381 of the Code of Virginia, as an itinerant merchant. You indicate that the merchant maintains an established business location in Frederick County but that sales are also made from a truck at different locations within your county. Frederick County does not impose a retail merchant or itinerant vendor license tax under § 58-266.1.

An "itinerant vendor" for purposes of State license tax\(^1\) is defined under § 54-809 as

"[A] person, firm or corporation who shall engage in, do or transact any temporary or transient business in this State, either in one locality or in traveling from place to place in the sale of goods, wares and merchandise, and who for the purpose of carrying on such business shall...use or occupy any...motor vehicle...[or] car...in any street, alley or other public place in any city or town, or in any public road in any county, for a period of less than one year, for the exhibition of or sale of such goods, wares or merchandise."

The definition of an itinerant vendor contained in § 54-809 includes persons transacting any temporary or transient business in this State and makes no exception for persons who maintain an established place of business in addition to their itinerant trade. Accordingly, I am of the opinion that the business which you describe is that of an itinerant merchant, subject to State license taxation under § 58-381 to the extent of sales made at different locations from the truck.\(^2\)

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\(^1\)State license taxes on itinerant vendors have been repealed effective January 1, 1983. See Ch. 633, Acts of Assembly of 1982.

\(^2\)Section 58-246 provides, "When any person, firm or corporation is engaged in more than one business which is made by the provisions of this Code subject to taxation, such person, firm or corporation shall pay the tax provided by law on each branch of the business."
You have asked whether a town has the authority to enact an ordinance designating the streets, alleys or public places where itinerant vendors can sell or offer for sale their goods. In my opinion, a town does have such authority.

Section 58-266.8 of the Code of Virginia authorizes a local governing body to levy and collect a license tax on all "itinerant merchants as defined by § 54-809" or peddlers as defined by § 58-340. In the second paragraph of § 58-266.8, the governing body is also permitted to "designate the streets or other public places on or in which all licensed peddlers may sell or offer for sale their goods, wares or merchandise...." (Emphasis added.) The latter paragraph does not specifically include "itinerant merchants," and itinerant merchants or vendors are referred to as a separate classification at the beginning of the section.

The primary criterion which separates an itinerant merchant from a peddler is that the itinerant merchant may, for the purpose of carrying on his business, hire, lease, use or occupy a building, structure, vehicle or part thereof, including, for example, a hotel room. Although there may be such a distinction, the issue here is the regulation of the business of itinerant merchants when they conduct their business in the public streets. For this purpose, an itinerant vendor who is selling in the streets is indistinguishable from a peddler.

Accordingly, I conclude that a town may regulate by ordinance the streets and public places in which itinerant vendors do business in the same manner as the town so regulates the business of a peddler pursuant to § 58-266.8.

1Section 54-809 reads, in part: "Itinerant vendor...is a person, firm or corporation who shall engage in, do or transact any temporary or transient business in this State, either in one locality or in traveling from place to place in the sale of goods, wares and merchandise, and who for the purpose of carrying on such business shall hire, lease, use or occupy any building or structure, motor vehicle, tent, car, boat or public room or any part thereof, including rooms in hotels, lodging houses, or houses of private entertainment, or in any street, alley or other public place in any city or town, or in any public road in any county, for
a period of less than one year, for the exhibition of or sale of such goods, wares or merchandise."

Section 58-340 reads, in part: "Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler.

All persons who do not keep a regular place of business, whether it be a house or a vacant lot or elsewhere, open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers...."

TAXATION. LICENSE. "NEWSPAPER" DEFINED FOR PURPOSES OF § 58-266.1(A)(3) LICENSE TAX EXEMPTION.

January 28, 1983

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have asked whether two publications, "Personal Finance" and "Tax Angles", are "newspaper[s]" within the meaning of § 58-266.1(A)(3) of the Code of Virginia. "Personal Finance" is published twice monthly, describes itself as "The Inflation Survival Letter" and is mailed to about 90,000 paid subscribers. It furnishes current analysis of financial investment opportunities and gives specific advice concerning those opportunities. "Tax Angles", published each month, describes itself as "A Monthly Letter of Tax Saving Ideas, Strategies, Techniques" and is mailed to about 42,000 paid subscribers. Typically, an individual issue of each of these letters consists of four, 8 1/2 x 11 inch sheets printed in two colors on both sides of the paper.

Section 58-266.1(A)(3) states in part that "[n]o city, town or county shall require a license to be obtained for the privilege or right of printing or publishing any newspaper...." A prior Opinion of this Office found in the 1977-1978 Report of the Attorney General at 278, acknowledges that Title 58 fails to define the term "newspaper" and, therefore, sets forth the applicable rules of statutory construction and the definition of "newspaper" to be used for purposes of § 58-266.1(A)(3).

Unless the language or context indicates otherwise, words used by the legislature in statutes are to be construed in the sense in which they are popularly used. Commonwealth v. Orange-Madison Coop., 220 Va. 655, 261 S.E.2d 532 (1980); Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938). Using this rule, this Office has defined "newspaper" as follows:

"In ordinary understanding a newspaper is a publication appearing at regular, or almost regular, short intervals of time, as daily or weekly, appearing usually in sheet
form and containing news, that is, reports of happenings of recent occurrence and of varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, and intended for the information of the general reader." See 1977-1978 Report of the Attorney General at 278. (Emphasis added.)

Using this definition, neither "Personal Finance" nor "Tax Angles" are "newspapers" within the meaning of § 58-266.1(A)(3). "Personal Finance" is published twice monthly and covers limited subject matters, e.g., tax, investment and financial information. "Tax Angles" is published once a month and deals solely with tax information and advice. Neither of these publications contains material that would be considered of "varied character." The material is intended for readers with a special interest in financial information, not for the information of the general reader. See Commonwealth v. Association of Iron and Steel Engineers, 421 Pa. 583, 220 A.2d 793 (1966).

The Virginia Supreme Court follows the rule of strict statutory construction on tax exemptions. In a recent case concerned with an exemption under subsection (4) of § 58-266.1(A), the Court reiterated its position that exemption statutes are to be construed strictly against the taxpayer. Solite Corp. v. King George Co., 220 Va. 661, 261 S.E.2d 535 (1980).

In summary, it is my opinion that neither "Personal Finance" nor "Tax Angles" are "newspapers" within the meaning of § 58-266.1(A)(3).

Section 58-266.1 permits the imposition of a license tax on businesses, trades, etc., conducted in cities, towns and counties.

TAXATION. LOCAL LEVIES. ASSESSMENT OR REASSESSMENT OF REAL PROPERTY RESULTING IN INCREASE IN TOTAL REAL PROPERTY TAX LEVIED. POTENTIAL IMPACT OF § 58-785.1 ON TAX RATE. WHEN RATE TO BE FIXED.

April 5, 1983

The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates

You have asked whether the City Council of the City of Fredericksburg may set its tax rate at any time on or before April 15, 1983, to become effective for the first six months of the 1983 calendar year. The letter you attached from Walter Jervis Sheffield, City Attorney for the City of Fredericksburg, focuses your question on the interpretation
The words "forthcoming tax year" as used in § 58-785.1(A) of the Code of Virginia.

Section 58-785.1(A) deals generally with the potential impact on the total real estate tax levied when real property tax assessments increase. It reads in pertinent part:

"Notwithstanding any other provision of law, where any annual assessment, biennial assessment or general reassessment of real property by a county, city, or town would result in an increase of one per centum or more in the total real property tax levied, such county, city, or town shall reduce its rate of levy for the forthcoming tax year so as to cause such rate of levy to produce no more than one hundred one per centum of the previous year's real property tax levies, unless subsection B of this section is complied with...." (Emphasis added.)

Mr. Sheffield's letter suggests that some contend it is possible to read "forthcoming tax year" to require the reduction in the levy to be made prior to the beginning of the tax year in which the reduction is to become effective.


Subsection 58-785.1(D) is such a pertinent part. It provides:

"Notwithstanding other provisions of general or special law, the tax rate for taxes due on or before the thirtieth day of June of each year, may be fixed on or before the fifteenth day of April of that tax year."

This subsection clearly and directly sets forth the time period in which the tax rate for taxes due on or before June thirtieth of each year are to be fixed. To interpret the phrase "forthcoming tax year" in subsection A of § 58-785.1 to mean that the tax rate for the year after the assessment or reassessment must be fixed on or before December thirty-one of the assessment year would create an unnecessary conflict between the two subsections in question.

Utilizing the rule of statutory construction that all parts should be construed so as to make a harmonious and consistent whole, I am of the opinion that the phrase "forthcoming tax year" appearing in § 58-785.1(A) merely
identifies the tax year immediately following the year in which the assessment or reassessment takes place as the year in which a rate reduction may be required. It is not determinative of when the tax rate must be fixed. Rather, § 58-785.1(D) controls the period of time in which the tax rate must be established.

Accordingly, it is my opinion that the City Council of the City of Fredericksburg may, on or before April fifteenth of each year, set the tax rate for taxes due on or before June thirtieth of that tax year.

TAXATION. LOCAL LEVIES. MEALS AND ROOMS MUST BE AUTHORIZED TAXING POWER BY LAW.

June 2, 1983

The Honorable Alson H. Smith, Jr.
Member, House of Delegates

You have asked by what authority a county, city or town may impose a sales tax on rooms and food. This response is based on the assumption that your inquiry does not pertain to the general sales tax authorized by § 58-441.49(b) but to a separate and additional local tax on transient lodging and restaurant meals.

Your inquiry is answered in part by § 58-441.49(a) which prohibits a local general sales tax except as authorized in § 58-441.49(b). Expressly exempted from this general prohibition are, among other things, "local taxes on transient room rentals and meals...to the extent authorized by law..." See § 58-441.49(a). This quoted language is not itself a grant of power to impose such a tax; it is merely an exception to the general prohibition. See 1975-1976 Report of the Attorney General at 365 and 1974-1975 Report of the Attorney General at 519.

Thus, while § 58-441.49(a) does not prohibit local taxes on meals and transient rooms, the actual grant of such power must be found elsewhere. Under the familiar Dillon's Rule followed in the Commonwealth, a county, city or town can exercise only those powers conferred expressly or by necessary implication. See City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 101 S.E.2d 641 (1958); 1972-1973 Report of the Attorney General at 378. Sections 58-76.1 and 58-76.2 authorize the counties of Albemarle, Arlington, Fairfax, Mecklenburg, Loudoun, Prince William and Rockingham to levy a transient occupancy tax on hotels, motels, boarding houses and travel campgrounds. I am aware of no other statute which can be construed to authorize a county to impose a tax on transient lodging or meals. Accordingly, I am of the opinion that no county may impose a local sales tax on meals and that only those counties listed previously may levy such a tax on rooms as authorized by §§ 58-76.1 and 58-76.2.
A different result may apply to cities and towns. Whereas the General Assembly has not given general taxation powers to counties, cities and towns may be granted such powers by their charters. Therefore, before a decision may be made with respect to a particular city or town, it is first necessary to review that city or town's charter. I am of the opinion that where such a charter provision exists the governing body thereof would be authorized to impose a local sales tax on meals and rooms within the terms of the exception provided in §58-441.49(a).4

1Section 58-441.49(b) of the Code of Virginia permits the governing bodies of cities and counties to levy a one percent general retail sales tax. Where such a sales tax is levied, a complementary one percent use tax is authorized by §58-441.49:1(a).

2Rate limitations are provided for and the tax does "not apply to rooms or spaces rented for continuous occupancy by the same individual or group for thirty or more days...." Ch. 614, Acts of Assembly of 1974 at 1169. See, also, Ch. 265, Acts of Assembly of 1977 at 322.

3Two Bills were introduced in the 1983 session of the General Assembly to authorize James City County to levy a food and beverage tax. See H.B. 96 and S.B. 6. A third Bill, S.B. 7, would have granted this power to any county or city. None of these Bills was passed by the General Assembly. Senate Bill 5 was enacted as Ch. 873, which authorizes James City County to enact a transient occupancy tax.

4In accord with this holding are two prior Opinions of this Office. See 1976-1977 Report of the Attorney General at 286 holding that based on a charter provision granting the general power of taxation, the council of the City of Colonial Heights may impose a tax on meals and lodging; 1974-1975 Report of the Attorney General at 519 holding likewise for the City of Alexandria where a similar charter provision existed.

TAXATION. MOTOR FUEL TAX. REDUCTION IN REAL ESTATE TAX REQUIRED BY LOCALITIES IN TRANSPORTATION DISTRICT LEVYING MOTOR FUEL TAX ONLY REQUIRED FOR ONE YEAR.

April 13, 1983

The Honorable Frank Medico
Member, House of Delegates

You have asked a question concerning the adjustment to local real estate taxes resulting from collection of the motor fuel tax in certain transportation districts pursuant to §58-730.5 of the Code of Virginia. Section 58-730.5(C) provides, in part, as follows:
"The governing body of each county or city in which such tax is levied shall reduce the rate of its real estate tax, or its real estate tax and other locally levied taxes, in an amount that will result, in the year following the first full fiscal year in which the two percent tax was authorized, in a reduction of tax revenues which equals the portion of the amount which has been or would have been allocated to the county or city for rail and bus services but is paid by the Commission from the levy. The amount of the tax reduction shall be calculated by subtracting the amount collected at the reduced rates from the amount which would have been collected at the tax rates in effect for the tax year immediately prior to the tax year in which the rates are reduced. Such reduced rate shall not be raised during the entire tax year for which the tax rate is reduced, but may be raised subsequently."

The section, as originally enacted in 1980, provided for a two percent fuel tax on July 1, 1980, and an additional two percent to be effective July 1, 1982. In 1982, the Code was amended to repeal the second two percent tax which was to have taken effect July 1, 1982. Consequently, you wish to know when a locality is required to make further reductions in local taxes due to the motor fuel tax collections which are still required by the Code.

In my opinion, no further tax reductions are required to be made by the locality pursuant to § 58-730.5(C). The tax reduction imposed by this section is applicable only for one year -- "the year following the first full fiscal year in which the two percent tax was authorized...." (Emphasis added.) This language clearly limits the mandated tax reduction to one year.

Prior to the 1982 deletion of the additional two percent fuel tax, § 58-730.5(C) provided for a reduction in the real estate tax rate "both in the year following the first full fiscal year in which the two per centum tax and the first full fiscal year in which the additional two per centum tax authorized hereunder is levied." When it deleted the additional two percent fuel tax, the General Assembly also deleted the requirement of an additional real estate tax reduction in the year following the levy of the additional tax. Therefore, no further tax reductions under this section of the Code are mandated.

Finally, it should be noted that § 58-730.5(C) restricts the locality from raising the real estate tax rate only during the tax year for which the tax rate is reduced. It specifically allows the rate to be raised subsequently.

TAXATION. NEIGHBORHOOD ASSISTANCE ACT. PROFESSIONAL CORPORATION. CORPORATION IS EMPLOYER WHILE PROFESSIONALS ARE EMPLOYEES.
January 14, 1983

The Honorable W. H. Forst
State Tax Commissioner

You have asked two questions concerning the application of the Neighborhood Assistance Act, § 63.1-320, et seq., of the Code of Virginia (the "Act") to professional corporations. First, in the case of a corporation of doctors or lawyers, you wish to know who is considered to be the employer and who are the employees. Second, you request clarification of the limitation in § 63.1-324 which provides that "no tax credit shall be granted to any business firm for activities that are a part of its normal course of business."

In answer to the first question, it is my opinion that the corporation itself is the employer while the professionals are considered employees. There is no definition of "employee" in the Act itself. The term is defined in another section of the tax code, however.

Section 58-151.1(3), under the article on withholding of income tax, defines "employee" as

"an individual, whether a resident or a nonresident of this State, who performs or performed any service in this State for wages, or a resident of this State who performs or performed any service outside this State for wages... The word 'employee' also includes an officer of a corporation."

According to Webster's Seventh New Collegiate Dictionary (1972), a wage is "a payment usually of money for labor or services...."

Consequently, so long as they receive remuneration for their services, the professionals, including corporate officers, are considered to be employees for purposes of the State income tax. In the context of the law on professional corporations, § 13.1-546 requires a professional corporation to render professional services through officers, employees and agents. Thus, the corporation itself must be the employer, and the professionals are its employees.

In response to your second question, § 63.1-324 provides "that no tax credit shall be granted to any business firm for activities that are a part of its normal course of business." "Normal course of business" is defined in § 63.1-321(10) as:

"those acts which are engaged in by a business firm with a view toward winning financial gain, or those acts which are performed by a business firm in the conduct of the business firm as a business."

It is my opinion that the term "view toward winning financial gain" is the linchpin to the proper interpretation
of the first part of the foregoing definition. Accordingly, activities engaged in by a firm from which it expects to gain financially do not qualify for the credit. Conversely, those activities which a firm engages in and from which it never intends to gain financially, may qualify for the credit if those activities are performed in accordance with the other requirements of the Act. The mere fact that the firm is paid for certain activities does not necessarily exclude the firm from receiving a credit under the Act. The test is whether the activity was undertaken with the intent of gaining from the venture financially. It may be difficult to discern the intent that preceded the activity in those instances where financial gain does occur. In those cases, it is important to compare the actions of the firm in relation to the goals established by the Act. The fact that some income is received for the service should not necessarily exclude it so long as that income is less than the cost to the business and does not result in a net gain, even including the tax credit.

The second half of the definition may be even more difficult to apply and will require a concerted judgment to be exercised in most cases. On the one hand, it is unlikely that the General Assembly intended to require businesses to perform only those services which they have never performed and, thus, have no skills, training or legal authorization to perform them. Conversely, a law firm specializing in antipoverty law or court-appointed criminal defense work, a clinic which specializes in treating medicare recipients, or a construction firm which often builds in impoverished areas were not intended to be included in this special tax incentive unless the program undertaken by them involves a completely different obligation than that usually performed by the firm.

On a case-by-case basis, several factors must be considered in determining whether an activity is in the usual course of an employer's business. The history of the business must be examined. Has it regularly performed such services in the past? The fact that physicians may regularly see medicare patients would not necessarily preclude them from receiving a credit for donating time to a well baby clinic because these are different obligations. Does the business hold itself out to the public as a business which performs such services as its normal activity?

This analysis may preclude some businesses from receiving the benefit of the credit and conceivably deter them from providing the service. On the other hand, if the business was already regularly providing such services, it presumably had some motivation or funding for doing so, which should not be affected by this Act.

TAXATION. OMITTED TAXES. AUTHORITY TO REQUIRE INDIVIDUALS OR BUSINESSES TO PRODUCE RECORDS FOR PURPOSES OF AUDIT FOR TAX YEARS PRIOR TO CURRENT YEAR.
April 19, 1983

The Honorable Ann C. White
Commissioner of the Revenue for the City of Chesapeake

You have inquired whether commissioners of the revenue in Virginia have authority to require an individual or business to produce records for tax years prior to the current tax year relating to property, income, sales, etc., for the purposes of an audit. You also ask whether the discovery of improper reporting by an individual or business in the current tax year is a prerequisite to exercise of the commissioners' authority to require production of records for prior tax years. Finally, you seek my opinion whether remedies other than criminal prosecution are available in the case of violations of §§ 58-860 and 58-874 of the Code of Virginia.

The answer to your first question is in the affirmative. Section 58-860 provides in pertinent part:

"If any taxpayer, upon demand, refuses to exhibit to the commissioner of the revenue or a duly qualified deputy any subject of taxation liable to assessment by the commissioner of the revenue, such taxpayer shall pay a fine of not less than twenty dollars nor more than one hundred dollars." (Emphasis added.)

Section 58-1164 requires you, as commissioner of the revenue, to assess all local taxes or any local license tax previously omitted or assessed at less than the law required for three years prior to the current tax year. This three-year period is extended to six years in certain circumstances including when the taxpayer fraudulently fails to file a return. See § 58-1161. Accordingly, I am of the opinion that §§ 58-860 and 58-1164 authorize you to demand the exhibition of any records relating to property, sales, etc., for the three years preceding the current year, provided they are the "subject of [local] taxation liable to assessment by the commissioner of the revenue." See 1976-1977 Report of the Attorney General at 33. If the conditions of § 58-1161 exist, this authority would extend to six years.

The answer to your second question is in the negative. The authority of commissioners to demand exhibition of records for past years pursuant to § 58-860 is not predicated on a discovery of improprieties in a taxpayer's current year reporting.

Your last inquiry relates to remedies other than criminal prosecution available to you where §§ 58-860 and 58-874 are violated. I assume that your question is limited to violations related to requests by you for information or access to records. Based on this assumption, I am aware of no civil remedy available for your use.
Examples of records subject to the commissioner's demand pursuant to § 58-860 include: records of sales or other evidence of gross receipts where the locality has imposed a local license tax (see § 58-266.1); records containing accounts receivables and payables where the locality imposes a tax on the capital of merchants (see §§ 58-832 and 58-833); and, generally, those same records which may be required for the current tax year under § 58-874, subsections (1), (4) and (5).


TAXATION. OMITTED TAXES. REQUIRED TO BE ASSESSED UNDER § 58-1164.

October 25, 1982

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

You have inquired as to the proper procedure for assessing real property which was erroneously listed in previous tax years as exempt from taxation. You state that real property owned by the Martinsville-Henry County Mental Health Association has been erroneously listed as exempt since 1977.

Section 58-1164 of the Code of Virginia authorizes a commissioner of the revenue to assess omitted taxes. This statute requires the commissioner of the revenue to make such an assessment subject to the three-year period of limitation set forth therein. See Opinion to the Honorable R. Wayne Compton, Commissioner of the Revenue for the County of Roanoke, dated September 17, 1982. Accordingly, I am of the opinion that § 58-1164 sets forth the procedure for assessment in the circumstances you describe.

You also inquire as to whether assessment of that property may be made other than under the provisions of § 58-1164. The provisions of § 58-1164 are mandatory and I am aware of no other provision of law which would permit an alternative procedure. Accordingly, I am of the opinion that in the circumstances you describe the procedures set forth in § 58-1164 must be followed.

You have also asked two questions concerning the property of a taxpayer which changed its name from Piedmont Regional Mental Association Retardation Board to Patrick Henry Mental Health Center and which was chartered under its previous name before 1971. You first inquire whether the date of the charter controls its entitlement to exempt
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status. The Constitution of Virginia, as revised in 1971, altered previously existing rules of construction used in determining tax exempt status of property used for charitable or benevolent purposes. Article X, § 6(a)(6) of the Constitution provides that such property may be exempt only by "a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed." Article X, § 6(f) provides a new rule of construction requiring that "[e]xemptions of property from taxation...shall be strictly construed; provided, however, that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly...." In construing this language, the Court in Manassas Lodge No. 1380 v. County of Prince William, 218 Va. 220, 237 S.E.2d 102 (1977) stated:

"Article X, Section 6(f) prescribes a rule of strict construction to apply prospectively to exemptions 'established or authorized' by the new constitution; but the grandfather clause of Article X, Section 6(f), implemented by the 1972 amendment to Va. Code § 58-12, retains a rule of liberal construction to apply retro-actively to determine whether certain property was exempt from taxation on July 1, 1971, and, therefore, should continue to be exempt." 218 Va. at 223. (Emphasis the Court's.)

I am of the opinion that Art. X, § 6(f) does not alter the requirements of exemption, but requires only that a rule of liberal construction, rather than strict construction, be applied in determining the status of property which was exempt on or before July 1, 1971. In the immediate instance, the question is not whether Patrick Henry Mental Health Center could have been exempt, but whether it was in fact exempt prior to July 1, 1971. Under Art. X, § 6, it is the date on which an organization's property is deemed to be exempt which controls, and not the date of the organization's charter.

Finally, you inquire whether the change in name will affect the exempt status of the organization's property. Such a change by an organization whose property has been determined to be exempt will not affect the exempt status of that property, provided the use to which the property is put, or the basis on which exemption was originally granted, has not also been changed. See 1977-1978 Report of the Attorney General at 413. Accordingly, I am of the opinion that a mere change in name of an organization whose property has previously been determined to be exempt will not in itself affect the exempt status of that property.

1 Section 58-1164 states in pertinent part: "If the commissioner of the revenue of any county or city...ascertain[s] that any person or property subject to
local taxation or any local license tax...has been assessed at less than the law required for...[any tax year of the three last past], or that the levies or taxes for any cause have not been realized, the commissioner of the revenue...shall list and assess the same with levies or taxes at the rate or rates prescribed for that year...."

TAXATION. PENALTIES. COMMISSIONER OF REVENUE MUST DETERMINE WHETHER FAILURE TO FILE RETURN OR PAY TAX WAS NOT IN ANY WAY FAULT OF TAXPAYER.

November 22, 1982

The Honorable Denise L. Burrell
Commissioner of the Revenue for Charles City County

You have asked for a description of the circumstances under which you may relieve a taxpayer of the ten percent penalty imposed by an ordinance of Charles City County for failure to file a timely return of tangible personal property. Though you have not stated the legal basis for the Charles City County ordinance, I assume that it was adopted pursuant to § 58-847 of the Code of Virginia. That section provides that the county "may provide by ordinance for the waiver of the penalty and interest for failure to file a return or to pay a tax if such failure was not in any way the fault of the taxpayer." I assume that your ordinance makes such provision.

The question you have asked has been addressed by two prior Opinions of this Office interpreting §§ 58-847 and 58-963, which appear in the 1981-1982 Report of the Attorney General at 393 and 1980-1981 Report of the Attorney General at 348. The same rules apply to the late filing of a return as apply to a late payment. According to these opinions, you must make a determination whether the fact that your office did not receive a return "was not in any way the fault of the taxpayer." If there is insufficient evidence to persuade you that the return was filed on time, you should not relieve the taxpayer of the penalty. If, based upon the evidence presented to you, you believe that the return was filed on time and that it did not reach your office because of some circumstance beyond the control of the taxpayer, then the penalty should not be imposed.

TAXATION. PERSONAL PROPERTY. MILITARY PERSONNEL DOMICILED ELSEWHERE ARE NOT SUBJECT TO TANGIBLE PERSONAL PROPERTY TAX WHEN ABSENT FROM "HOME" STATE BY REASON OF COMPLIANCE WITH MILITARY ORDERS.

November 22, 1982

The Honorable Esten O. Rudolph, Jr.
Commissioner of the Revenue for Frederick County
You have asked whether the Soldiers' and Sailors' Civil Relief Act exempts military personnel from all their tangible personal property tax obligations or only a portion thereof. The facts contained in your letter indicate that (1) military personnel come into your jurisdiction from outside of Virginia by reason of compliance with military orders, (2) that they have one or more vehicles including recreation vehicles and motorcycles, and (3) that these vehicles are registered in the names of the military personnel and never in the names of their non-military spouses. You do not state whether these military personnel retain their domicile in their "home" state.

The Soldiers' and Sailors' Civil Relief Act (the "Act"), 50 App. U.S.C.A. § 574, provides that military personnel shall not be deemed to have lost their domicile in their "home" state if they are absent therefrom solely in compliance with military orders. The Act further states that such persons' personal property "shall not be deemed to be located or present in or to have a situs for taxation" in the host state. In accordance with the Act, this Office has previously held that such nonresident military personnel are not liable for personal property tax on motor vehicles even though registered and licensed in this State. 1952-1953 Report of the Attorney General at 237. See, also, United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964) and 1981-1982 Report of the Attorney General at 370.

Under the circumstances you have described, (1) assuming that these military personnel have retained their "home" state domicile, and (2) the vehicles are owned solely by such persons,1 I am of the opinion that they are exempt from all of their personal property tax obligation to Virginia localities.

1This conclusion is applicable only in those cases in which the property is solely owned by the military spouse. This Office has opined that where personal property is jointly owned by a nonresident military person and the nonmilitary spouse, or owned by the nonmilitary spouse, the situs of the personal property is established in this State, and the property is subject to local personal property taxes. 1960-1961 Report of the Attorney General at 301.

TAXATION. PERSONAL PROPERTY. PURSUANT TO § 58-835.1(A) TAXPAYER BY ORDINANCE MAY BE REQUIRED TO REPORT TRANSFER OF PROPERTY TO PRORATION JURISDICTION EVEN THOUGH PROPERTY HAS BEEN LEGALLY ASSESSED BY NON-PRORATION JURISDICTION.

February 1, 1983

The Honorable Richard M. Bagley
Member, House of Delegates
You have asked for an interpretation of the exemption provisions of § 58-835.1 of the Code of Virginia. That section was adopted by the 1982 General Assembly, Ch. 433, Acts of Assembly of 1982, and provides authority for certain counties and cities to adopt ordinances for proration of personal property taxes for certain types of property which gain or lose a 'tax situs' in those jurisdictions during the tax year.

You have set forth the following fact situation: (a) a taxpayer purchases a motor vehicle, trailer or boat in a jurisdiction which does not have a proration ordinance for personal property taxes; (b) that jurisdiction assesses on an annual basis in accordance with §§ 58-834 and 58-835; (c) the taxpayer's property is legally assessed in that jurisdiction; and, (d) the taxpayer then moves his property to the City of Hampton prior to the payment of any personal property tax in the first jurisdiction. Assuming these facts, you then ask four questions:

1. Does the taxpayer have to report the transfer to the Hampton Commissioner of the Revenue?

2. Can the City of Hampton assess the property when it acquires a situs in the city, and if so, can the city collect the appropriate amount of taxes on the next due date for collection?

3. If the City of Hampton assesses the taxpayer's property and collects the appropriate amount of taxes for the balance of the tax year, will the previous jurisdiction be estopped from also collecting based on the first assessment?

4. Of the following two alternatives, which value should be used in determining the tax: the value on the date it acquired situs in the City of Hampton or the January first value?

Subsection B of § 58-835.1 contains the exemption provision in question and reads in pertinent part:

"Such ordinance shall provide for the filing of returns and payment of such tax. Such ordinance shall also exempt property from the levy of such personal property tax for any tax year or portion thereof during which the property was legally assessed by another jurisdiction in the Commonwealth and the tax paid."

In response to your first question, the relevant statutory language provides only that the proration ordinance "shall provide for the filing of returns...." The exemption required to be in the proration ordinance applies only to the levy of the tax, not the filing of returns. I am, therefore, of the opinion that the City of Hampton may, by ordinance, require taxpayers to file returns reporting the transfer of property to Hampton in the factual situation you have
presented. The fact that the taxpayer was already assessed in the previous jurisdiction does not affect this result.

Your second question addresses the meaning of § 58-835.1(B) which requires localities to grant an exemption in every case where "the property was legally assessed by another jurisdiction in the Commonwealth and the tax paid." (Emphasis added.) For the exemption to be operative, two conditions must exist: (1) the first jurisdiction must have legally assessed the tax and (2) the tax must be paid. Under the facts presented, the first condition has been satisfied, but the second has not. It is my opinion, therefore, that the City of Hampton may assess the property on a prorated basis and collect the appropriate tax on the next due date.

Your third question concerning whether the first jurisdiction is estopped from collecting on its levy is answered in the negative because I find no language in § 58-835.1 or any other section of the Code to estop the first jurisdiction. Further, it is my opinion that the General Assembly used the term "tax paid" to prevent taxpayers from escaping the payment of these taxes. In fact, if the taxpayer later pays the tax to the first jurisdiction, his property will then fall within the exemption provision discussed above in response to your second question. Accordingly, if the taxpayer has paid the tax in both jurisdictions, he could apply for a refund from the city pursuant to §§ 58-1141 and 58-1142 or § 58-1152.1 (if applicable). In order to avoid this practical inconvenience to both the taxpayer and the city, the city may wish to exercise the option expressly provided in § 58-835.1 to establish a return date for such levies on or after December 15.

Finally, in answer to your last inquiry concerning the date of valuation, I am of the opinion that the prorated assessment should be based upon the January first value of the property. This will promote the constitutional mandate for uniformity of taxation upon the same class of subjects within the city.

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1Except as provided under § 58-851.7, the tax day is January first of each year. See § 58-835.
2Because of the requirement that the proration ordinance contain an exemption where the tax is legally assessed and the tax paid, no double taxation occurs. Cf. § 58-829.3 on quarterly proration for mobile homes which lacks an exemption clause. See also, Opinion to the Honorable G. M. Weems, Treasurer of Hanover County, dated August 9, 1982.
March 23, 1983

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

You have asked three questions concerning the assessment of personal property taxes on automobiles.

First, in a situation where the taxpayer traded automobiles in December 1982, signed the title over to the dealer on the automobile which she traded, continued to drive this automobile using her tags and did not take delivery of the new automobile until after January 1, 1983, on which vehicle should she be assessed for 1983?

Second, if a taxpayer purchased an automobile in December 1982 and used a temporary license (30 day tag) until after January 1, 1983, should he be assessed on this vehicle for 1983?

Third, if a taxpayer owns a vehicle which, on January 1, is not licensed, not insured, not in running condition and which he does not intend to use, should an assessment be made of the vehicle?

In answer to your first question, because the taxpayer signed title to her old automobile over to the dealer prior to January 1, she was not the owner and would not be taxed on that automobile. Taxation is based on ownership, not on possession alone. See Opinion to the Honorable C. B. Harrell, Jr., Commissioner of the Revenue for the City of Newport News, dated January 24, 1983.

Whether the taxpayer may be taxed on the new vehicle depends on the ownership interest which she has in the new vehicle. The considerations for determining this interest were set out in a prior Opinion of this Office found in the 1977-1978 Report of the Attorney General at 433.

If title to the new vehicle was conveyed to the taxpayer prior to January 1, then in my opinion she need not have possession in order for the vehicle to be taxable to her. However, holding the title is not in itself the sole determining factor. The taxpayer does not have to be the holder of title in order to possess an ownership interest sufficient to confer taxable status. The holder of a beneficial or equitable interest, such as that conferred by a contract of sale, may be sufficient to confer ownership. See 1977-1978 Report of the Attorney General, supra. Whether the taxpayer bears the risk of loss of the vehicle is also relevant. Id. Therefore, you will need to look at the facts concerning the taxpayer's legal interest in the automobile in order to determine if it can be classified as an ownership interest.

Your second inquiry is controlled by the same test applied in the first. As was related earlier, the taxation
of personal property is based on ownership. Section 58-20 of the Code of Virginia. So long as the taxpayer has purchased the vehicle and has an ownership interest in it, it is taxable to him. In my opinion, the fact that he has not obtained his permanent license and registration is not relevant. Accordingly, your second question is answered in the affirmative.

In answer to your third question, it is my opinion that the owner is taxable on the vehicle regardless of its registration or insurance status. His intention in regard to its use does not govern taxability. The fact that the automobile is not in running condition may be considered when affixing a value to the property, however. Section 58-829 generally requires automobiles to be valued by means of a recognized pricing guide or a percentage of original cost. However, it further states that "[n]othing herein shall be construed to prevent a commissioner of revenue from taking into account the condition of the property."

TAXATION. PERSONAL PROPERTY. WHERE TAXPAYER MOVES FROM NON-PRORATION JURISDICTION TO PRORATION JURISDICTION AFTER TAX DAY AND TRADES VEHICLE FOR ANOTHER, EXEMPTION PROVISION OF § 58-835.1(B) PROVIDES NO PROTECTION FROM TAX ON SECOND VEHICLE.

June 13, 1983

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

This is in reply to your inquiry related to proration of personal property taxes. You have presented the following fact situation: On January 1, 1983, a person was a resident of the City of Chesapeake, a jurisdiction which has not adopted an ordinance providing for a system of prorating the assessment of personal property taxes on motor vehicles. That person received a personal property tax bill on his automobile, vehicle "A," for the entire year from Chesapeake and in April of the same year moved to Norfolk, a jurisdiction which does prorate such assessments. Thereafter, the person trades vehicle "A," for a newer model, vehicle "B." You ask whether this taxpayer is protected from the imposition of 1983 personal property taxes by Norfolk on vehicle "B" because vehicle "B" is not the automobile which was taxed in Chesapeake.

Section 58-835.1 of the Code of Virginia is dispositive of your question. This statute authorizes the adoption of an ordinance by certain cities and counties to levy and collect personal property taxes prorated on a monthly basis for the balance of the tax year on motor vehicles, trailers and boats which have acquired situs in the city or county after the tax day. The statute also provides that when a person acquires a motor vehicle with situs in the proration jurisdiction after tax day, that person is subject to the tax
on the vehicle for the portion of the tax year in which the taxpayer owns the vehicle and the situs of such property remains within the locality. In certain circumstances, the statute also provides some protection from taxation in the proration jurisdiction.

The protection referred to in your question appears to relate to the statutory requirement that a proration "ordinance shall...exempt property from the levy of such personal property tax for any tax year or portion thereof during which the property was legally assessed by another jurisdiction in the Commonwealth and the tax paid." (Emphasis added.) See § 58-835.1(B). From this language, it is clear that the exemption protects the taxpayer from taxation in the proration jurisdiction only where the subject property is the same property which was legally assessed in another jurisdiction of the State. Vehicle "A" was taxed in Chesapeake and would fall within the exemption provided that the Chesapeake tax has been paid. However, because vehicle "B" was not assessed in Chesapeake, it is my opinion that § 58-835.1(B) does not protect the taxpayer from taxation on vehicle "B" in Norfolk, the proration jurisdiction. Accordingly, vehicle "B" would be subject to tax in the City of Norfolk on a prorated basis.

1Subject to the exception for nonresidents, the "situs" of such vehicles is "the county, district, town or city where the vehicle is normally garaged, docked or parked..." or when this fact cannot be determined, the domicile of the owner of such personal property. See § 58-834.
2"Tax day" refers to January first of each year except for localities which utilize a fiscal year concept. See §§ 58-835 and 58-851.7.
3In addition to this exemption provision, § 58-835.1 requires that proration jurisdictions grant relief from tax and a refund of the appropriate amount of tax already paid, prorated on a monthly basis, (a) whenever the vehicle loses situs within the proration jurisdiction after tax day or situs day and (b) whenever any person sells or otherwise transfers title of the subject property with a situs in the proration jurisdiction after the tax day or situs day. Because no loss of situs of a vehicle in the proration jurisdiction is involved in the facts presented, the relief described in "(a)" would not be applicable. The relief outlined in "(b)" would not be applicable to the newer model because the question presented deals with its purchase, not its sale. Additionally, provided the tax has been paid in Chesapeake, no assessment or tax would be due in the proration jurisdiction on the vehicle taxed in Chesapeake. Thus, the relief described in "b" would not be available to the taxpayer.
4Amendments added to this subsection by the 1983 General Assembly state that the exemption is available only where such property was legally assessed to the same owner by

See Opinion to the Honorable Richard M. Bagley dated February 1, 1983, which discusses the exemption provision of § 58-835.1.

If this newer model subsequently loses its situs in Norfolk or is sold by the taxpayer, the relief and refund provisions discussed in fn.4 would apply.


July 8, 1982

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You have requested my opinion as to whether property owned by Multi-Media Evangelism, Inc., a Virginia nonprofit corporation, is exempt from taxation under the provisions of § 58-12.24 of the Code of Virginia. Section 58-12.24 provides for tax exemption for "[p]roperty owned by any church, religious association or denomination or its trustees or duly designated ecclesiastical officer, and used exclusively on a nonprofit basis for charitable, religious or educational purposes...."

According to its articles of incorporation, Multi-Media Evangelism, Inc. is organized "[t]o foster, promote and encourage the proclamation of the Christian Gospel in all parts of the world by all methods, means and media possible; [t]o promote and finance the work of any and all Christian ministers in a proclamation ministry in the churches of the United States and foreign lands." You indicate that the primary method the corporation uses to carry out its purposes is the production and distribution of audio and video tapes proclaiming the Christian Gospel.

The availability of exemption under § 58-12.24 to an incorporated entity was recently considered by this Office in an Opinion to the Honorable Ivan D. Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated February 23, 1982. The reasoning in that Opinion controls the answer to your question. That Opinion recognized that, regardless of the nature and merits of the organization,

"The question remains, however, whether the corporation qualifies as a 'church, religious association, or denomination, or its trustees or duly designated ecclesiastical officer' as specified in that section [$ 58-12.24]. In my opinion, it does not."

"The General Assembly is obviously aware of the distinction between a corporation and other non-incorporated entities. In several subsections of § 58-12, the General Assembly provided for exemptions to
corporations. Its omission of corporations from § 58-12.24 evidences its intent not to provide exceptions for corporations seeking to come within the protection afforded by that section...." (See Mapp Opinion.)

Multi-Media Evangelism, Inc., like the organization considered in the earlier Opinion to Mr. Mapp, is an incorporated body or enterprise. I am, therefore, of the opinion that it is not one of the entities referred to in § 58-12.24 and its property is not exempt from taxation under that section.

TAXATION. REAL ESTATE. COMMISSIONERS OF REVENUE. SOVEREIGN IMMUNITY. INFORMATION ON REAL ESTATE PROPERTY APPRAISAL CARDS MAINTAINED BY COUNTY COMMISSIONER OF REVENUE AS ASSESSING OFFICER AVAILABLE TO TOWN GOVERNING BODY. LIABILITY OF PUBLIC OFFICER FOR NEGLIGENTLY PROVIDING INACCURATE ASSESSMENT FIGURES.

December 16, 1982

The Honorable Charles R. Hawkins
Member, House of Delegates

This is in reply to your recent letter on behalf of the Town of Chatham, in which you make the following inquiries:

"1. What is the responsibility of the Commissioner of Revenue in providing a locality with facts and figures concerning assessment of property to be used in determining the tax rate of that locality?

2. Assuming that responsibility, what legal recourse would the locality have if the Commissioner of Revenue provides erroneous property assessment figures?"

With regard to your first question, § 58-796, et seq., of the Code of Virginia requires each commissioner of the revenue to ascertain all the real estate in his county or city and to prepare land books containing tax assessment information. Section 58-817.1 requires each county, city or town assessing officer to maintain property appraisal cards for real estate parcels assessed and assessable by him, which cards "shall include thereon the appraised value of the property and improvements, if any, and the calculations used in determining the assessed value of such property and improvements." Such information maintained by the commissioner or other assessing officer is a matter of public record and is available to the locality upon proper demand. See 1981-1982 Report of the Attorney General at 372. Certainly, it would be available to a town even when the assessing officer is a constitutional officer of the county in which the town is located.
With regard to your second question, I understand the factual context to be that the county commissioner of the revenue mistakenly provided to the town council what proved to be inaccurate property assessment information, upon which the town relied in setting its property tax rate. The commissioner afterwards corrected the error, which required the town also to take corrective action. Whether the commissioner may be liable to the town for the results of his acts as a public official in this set of circumstances, assuming that the town sustained some measureable damage, would need to be determined in a court of law. The Virginia Supreme Court recently discussed the principles of liability, and immunity therefrom, applicable to public officers and employees in the conduct of their employment in James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980), and in Banks v. Sellers, 224 Va. ___, 294 S.E.2d 862 (1982). See, also, 1981-1982 Report of the Attorney General at 336.

The only other recourse of which I am aware would be an action on the public officer's performance bond, which, again, would necessitate a showing that the acts and injuries complained of are within the terms and extent of coverage of the bond. See §§ 15.1-41, 15.1-42, 49-12, 49-19. See, also, 1973-1974 Report of the Attorney General at 44.

TAXATION. REAL PROPERTY. EXEMPTION. ELDERLY OR DISABLED OWNER'S RELATIVE LIVING IN TAXPAYER'S HOUSEHOLD MUST HAVE INCOME CONSIDERED IN QUALIFYING FOR EXEMPTION.

May 17, 1983

The Honorable Floyd C. Bagley
Member, House of Delegates

You have asked whether a taxpayer may qualify for tax relief for the elderly or disabled, under a local ordinance enacted pursuant to § 58-760.1 of the Code of Virginia, if a portion of the eligible building, but not a part of the same household, is rented to the taxpayer's grandson. In the situation presented, the grandson has an income which, if added to that of the taxpayer, would exceed the allowable combined income provision of § 58-760.1(a)(1).

For the reasons set out below, in my opinion, the taxpayer does not qualify for exemption under the language of the applicable Code provisions.

Section 58-760.1(a) provides, in part:

"The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemption from and deferral of taxation of real estate and mobile homes as defined in § 36-71(4), or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe, owned by, and occupied as the sole dwelling
of a person or persons not less than sixty-five years of age, and may also provide the same exemption or deferral for such property of a person who is determined to be permanently and totally disabled as defined in subsection (e) of this section." ¹ (Emphasis added.)

The applicable rule of construction of this exemption is set out in Art. X, § 6(f) which provides that "[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed...." Accordingly, exemptions under § 58-760.1 must be strictly construed and, in doubtful cases, resolved against recognition of the exemption. See Forst v. Rockingham Poultry Marketing Coop., 222 Va. 270, 279 S.E.2d 400 (1981).

Use of a portion of the property by a relative of the owner is contemplated by § 58-760.1(a)(1) and would enable the property to retain its qualification for exemption, so long as the income limitations of § 58-760.1(a)(1) are met.² In the situation cited here, however, you advise that the income limitations are exceeded.

The fact that the relative in question pays rent does not make him any less a relative, for purposes of the statute. Section 58-760.1(a)(1) includes the income of "the owners' relatives living in the dwelling"; the conditions imposed on his living there do not appear to be relevant. The income of relatives living in the same building cannot be disregarded even though the tenant relative does not occupy the same portion of the building as the taxpayer. To disregard such income would violate the provisions of § 58-760.1(a)(1). The test is (1) whether the property is occupied as the sole dwelling (as opposed to one of several places) and (2) whether the combined income of the taxpayer and the relatives residing on the property exceeds $18,000 annually.

¹Section 58-760.1 is authorized by Art. X, § 6(b) of the Constitution of Virginia (1971) which provides that "[t]he General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate and personal property designed for continuous habitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said property in relation to their income and financial worth."

²Section 58-760.1(a)(1) provides, in part: "That the total combined income, excluding at the option of the local government, the first $5,000 or any portion thereof, of any income received by an owner as permanent disability
compensation, during the immediately preceding calendar year from all sources of the owners of the dwelling living therein and of the owners' relatives living in the dwelling does not exceed $18,000, provided that the first $4,000 of income of each relative, other than spouse, of the owner, or owners, who is living in the dwelling shall not be included in such total, and further provided that the county, city or town may by ordinance specify lower income figures." (Emphasis added.)

TAXATION. REAL PROPERTY. INDUSTRIAL DEVELOPMENT AUTHORITY WAREHOUSE LEASED IN PART TO THIRD PARTIES FOR COMMERCIAL PURPOSES IS EXEMPT FROM REAL ESTATE TAX UNDER § 58-14.

February 2, 1983

The Honorable Richard M. Chapman
Commissioner of the Revenue for Scott County

You have asked whether Scott County may assess a real estate tax under § 58-14 of the Code of Virginia on the portion of a warehouse owned by Duffield Development Authority which is leased to third parties and used for commercial purposes. For the reasons hereinafter stated, your inquiry is answered in the negative.

Article X, § 6(a)(1) of the Constitution of Virginia (1971) and § 58-12(1) exempt from taxation "[p]roperty owned directly or indirectly by the Commonwealth, or any political subdivision thereof...." Duffield Development Authority, created pursuant to the Industrial Development and Revenue Bond Act, § 15.1-1373, et seq., is a political subdivision of the Commonwealth in accordance with § 15.1-1376 and, as such, enjoys exemption from real estate taxation under the Constitution and § 58-12(1).

A prior Opinion, found in the 1974-1975 Report of the Attorney General at 475, dealing with a leased apartment building owned by an industrial development authority, stated that the authority was exempt from taxation under Art. X, § 6(a)(1) and § 58-12(1). However, the Opinion did not address the question you raise regarding the effect of the exemption restrictions under § 58-14.

Article X, § 6(c) allows the General Assembly to restrict or condition any exemption except with respect to property of the Commonwealth. In § 58-14, the General Assembly did choose to put restrictions on the exemption of leased property "mentioned in § 58-12, and not belonging to the State...."

As I stated above, Duffield Development Authority is a political subdivision; thus, its property is "mentioned in § 58-12." Ownership of property by a political subdivision of the Commonwealth does not imply ownership by the "State." See 1967-1968 Report of the Attorney General at 263 and
Property which would be exempt from taxation, except for its being subject to § 58-14, becomes subject to taxation whenever it is "leased or shall otherwise be a source of revenue or profit...." Leasing, however, does not automatically subject the property to taxation. Board of Supervisors of Nansemond County v. City of Norfolk, 153 Va. 768, 151 S.E. 143 (1930). The guideline, originally stated in Commonwealth v. City of Richmond, 116 Va. 69, 81 S.E. 69 (1914), was quoted with approval by the Court in Board of Supervisors v. Norfolk, supra, at 777, and is as follows:

"If the use made of the property so held has direct reference to the purposes for which it is by law authorized to be owned and held, and tends immediately and directly to promote those purposes, then its use is within the provisions exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use."


Duffield Development Authority is granted statutory powers by the Industrial Development and Revenue Bond Act, supra. Section 15.1-1375 indicates that the intent of the legislature in creating industrial development authorities is that "authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth...." Section 15.1-1378(e) specifically gives authorities the power to lease their facilities and to charge and collect rent. Section § 15.1-1382 indicates that the amount of rents charged must cover certain expenses of the facility. Section 15.1-1384 states that authorities will be nonprofit and provides for payment of the funds in excess of expenses to the municipality for whose benefit the authority was created. In the context of granting such authorities income taxation exemption, § 15.1-1383 states that "[t]he authority is hereby declared to be performing a public function in behalf of the municipality...."

Applying the rationale of the Court quoted above, it is clear that the general purpose underlying an authority is to promote industry and develop trade for the benefit of the Commonwealth. Use of the Duffield Development Authority building as a warehouse directly promotes those purposes, although revenue as profit may be derived therefrom as an incident to such use. Accordingly, it is my opinion that the leased portion of the warehouse is not subject to taxation by Scott County under § 58-14.
TAXATION. REAL PROPERTY. VALUE AS CONDOMINIUMS OR COOPERATIVES MAY BE TAKEN INTO CONSIDERATION FOR ASSESSMENT PURPOSES ONLY AFTER OWNER INITIATES ACTION MANIFESTING INTENT TO CONVERT TO CONDOMINIUM OR COOPERATIVE.

July 6, 1982

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

You have asked my opinion concerning the application of a 1982 amendment to § 58-760 of the Code of Virginia relating to the taxation and assessment of real estate. Chapter 619, passed by the 1982 session of the General Assembly, added the following sentence to § 58-760:

"Beginning with assessments effective on January 1, 1984, the fair market value of multi-unit real estate leased primarily to residential tenants shall be determined without regard to its potential for conversion to condominium or cooperative ownership...."

Your several inquiries seek to determine at what point in the process of conversion the added value attributable to the actual or potential status of rental property as condominiums or cooperatives may be taken into consideration by the tax assessor in the assessment process. The specific situations which you present are as follows:

"(1) The rental property is advertised for sale at a price in excess of its value as rental property, with the express representation that the property has a higher than normal value because of its potential for condominium conversion.

(2) The rental property is actually sold for a value in excess of what its sales price as rental would normally be and it is obvious that the purchaser has paid a higher price because of the potential for conversion. May the assessor use the actual sales price as the fair market value of the property?

(3) An application for permission to convert a rental property to a condominium is filed with the local governing body.

(4) The local governing body grants its permission to convert a rental property to condominium.

(5) The owner of a rental property files a deed of declaration under the Virginia Condominium or Cooperative Act.

(6) The owner of a rental property obtains permission to convert to condominium from the local governing body, files a deed of declaration, and begins the physical
renovations incident to conversion, but has not marketed or sold a unit.

(7) The condominium is established and at least one unit is sold."

For the reasons set forth below, I am of the opinion that the above quoted language of § 58-760 permits the assessor, in assessing multi-family real estate presently rented primarily to residential tenants, to consider the potential increase in value derived from the potential of the real estate for conversion to cooperative or condominium units only after recordation of documents or completion of other acts by the property owner necessary to evidence his clear intent to create a condominium or cooperative under Virginia law.

The creation and operation of real estate cooperatives is controlled by Virginia's Real Estate Cooperative Act found at §§ 55-424 through 55-506. Section 55-438 states that "[a] cooperative may be created pursuant to this chapter only by recording a declaration executed in the same manner as a deed, and by conveying to the association the real estate subject to that declaration...." No offer for sale or disposition of a cooperative interest may be made unless the cooperative is registered with the Virginia Real Estate Commission in accordance with § 55-497. Registration is achieved by filing an application for registration in accordance with § 55-498.

Similarly, §§ 55-79.45, found in Virginia's Condominium Act (§§ 55-79.39 through 55-79.103), provides that "[n]o condominium shall come into existence except by the recording of condominium instruments pursuant to the provisions of this chapter...." Sales of condominium units are also prohibited prior to the time the condominium is registered with the Virginia Real Estate Commission in accordance with § 55-79.88. Once again, registration is achieved by filing an application for registration in accordance with § 55-79.89.

No cooperative unit and no condominium unit may be offered for sale or otherwise disposed of prior to the recording of the declaration in the clerk's office where deeds are recorded and the filing of an application for registration with the Virginia Real Estate Commission. Each act may be taken independently of the other, and each is a voluntary, affirmative act of the declarant owners which constitutes evidence of preparation for conversion of real estate to condominium or cooperative ownership.

The apparent intent of the 1982 amendment to § 58-760 is to relieve owners of certain rental property of the tax pressure brought about solely by the potential of their property for dramatically increased property values created by the recent phenomenon of condominium conversion.¹ When the rental property owner does not seek to convert his property to another form of ownership, then he is protected
from the potential increase in value which might be derived from such conversion. When the property owner initiates steps to convert his rental property to condominium or cooperative ownership, however, then the tax assessor may properly consider any increase in value because the potential, at least to some degree, has then been realized.

Turning to your specific questions, I am of the opinion that the acts described in your paragraphs 3 through 7 indicate an intent by the owner to convert the form of ownership from rental property to condominium or cooperative ownership and, accordingly, the property is thereby enhanced in value so that the increase may be properly recognized and taxed. With respect to paragraph 1, in that situation the owner has not actually sought to convert the property to condominium or cooperative ownership and, therefore, the potential has not been realized and should not be taxed. With respect to paragraph 2, I am of the opinion that there is nothing in the language of § 58-760 which would prohibit an assessor from considering the actual price at which a property is sold. In fact, he is obligated to do so. See Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958).

1See Opinion to the Honorable Clive L. DuVal, 2d, Member, Senate of Virginia, dated March 10, 1982.
2Steps 3 and 4 will presumably arise in a zoning context and may not be applicable in all communities.

TAXATION. REASSESSMENT. BOARD OF EQUALIZATION HAS JURISDICTION OVER NEWLY ANNEXED AREA EVEN THOUGH NOT SUBJECT TO PREVIOUS YEAR'S REASSESSMENT.

April 27, 1983

The Honorable Victor J. Smith
Commissioner of the Revenue for the City of Harrisonburg

This is in response to your request for an opinion related to the taxing of real estate in the recently annexed portion of the City of Harrisonburg.

Effective January 1, 1983, the City of Harrisonburg annexed a certain part of the County of Rockingham. The city had its biennial assessment of real property in 1982, effective January 1, 1983, and will have a board of equalization appointed for 1983. On the other hand, the county had its last general reassessment in 1981, effective January 1, 1982. The county board of equalization was appointed in 1982 and completed its hearings. In November 1982, the city adopted a motion accepting the values of real estate for the annexed area as shown on the land book of the county, to remain in effect until the city's next scheduled biennial assessment in 1984. Consequently, you have asked
whether the city's board of equalization, appointed for 1983, has jurisdiction over the properties annexed from the county, whose owners had access to a county equalization board prior to the annexation.

For the reasons hereinafter discussed, I am of the opinion that the board of equalization does have jurisdiction over properties located in the annexed area. Nothing in the Code of Virginia would permit the board of equalization to limit its jurisdiction to anything less than the entire territory encompassed by the city as of January 1, 1983.

Section 58-905 of the Code of Virginia states that "[a]ny taxpayer may apply to the board of equalization for the equalization of his assessment...." (Emphasis added.) The territorial limits of the board of equalization have been stated to be the actual boundaries of the political subdivision levying the tax. Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908); see 1974-1975 Report of the Attorney General at 498. This Office has previously opined that the orders of a board of equalization rendered in a particular year are effective for assessments as of January one of that year (in this case, January 1, 1983). See Strother Drug Co. v. Taylor, 160 Va. 427, 168 S.E. 756 (1933); 1974-1975 Report of the Attorney General at 450. Therefore, the property covered by the board of equalization's orders includes all that property which is taxable by the city as of January 1, 1983.

The Constitution of Virginia (1971) permits nonuniform treatment of annexed territory for taxation purposes in certain, narrowly-defined ways. Article X, § 1 provides, in part:

"All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits...Such differences in the rate of taxation shall bear a reasonable relationship to differences between nonrevenue producing governmental services giving land urban character which are furnished in one or several areas in contrast to the services furnished in other areas of such unit of government." (Emphasis added.)

This section, while generally requiring uniformity of real property taxation, permits an exception to that rule as far as tax rates are concerned and that exception is based on the amount by which the property in annexed areas does not receive the same level of services as those provided to the city as a whole.

Assessment of real property, with which this Opinion is concerned, is governed by Art. X, § 2 of the Constitution.
which provides, in part, that "[a]ll assessments of real
estate...shall be at their fair market value...." The
dominant purpose of both §§ 1 and 2 of Art. X is to
"distribute the burden of taxation, so far as is practical,
evenly and equitably," and to that extent they must be read
202, 228 S.E.2d 113 (1976). The requirement of uniformity
thus extends to the process of assessment, including the
function of the board of equalization. Section 2 of Art. X
does not, however, contain a corollary to that part of § 1
which excepts from its uniformity mandate the tax rates
to the extent that such nonuniformity reflects differences in
provision of governmental services between the areas.
Therefore, § 2 would require that assessment practices,
including the equalization procedure, be uniform throughout
the city's jurisdiction.

Furthermore, the exception from uniformity provided in
§ 1 is limited to that prescribed by the General Assembly.
In § 15.1-1047.1, the General Assembly has provided that a
city or town council "may, by ordinance, allow a lower rate
of taxation to be imposed for a period not to exceed five
years upon land added to its corporate limits...." Pursuant
to the Constitution, such lower rates must reflect reduced
governmental services. This provision does not extend to a
difference in assessment practices; therefore, there is no
statutory authority for annexed areas to be excepted from the
equalization aspect of the assessment process so long as the
equalization process is available to the city as a whole.

The primary purpose of the board of equalization
procedure supports this conclusion as well. Section 58-904
requires that the duties of the board of equalization be
carried out as "necessary to equalize and accomplish the end
that the burden of taxation shall rest equally upon all
citizens of such county or city." The requirement of
uniformity has been held to be a predominant constitutional
consideration relating to local real estate taxation;
inequality may exist when an entire group of parcels is
assessed differently from other groups within the
jurisdiction, as well as when individual properties are
assessed differently. Perkins v. County of Albemarle, 214
Va. 240, 198 S.E.2d 626 (1973); 1974-1975 Report of the
Attorney General at 498. Therefore, even though parcels in
the annexed area had the opportunity to have their
assessments equalized with the rest of the county, for tax
year 1982, they have not yet had the opportunity, along with
the rest of the city, to be equalized in relation to the
entire city, for the tax year 1983.1 So long as the other
parcels in the city are given this opportunity, the annexed
parcels must be afforded it as well.

1Pursuant to § 58-895(C), the appointment of a board of
equalization is tied to a specific assessment or
reassessment. Arguably, land in Rockingham County prior to
January 1, 1983, was not part of the city's biennial assessment, and thus would not qualify to participate in the subsequent equalization procedure. On the other hand, while reassessment triggers the appointment of a board of assessors, there is nothing in the Code which limits its authority, once appointed, to those properties specifically reassessed. In light of the general purposes for the board of equalization procedure outlined above, such an interpretation of § 58-895(C) would be too restrictive.

TAXATION. RECORDATION. ASSIGNMENT OF LEASE IS TAXABLE UNDER § 58-58.

August 10, 1982

The Honorable Charles E. King, Jr., Clerk
Circuit Court of Gloucester County

You have asked whether an instrument assigning a lessee's interest under a lease of real property is subject to State recordation tax under § 58-58 of the Code of Virginia. Subparagraph (i) of § 58-58 states:

"(i) the tax for recording a deed of lease for a term of years, or assignment of the lessee's interest therein or memorandum thereof, shall be taxed according to the provisions of this section, unless provided otherwise in § 58-60 or unless the annual rental, multiplied by the term for which the lease runs, or remainder thereof, equals or exceeds the actual value of the property leased, in which case the tax for recording the deed of lease shall be based upon the actual value of the property at the date of lease, but including the value of any realty required by the terms of the lease to be constructed thereon by the lessor...." (Emphasis added.)

Recent amendments effective July 1, 1982, added the underlined language to § 58-58 to make clear that assignments of a lessee's interest were subject to recordation tax under this section. Section 58-58, as it existed before these amendments, was construed by previous Opinions of this Office to include assignments of a lessee's interest under a lease. See Reports of the Attorney General 1972-1973 at 434; 1966-1967 at 297; and 1955-1956 at 217. I am, therefore, of the opinion that under the express language of § 58-58 as recently amended, an assignment of a lessee's interest under a lease of real property continues to be subject to State recordation tax in accordance with the provisions of § 58-58.¹

The Opinion to the Honorable Carl W. Henrich, Clerk, Circuit Court for the City of Charlottesville, found in the 1975-1976 Report of the Attorney General at 382, to which you refer, relates to an assignment of a lessor's interest in a lease, which is an assignment of rents rather than an
assignment of an interest in the leasehold itself. That Opinion holds that a lessor's assignment of rents is taxable under separate provisions of § 58-58 and is not applicable to the instrument you enclose.

You have also asked whether local recordation tax should be prorated where an instrument offered for recordation describes property located in more than one taxing jurisdiction. In such circumstances § 58-65.1 provides for the assessment of local recordation tax as follows:

"where a deed or other instrument conveys, covers or relates to property located in the county or city of first recordation and also to property located in another county or city, or in other counties or cities, the tax imposed under the authority of this section by the county or city of first recordation shall be computed only with respect to the property located in such county or city; and when such deed or other instrument is recorded in the other county or city, or in other counties or cities, the tax imposed by each of them under the authority of this section shall be computed only with respect to the property located in each of them, respectively."

In view of the requirements of § 58-65.1, I am of the opinion that when an instrument which relates to real property located within two or more jurisdictions is offered for recordation, local recordation tax may be assessed by each locality only with respect to the property actually located within its taxing jurisdiction. See 1975-1976 Report of the Attorney General at 390.

You finally inquire whether it is proper to record an assignment of lease where the lease itself has never been recorded in your jurisdiction. The fact that the lease was never recorded in your jurisdiction does not render its assignment invalid. However, under §§ 11-1, 55-95 and 55-96, contracts in writing which convey an interest in real property, such as a lessee's assignment under a lease, are void as against all purchasers for value unless notice is given. Recordation of the assignment provides such notice. I am therefore of the opinion that a clerk may accept for recordation a lessee's assignment of its interest in a lease without prior recordation of the lease itself in his office.  

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1If the original lease had been recorded and recordation tax paid, subsequent assignments of the same lease could be exempt from additional recordation tax under recent amendments to § 58-60.

2As in fn. 1, if the original lease was recorded and the full amount of the recordation tax was paid in another jurisdiction, then, under §§ 58-60 and 58-62, the recordation of the assignment of the lessee's interest may be exempt from additional recordation tax.
The Honorable Rhea F. Moore, Jr., Clerk
Circuit Court of Tazewell County

You have asked whether the provisions of § 58-54.1 of the Code of Virginia apply to:

1. A deed reconveying property to a seller because the purchaser has been unable to make the payments under a deferred payment plan. No money passes between the parties and the seller is taking the property back rather than having a foreclosure sale; and

2. A deed conveying property from the borrowing parties by a trustee to the original secured party under a deed of trust when a foreclosure sale has been made.

Section 58-54.1 imposes a tax on each deed...by which any lands, tenements or other realty sold shall be granted...or otherwise conveyed to, or vested in the purchaser or purchasers...when the consideration or value of the interest exceeds $100...." In the absence of consideration for the transfer, the tax does not apply. See 1974-1975 Report of the Attorney General at 517. If consideration exists, the tax is applicable.

Based on the foregoing, I am of the opinion that the tax imposed by § 58-54.1 applies in both of the factual situations you have presented provided the consideration exceeds $100. In the first instance, the reconveyance by the purchaser (mortgagor) to the seller (mortgagee) is in consideration of the cancellation of the purchaser's mortgage debt. Accordingly, the realty is deemed to have been sold and the tax is computed on the unpaid mortgage debt. In the second situation, a sale occurred, the foreclosure sale, in which consideration was received for the interest conveyed. Accordingly, the tax would apply.

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1The tax in question is a grantor's tax. See the fourth paragraph of § 58-54.1. Cf. § 58-54, a grantee's tax.
2No money need change hands. See 1975-1976 Report of the Attorney General at 389. The satisfaction of a debt by a conveyance will be deemed consideration. See 1970-1971 Report of the Attorney General at 379, wherein it was opined that realty transferred in liquidation is deemed realty sold if liabilities of the liquidating corporation were satisfied or assumed by the stockholders.
3Id.
TAXATION. RECORDATION. DEEDS INCIDENT TO DECREE OF DIVORCE OR SEPARATE MAINTENANCE MAY BE RECORDED EXEMPT FROM TAX IF HUSBAND AND WIFE ARE ONLY PARTIES TO DEED.

July 26, 1982

The Honorable Charlton E. Gnadt, Clerk
Circuit Court of Prince William County
and the Cities of Manassas and Manassas Park

You have asked whether § 58-61 of the Code of Virginia as amended by the 1982 General Assembly, is in conflict with another provision on a related subject found in § 58-57. Since 1972, § 58-57 has provided that "[t]he tax on any deed...transferring property pursuant to a decree of divorce or of separate maintenance or pursuant to a written instrument incident to such divorce or separation, shall be fifty cents per deed." By Ch. 651, Acts of Assembly of 1982, § 58-61 was amended, effective July 1, 1982, to provide that "[w]hen the tax has been paid at the time of the recordation of the original deed, no additional recordation tax shall be required for admitting to record...[a] deed to which a husband and wife are the only parties...." Of course, if a decree of divorce has been entered, the husband-wife relationship no longer exists and there can be no conflict between the statutes.

Not every deed transferring property pursuant to a decree of separate maintenance or pursuant to a written instrument incident to such separation will be a deed to which a husband and wife are the only parties. Thus, it is entirely possible that § 58-57 will require that a tax of fifty cents per deed be imposed on such a deed. On the other hand, as a result of the 1982 amendment to § 58-61, a deed to which a husband and wife are the only parties will not require the payment of an additional recordation tax for admitting such deed to record if the full amount of tax has been paid at the time of the recordation of the original deed.

In those factual situations in which there is a conflict between the two statutes, the statute later enacted must prevail. See Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938); 1980-1981 Report of the Attorney General at 329 and 1976-1977 Report of the Attorney General at 102. Accordingly, I am of the opinion that § 58-61 should be applied in all instances in which the husband and wife relationship still exists and they are the only parties to the deed.

TAXATION. RECORDATION. EXEMPTION. RECORDATION OF OPTION TO PURCHASE IS NOT RECORDATION OF CONTRACT TO PURCHASE QUALIFYING DEED CONVEYING TITLE TO EXEMPTION UNDER § 58-61(A)(4).
May 11, 1983

The Honorable Rosemary F. Davis, Clerk
Circuit Court of Nelson County

You have asked whether the deed which you have enclosed is exempt from the recordation tax under any provisions in Title 58, Ch. 3, Art. 3 of the Code of Virginia, particularly § 58-61(A)(1) [deed of confirmation] or § 58-61(A)(4) [deed arising out of a contract to purchase real estate]. You have set forth background information and have also enclosed a related lease agreement.

The relevant facts are as follows:

In 1976, the Industrial Development Authority (the "Authority") of Nelson County acquired real estate and equipment (the "Project") which it subsequently leased to a second party pursuant to the lease agreement which you enclosed. The lease agreement was recorded and the recordation tax imposed by § 58-58 was paid by the lessee based on the fair market value of the property. The agreement contained a provision whereby the lessee had an option to purchase the Project if certain conditions were met. In 1983, pursuant to this option, the Authority conveyed a portion of the Project to the lessee by the deed about which you inquire. The remaining portion of the Project was conveyed to a third party by a deed upon which the recordation tax imposed by § 58-54 was paid.

Section 58-54 imposes a tax "[o]n every deed, except a deed exempt from taxation by law, which is admitted to record...." Sections 58-60 through 58-64.1 set forth the circumstances in which a deed will be exempt from the tax. You question whether §§ 58-61(A)(1) or 58-61(A)(4) applies to the deed in question.

Section 58-61(A) provides in part:

"When the tax has been paid at the time of the recordation of the original deed, no additional recordation tax shall be required for admitting to record:

1. A deed of confirmation."

The statute does not define the term "deed of confirmation;" therefore, it must be construed according to its ordinary and familiar meaning, within the context of the statute. Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969). A deed of confirmation is an instrument used "to remove doubts as to the operativeness of a prior deed to convey title to the land intended." 23 Am.Jur.2d Deeds § 287 (1965). This exemption contemplates a situation where a prior deed has purported to convey title, yet a second deed must be recorded to confirm the conveyance because of some
mistake on the face of the original deed, mistake in notarial
acknowledgement, for example. In your factual situation, the
prior recorded instrument did not purport to convey title to
the property in any manner; rather, it was a lease agreement
containing an option to purchase. The deed you enclosed is
the first instrument that conveys title. Therefore, it is my
opinion that the deed in question is not exempt from the
recordation tax under § 58-61(A)(1).

Section 58-61(A) provides in part:

"When the tax has been paid at the time of the
recordation of the original deed, no additional
recordation tax shall be required for admitting to
record:

***

4. A deed arising out of a contract to purchase real
estate...."

The effect of this exemption is that the recordation tax will
be paid only once when recording: (1) a contract to purchase
real estate and (2) the deed incident to the purchase
contract conveying title to the property. In your factual
situation, the first instrument recorded was not a contract
to purchase the real estate; rather, it was a lease with an
option to purchase the property. In an option contract, the
parties contemplate two distinct contracts: (1) the option
contract and (2) if the optionee chooses, the contract for
the sale of the property. See Humble Oil and Refining
statute exempts deeds arising only out of a contract for the
sale of real property; it does not offer an exemption where
the prior recorded instrument was merely an option contract.
Therefore, it is my opinion that the deed in question is not
exempt from the recordation tax under § 58-61(A)(4).

I know of no other exemption provisions which would
apply to the facts that you have outlined. Therefore, it is
my opinion that the deed which you enclosed is not exempt
from the recordation tax under any provisions in Title 58,
Ch. 3, Art. 3.

TAXATION. RECORDATION. TAX ON DEED PURSUANT TO § 58-54 TO
BE THE GREATER OF CONSIDERATION OR ACTUAL VALUE OF PROPERTY
CONVEYED.

March 30, 1983

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

You have asked whether the clerk should use the locally
assessed value of real property for real estate taxes or the
Ratio Sales Study (the "Study") to assess recordation taxes
on deeds where no sale has taken place and where the
Your letter limits your question to the tax imposed by § 58-54, which provides in part:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." (Emphasis added.)

Your letter also indicates that the deeds were intended to be deeds of gift primarily among family members, but that no statement to this effect appeared in the deeds. Section 58-61(B) exempts deeds of gift between an individual grantor or grantors and an individual grantee or grantees provided in the deed it is stated that it is a deed of gift. Because the deeds did not comply with this requirement, they are not exempt from the recordation tax imposed by § 58-54.

In those instances where the deed recites only nominal consideration, § 58-54 requires that the recordation tax be based upon the actual value of the property conveyed. The actual value of real property is its fair market value, which is generally defined as the price it will bring by one under no obligation to sell and is bought by one who is under no obligation to buy. See Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958) citing Seaboard Air Line v. Chamblin, 108 Va. 42, 60 S.E. 727 (1908).

The recordation tax is not a tax upon property, but rather a tax on the privilege of using the benefits of the State's recordation statutes. Pocahontas Collieries Company v. Commonwealth, 113 Va. 108, 73 S.E. 446 (1912). Accordingly, the assessed value is not controlling for determination of actual value for recordation tax purposes, even though it may well be a valuable tool for making the determination.

There are several recognized methods for determining fair market value; e.g., comparable sales or other methods of making appraisals. The Study of the Department of Taxation may be used as evidence of value. If the study shows the local assessment is fixed at less than 100% of fair market value, I am of the opinion that the Study may be used to determine the actual value upon which the amount of recordation tax is assessed. See 1969-1970 Report of the Attorney General at 289. This is not to say, however, that the Study must be used in every instance in which the assessed value is less. The assessed value could very well reflect the actual value of the property conveyed.

transaction is actually a gift but does not state it is a gift.
See § 58-33.2(C) of the Code of Virginia providing that the State Tax Commissioner "shall publish annually the findings of the assessment sales ratio studies" required by § 58-33.2(A).

As between husband and wife only, the requirement that the deed state therein that it is a deed of gift was removed by the 1982 General Assembly. See Ch. 651, Acts of Assembly of 1982. The deeds in question were all recorded prior to 1982, so this amendment would have no effect on them.

TAXATION. RECORDATION. WHERE DEED OF TRUST FALLS WITHIN PROVISOS OF PARA. 6 OF § 58-55, TAX IMPOSED LIMITED TO AMOUNT OF DEBT SECURED BY DEED OF TRUST IN EXCESS OF EXISTING DEBT. WHERE NO ADDITION TO EXISTING DEBT, NO TAX DUE.

January 11, 1983

The Honorable David A. Bell, Clerk
Circuit Court of Arlington County

In light of the sixth paragraph of § 58-55 of the Code of Virginia, you have asked whether recordation taxes should be collected on a particular deed of trust that has been presented to you. You state further that the person wishing to record this instrument maintains that this transaction, whereby the original deed of trust is being paid off and released for a lower interest rate, is to "refinance" the existing debt. You point out that the borrower, lender, trustees and face amount in each instrument are the same and that the deed of trust is in standard form with the following language inserted at the end:

"This Deed of Trust represents refinance of the Deed of Trust with an existing debt in the amount of $150,000.00, securing First Mortgage Corporation, now F & M Mortgage Corporation, recorded in Deed Book 2054, at Page 1735 among the aforesaid County land records."

Subject to limitations and exceptions set forth in the Code, § 58-55 imposes a tax on the recordation of a deed of trust or mortgage. The sixth paragraph thereof was added in 1982 and reads:

"On deeds of trust or mortgages the purpose of which is to refinance or modify the terms of an existing debt with the same lender, which debt is secured by a deed of trust or mortgage on which the tax imposed hereunder has been paid, the tax shall be paid only on that portion of the amount of the bond or other obligation secured thereby which is in addition to the amount of the existing debt secured by a deed of trust or mortgage on which the tax has been paid. The instrument shall
certify the amount of existing debt." Chapter 630, Acts of Assembly of 1982.

This paragraph limits the tax imposed by § 58-55 to the amount of the bond or other obligation secured by the instrument in excess of the amount of the existing debt provided that:

(a) the purpose of the deed of trust is to refinance or modify the terms of the existing debt;
(b) the lender is the same;
(c) the tax imposed under § 58-55 was paid on the original deed of trust securing the debt; and
(d) the instrument certifies the amount of the existing debt.

I am of the opinion that the deed of trust which you have described, comes within the provisos of the sixth paragraph of § 58-55 as set forth herein and that the last sentence of the instrument constitutes the necessary certification of the existing debt. In light of the foregoing and because the amount of the existing debt has not changed, no recordation taxes as imposed by § 58-55 should be collected on the instrument you have described.

TAXATION. RECORDATION. WHETHER PURCHASER TAKES "SUBJECT TO" OR ASSUMES EXISTING DEED OF TRUST ARE FACTORS WHICH MAY BE CONSIDERED IN DETERMINING MEASURE OF RECORDATION TAX UNDER § 58-54.

August 3, 1982

The Honorable Irene W. Walker, Clerk
Circuit Court of the City of Chesapeake

You have inquired as to the difference between a transaction in which a purchaser of real property takes "subject to" a deed of trust and one in which the purchaser "agrees to assume" an existing deed of trust in conveyance by deed of bargain and sale, assumption deed and a foreclosure or trustee's deed.

These transactions differ as to the personal liability of the purchaser for the underlying debt. If a purchaser agrees to "assume" an existing deed of trust, he agrees to become personally liable for the debt. On the other hand, if property is taken "subject to" an existing deed of trust, the purchaser is not personally liable for the debt. The original debtor would still be personally liable unless released.
An earlier Opinion of this Office found in 1976-1977 Report of the Attorney General at 221, 222, describes the effect of an agreement to assume an existing deed of trust:

"By this document the mortgagors [sellers] have transferred the property encumbered by a deed of trust to a purchaser, who has assumed the debt owed to the mortgagee. The mortgagee [lender] has agreed to accept the purchaser as the obligor on the debt underlying the deed of trust, in lieu of the mortgagor [seller]...."

This is often referred to as a novation. In contrast, when property is sold "subject to" an existing deed of trust the purchaser does not become the obligor on the underlying debt which remains chargeable and may be enforced only against the real estate or the seller-obligor.

You have also inquired as to the measure of the recordation tax to be charged on conveyances of these types. Recordation of a deed of conveyance is taxed separately from recordation of a deed of trust pursuant to § 58-54, et seq., of the Code of Virginia. Deeds of trust or mortgages are assessed under the provisions of § 58-55. Deeds of conveyance are assessed under both §§ 58-54 and 58-54.1.

The measure of the recordation tax on deeds of conveyance under § 58-54, the grantee's tax, is stated to be "fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." (Emphasis added.) The clerk must determine the "actual value" of the property as well as the sales price or "consideration of the deed," and assess the tax due under this section on the greater amount. The balance due on a previously recorded deed of trust which the purchaser is either "assuming" or taking "subject to" is only one element of consideration and may properly be considered by the clerk in determining the "actual value" of the property as required under § 58-54.

The grantor's tax under § 58-54.1 is also assessed on a deed of conveyance and is measured by the consideration or value of the [seller's] interest "exclusive of the value of any lien or encumbrance remaining...[on the property] at the time of the sale...." (Emphasis added.) A purchaser's agreement to assume an existing debt is sometimes included in the deed of conveyance itself or can be stated separately in a deed of assumption.

Prior to July 1, 1981, agreements to assume an existing deed of trust were separately taxable under § 58-58. See 1976-1977 Report of the Attorney General at 221. However, § 58-60 was amended to eliminate recordation tax on deeds of assumption or agreements to assume offered for recordation after July 1, 1981.

In light of the foregoing, I am of the opinion that, except as otherwise exempt, deeds of conveyance of real
property are subject to recordation tax under both §§ 58-54 and 58-54.1. Whether the purchaser takes "subject to" or agrees to assume an existing deed of trust, and the amount thereof, are factors which are to be considered by the clerk in determining the greater of consideration or actual value of the property in order to ascertain the appropriate measure of the recordation tax under § 58-54.

TAXATION. RECORDATION. WRAP-AROUND FINANCING. OUTSTANDING LOAN BALANCES SHOULD BE EXCLUDED IN DETERMINING TAX UNDER § 58-54.1 WHERE PURCHASER ASSUMES OR TAKES SUBJECT TO RECORDED DEED OF TRUST.

August 3, 1982

The Honorable Irene W. Walker, Clerk
Circuit Court of the City of Chesapeake

You have asked whether balances on loans secured by recorded deeds of trust should be deducted in computing the measure of recordation tax due on a deed of conveyance under § 58-54.1 of the Code of Virginia. You indicate that the purchaser has secured "wrap-around" financing which consolidates outstanding loans on the property under a new loan so that only one debt service or payment is made by the purchaser. Under the typical "wrap-around" loan arrangement, the lender is responsible for discharging payments on the old debts, which are secured by previously recorded deeds of trust. See 1972-1973 Report of the Attorney General at 433(1).

Recordation of a deed of conveyance and recordation of a deed of trust on the same property are two separate taxable transactions. Subject to limitations and exceptions set forth in the Code, deeds of trust or mortgages are assessed under the provisions of § 58-55 while deeds of conveyance are assessed under §§ 58-54 and 58-54.1. The measure of recordation tax on deeds of conveyance under § 58-54.1, the grantor's tax, is "the consideration or value of the [seller's] interest...exclusive of the value of any lien or encumbrance remaining...[on the property] at the time of the sale."

A previous Opinion of this Office found in 1972-1973 Report of the Attorney General at 437, holds that where a purchaser assumes or takes subject to a previously recorded deed of trust, the amount of the pre-existing encumbrance should be excluded in determining the grantor's tax under § 58-54.1. I am therefore of the opinion that in the circumstances you describe the balances on the previously recorded deeds of trust should be deducted in determining the measure of the grantor's tax under § 58-54.1.

You have also asked whether it is proper to record a deed of assumption in connection with "wrap-around" financing. Under § 55-96, a deed of trust or, in this case,
an agreement to assume the obligations expressed in previously recorded deeds of trust, which has not been recorded is void as against purchasers for value without notice of the agreement to assume. Under subparagraph (A2) of § 55-96, the clerk of court is required to keep an index of all instruments duly recorded. I am, therefore, of the opinion that in the circumstances you describe it is proper to record the agreement to assume the existing deeds of trust. Under amendments to § 58-60 effective July 1, 1981, an agreement to assume a deed of trust is no longer subject to recordation tax under § 58-54, 58-55 or 58-58, although the deed of conveyance itself remains taxable in accordance with the guidelines set forth above.

TAXATION. SALES AND USE. CITY MAY NOT TAX TOBACCO AND TOBACCO PRODUCTS. MAY LEVY EXCISE TAX ON CIGARETTES IF AUTHORIZED BY CHARTER.

June 7, 1983

The Honorable Robert W. Ackerman  
Member, House of Delegates

You have asked whether the City of Fredericksburg can levy a tax upon the sale or use of tobacco or tobacco products sold in the city. You have enclosed the opinion of the city attorney which states that "[t]he latest amendment to the Charter of the City of Fredericksburg was granted in Ch. 144, Acts of Assembly of 1975. Section 32 of the City Charter states:

In the execution of its powers and duties, the City Council may annually levy and collect, in such manner as it may deem appropriate, taxes by assessment of said city on all subjects for taxation, the taxation of which by cities, is not forbidden by general law...." (Emphasis added.)

While this provision does grant council the general power of taxation, that power is subject to any limitations imposed by the Code of Virginia. In this vein, there are two chapters in Title 58 of the Code which are relevant to your question: Ch. 14.2, Taxes on Tobacco Products, and Ch. 8.1, Virginia Retail Sales and Use Tax.

The original enactment of Ch. 14.2 was approved in Ch. 392, Acts of Assembly of 1960. The preamble states that this is "[a]n Act to levy excise (sales and use) taxes on certain tobacco products, to-wit: little cigars, cheroots, stogies, cigars, and cigarettes...." Within Ch. 14.2, § 58-757.27(A) states that:

"No provision of this chapter shall be construed to deprive...cities...of the right to levy taxes upon the sale or use of tobacco or tobacco products, provided
such...city...had such power prior to January one, nineteen hundred seventy-seven." (Emphasis added.)

This provision does not authorize Fredericksburg to tax the sale and use of tobacco products, but neither does it deprive Fredericksburg of the right to tax the sale and use of tobacco and tobacco products if it had that power under its charter. It is then necessary to determine whether Ch. 8.1, the Virginia Retail Sales and Use Tax Act, imposes such a limitation.

The Virginia Retail Sales and Use Tax Act (the "Act"), Ch. 8.1 of Title 58 enacted in 1966, deals with sales and use tax on a wide variety of items. Section 58-441.49(a), dealing with the localities' authority to levy a sales tax, provides that:

"No city, town, or county shall impose or continue to impose any local general sales or use tax or any local general retail sales or use tax after the state tax imposed by this chapter becomes effective, except as authorized by this section. Nothing contained in this chapter, however, shall be construed as impairing in any way the authority conferred upon any city, town or county by any other statute including charter provisions to impose local license taxes or other local taxes not intended to be separately stated or required to be passed on to the consumer, except that any locality may impose or continue to impose local excise taxes on cigarettes, local admissions taxes, local taxes on transient room rentals and meals...to the extent authorized by law...." (Emphasis added.)

The Act is the sole authority dealing with general sales and use taxes. Section 58-441.49(a) of the Act leaves localities the option to impose a local excise tax on cigarettes (and other subjects expressly listed) provided that they have taxing authority conferred on by statute or charter. See 1970-1971 Report of the Attorney General at 392. It does, however, deprive localities of the power to impose sales or use taxes on other tobacco products because only cigarettes are expressly listed in the exception.

Based on the foregoing, it is my opinion that the City of Fredericksburg may not levy a sales and use tax on tobacco and tobacco products; however, under the general taxing authority of the city charter, as limited by § 58-441.49(a), the city may levy a local excise tax on cigarettes.

1See Opinion to the Honorable Alson H. Smith, Jr., dated June 2, 1983, in which I concluded that cities and towns which have charter provisions granting general taxing authority may impose a local sales tax on meals and rooms, within the terms of the exception in § 58-441.49(a).
TAXATION. SALES AND USE. SERVICE COMPANY-PURCHASER. UNDER § 58-441.38, BACK TAXES MAY BE ASSESSED FOR PERIOD OF SIX YEARS WHERE NO SALES OR USE TAX RETURN WAS FILLED.

January 11, 1983

The Honorable George W. Jones
Member, House of Delegates

You have asked whether the three year or six year statute of limitations for the assessment of sales and use taxes set forth in § 58-441.38 of the Code of Virginia would be applicable to a situation in which a business has not filed a sales or use tax return and has not been "required" to file such a return. Your letter states further that your inquiry relates to the meaning of the phrase "failure to file" within the context of this statute. Clarifying information which you provided by telephone indicates that the type of business to which you refer is a service business and not one engaged in retail sales.

Section 58-441.38 provides that:

"The taxes imposed by this chapter shall be assessed within three years from the date on which such taxes became due and payable; provided, however, in the case of a false or fraudulent return with intent to evade payment of the taxes imposed by this chapter, or a failure to file a return, the taxes may be assessed, or a proceeding in court for the collection of such taxes may be begun without assessment, at any time within six years from such date." (Emphasis added.)

This section requires the Department of Taxation (the "Department") to assess sales and use taxes found to be owed during the three year period described therein. In addition, however, the proviso clause permits the Department, in its discretion, also to assess back sales and use taxes for a six year period in two instances: (a) where there is a failure to file a return or (b) where a false or fraudulent return is filed with the intent to evade payment of taxes. See 1976-1977 Report of the Attorney General at 300. The section does not require a finding of an intent to evade taxes as a condition to invoking the provision for the "failure to file a return."

In certain situations, a service company may be required to file a sales and use tax return. Section 58-441.5 imposes a use tax and reads in pertinent part as follows:

"There is hereby levied and imposed, in addition to all other taxes and fees of every kind now imposed by law...a tax upon the use or consumption of tangible personal property in this State...." (Emphasis added.)

"Section 58-441.5(d) provides a credit for the use tax imposed by § 58-441.5, where a sales tax has been paid
pursuant to § 58-441.4. Conversely, where no sales tax has been paid, the use tax [imposed by § 58-441.5] is due and owing." 1977-1978 Report of the Attorney General at 443, 444. Accordingly, where a supplier, whether located within or without this State, fails to collect the four percent Virginia sales tax, the use tax imposed by § 58-441.5 is applicable to the purchaser using the property in Virginia. 1

Pursuant to § 58-441.12(1)(b) or § 58-441.12(1)(j), 2 any person who is subject to a sales or use tax becomes a "dealer" and, in accordance with § 58-441.20, 3 is required to file sales or use tax returns. Thus, assuming none of the exemptions from sales and use tax provided in § 58-441.6 apply, in a situation in which a supplier fails to collect the four percent Virginia sales tax, a service company-purchaser is not only subject to the use tax but also is required to file a return.

Accordingly, if the foregoing circumstances exist in the situation about which you inquire, I am of the opinion that the Department may, pursuant to § 58-441.38, assess a service company-purchaser for back taxes covering a period of six years.

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1Exemptions from the Virginia Retail Sales and Use Tax Act (the "Act") are set forth in § 58-441.6. On the information before me, I am unable to determine whether any of these exemptions apply. I am, however, unaware of any provision in the Act which relieves the purchaser of the obligation to pay the use tax simply due to a failure on the part of the supplier to collect the sales tax.

2These two statutory provisions provide: "The term 'dealer,' as used in this chapter, shall include every person who:

(b) Imports or causes to be imported into this State tangible personal property from any state or foreign country, for sale at retail, for use, consumption, or distribution, or for storage to be used or consumed in this State; **

(j) Shall become liable to and shall owe this State any amount of tax imposed by this chapter, whether he holds, or is required to hold, a certificate of registration under § 58-441.16 or not." **

3This section states in pertinent part: "Every dealer required to collect or pay the sales or use tax shall, on or before the twentieth day of the month following the month in which the tax shall become effective, transmit to the Commissioner, upon a form prescribed, prepared and furnished by him, a return showing the gross sales, gross proceeds, or cost price, as the case may be, arising from all transactions taxable under this chapter during the preceding calendar month, and thereafter a like return shall be prepared and transmitted to the Commissioner by every dealer on or before the twentieth day of each month, for the preceding calendar
month...." See, also, § 1-31 of the Virginia Retail Sales and Use Tax Regulations.

TAXATION. SECRECY OF INFORMATION. DISCLOSURE OF INFORMATION IN "LINE OF DUTY" NOT PROHIBITED.

September 1, 1982

The Honorable John W. Henderson
County Attorney for Wise County

You have presented a question concerning information that is acquired by certain local tax or revenue officers or their employees in the performance of their public duties and which relates to "the transactions, property, income, or business of any person, firm or corporation." Specifically, you ask whether such information may be disclosed to an attorney in aid of the recovery of delinquent local taxes on the grounds that it comes within the "line of duty" exclusion from the prohibition contained in § 58-46 of the Code of Virginia.

Section 58-46 is a general penal statute which, inter alia, prohibits the disclosure of information regarding a taxpayer's transactions, property, income or business by a commissioner of revenue, treasurer or other local tax or revenue officer. It is noted, however, that this section contains a proviso that the limitations of this section do not extend to any act performed or words spoken or published in the line of duty under the law.

In an Opinion found in the 1957-1958 Report of the Attorney General at 275, the Attorney General found that the "line of duty" exclusion from the prohibition of § 58-46 allowed a commissioner of revenue to divulge information to an individual employed as a delinquent tax collector. Similarly, your question relates to local tax collections and revenue officers' divulging information to an attorney hired to collect delinquent local taxes under § 58-991 or 58-1016. See, e.g., 1952-1953 Report of the Attorney General at 227.

In an Opinion found in the 1974-1975 Report of the Attorney General at 490, 491, the Attorney General found the disclosure of information by a department of assessments to a board of equalization to be implicitly in the line of duty quoting Sands, Sutherland Statutory Construction, § 55.04 as follows:

"An express statutory grant of power or the imposition of a definite duty carries with it by implication, in absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty....That which is clearly implied is as much a part of the law as that which is expressed."
The statutory authority for an attorney to be hired to collect delinquent local taxes also clearly implies the authority to have such attorney be given access to information related to delinquent local taxes, either through the official authorized to collect the delinquent local taxes or directly from the custodian of the information otherwise protected from disclosure by § 58-46.

It is, therefore, my opinion that disclosure to an attorney of information in aid of the recovery of delinquent local taxes is within the exception to § 58-46 because it is an "act performed or words spoken or published in the line of duty under the law..." and, thus, the prohibition of § 58-46 is inapplicable to such a disclosure. The attorney, of course, would be obligated to protect the confidentiality of the information pursuant to § 58-46 except as he may have need to use the information in the line of duty.

TAXATION. SECRECY OF INFORMATION. TOWN COUNCIL MEMBERS NOT PERMITTED TO SEE TREASURER'S FILES CONTAINING INFORMATION REVEALING EARNINGS OF PROFESSIONALS.

February 25, 1983

The Honorable G. C. Jennings
Member, House of Delegates

You have asked whether information submitted to the town treasurer in connection with the payment of the professional license tax fees is confidential and, if it is, what the penalties are for violating this confidence. You indicate that the treasurer's files contain information that reveals the earnings of professionals in the area. I presume that the materials you are speaking of are the business license tax returns.

Section 58-46 of the Code of Virginia governs this situation. The pertinent language states:

"[I]t shall be unlawful for the...treasurer...to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties...provided, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under law...Nothing contained herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof...This section shall not be construed to prohibit a local tax official from disclosing whether a person, firm or corporation is licensed to do business in that locality."
The language in the statute prohibits disclosure of information concerning "transactions, property, income or business." These terms are descriptive of financial information and clearly embrace information as to earnings of professionals which is contained in business license tax returns. See 1981-1982 Report of the Attorney General at 377; 1959-1960 Report of the Attorney General at 344.

The statute does provide for exceptions and circumstances when some disclosure is not prohibited; however, none of the exceptions applies to the revelation of an individual business' financial information in the situation which you describe. For example, a prior Opinion of this Office has held that § 58-46 allows disclosure of an individual business' name, address, and the type of business in which it is licensed to engage. See 1981-1982 Report of the Attorney General, supra. The language of the statute specifically allows publication of statistics about local business license taxation, as long as classifications prevent identification of individual businesses. See, also, 1981-1982 Report of the Attorney General at 379; 1959-1960 Report of the Attorney General, supra. Disclosure is allowed when the information sought is required by law to be entered on any public assessment roll. I am not aware of any provision in the Code providing that the income of businesses reported for business license tax purposes must be entered on a public assessment roll. See 1974-1975 Report of the Attorney General at 524. Disclosure is also allowed when the treasurer must do so in the line of duty. Disclosure of financial information is not necessary in order for the treasurer to carry out his duties to administer the tax laws in this situation which you described; and, the treasurer is not claiming that necessity in this instance.

It is my opinion that § 58-46 protects information contained in the treasurer's files revealing earnings of professionals from disclosure to town council members. Section 58-46 prescribes the penalty for a violation of the statute as punishment "by a fine not exceeding five hundred dollars or by confinement in jail not exceeding six months or by both...."

TAXATION. § 58-603(6) HELD APPLICABLE TO § 58-603(2).

November 3, 1982

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

This is in reply to your recent letter pertaining to local license taxes imposed on corporations furnishing light and power. You have asked whether § 58-603(6) of the Code of Virginia permits an electric cooperative to deduct the electric cooperative's cost of purchasing electricity from a vendor subject to the State franchise tax from the electric cooperative's gross receipts base upon which a town license
Section 58-603(2) is the provision of law which permits towns to impose limited gross receipt taxes upon water or heat, light and power companies. 1971-1972 Report of the Attorney General at 401; compare § 58-266.1(A)(1) (prohibition against levying license taxes upon public service companies). Subsections (5) and (6) (requiring certain deductions for electric cooperatives) were added to § 58-603 in 1978, and the General Assembly specifically limited the applicability of such subsections to § 58-603 by use of the phrase "for purposes of this section." Subsection (2), the town's authority for imposing the license tax, is clearly part of the section (§ 58-603). Therefore, absent some language excluding subsection (2) from the operation of subsections (5) and (6), I must conclude that the deduction from gross receipts required by subsection (6) applies to the gross receipts base taxable under subsection (2).

The rules of statutory construction come into play only where there is some ambiguity in the statute under consideration, and I find no such ambiguity here with respect to the relationship between subsections (2) and (6) of § 58-603. Nevertheless, I do note that the title to the pertinent act, Ch. 786, Acts of Assembly of 1978, plainly states that the legislature intended to amend and reenact § 58-603, a provision "relating to the annual State franchise tax and local license tax on water or heat, light and power companies." (Emphasis added.) As the two subsections added by Ch. 786 related to deductions from the gross receipts base, and because the General Assembly specifically mentioned both State and local taxes in its title to the act, it should be presumed that the General Assembly knew exactly what it was doing and intended the deductions to be applicable for both State and local tax purposes. See Commonwealth v. Champion International Corp., 220 Va. 981, 992, 996, 265 S.E.2d 720, 726, 729 (1980).

In light of the foregoing, I am of the opinion that § 58-603(6) does apply to § 58-603(2), and that an electric cooperative may deduct from its gross receipts the amount paid by the cooperative to purchase electricity from a vendor subject to the State franchise tax.

Furthermore, I am of the opinion that the response to your first question does not result in the violation of any constitutional provision. The statute is presumptively constitutional and there are no facts apparent to indicate that the classification established by § 58-603(6) is unreasonable or arbitrary. 1976-1977 Report of the Attorney General at 198.
Section 58-603(6) provides: "There shall be deducted for purposes of this section from the gross receipts of any electric cooperative, as defined in § 56-209, which is engaged in sales to ultimate consumers, and every corporation engaged in the business of furnishing heat, light and power by means of electricity the amount paid in such taxable period by such cooperative or corporation to purchase electricity from a vendor subject to the state franchise tax." (Emphasis added.)

"The title of an act is often, but not always, a sure guide to the true meaning and intent of the legislature, especially in this State, where the Constitution in terms requires that the object of the law shall be expressed in its title." Peters v. Auditor, 74 Va. (33 Gratt.) 368, 373 (1880).

3 The vendors of electricity in your hypothetical question are not similarly situated; only one of the entities involved purchased electricity from a vendor subject to the State franchise tax.

TAXATION. SEVERANCE TAX. DILLON'S RULE. WHERE POWER TO LEGISLATE TAX IS CONFERRED POWER TO COLLECT IS NECESSARILY IMPLIED. ORDINANCE PASSED TO PRESCRIBE MODE OF EXERCISE OF SUCH A POWER MUST BE REASONABLE. REVOCATION OF LICENSE PROVISION AND BOND REQUIREMENT DEEMED REASONABLE.

October 7, 1982

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County

You have requested my opinion concerning your duties under the Wise County Severance License Ordinance. Your inquiry raises questions on the validity of the ordinance which authorizes the commissioner of the revenue

1) to revoke a license after it has been issued;
2) to place coal operators under oath;
3) to require coal operators to file a bond with him;
4) to cause coal operators to file and pay before the due date pursuant to a jeopardy assessment.

Virginia follows the Dillon Rule of strict construction applicable to the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication. Commonwealth v. County Board of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1970); 13B M.J. Municipal Corporations § 26 (1978). The county's power to impose a severance tax is derived from § 58-266.1:1 of the Code of Virginia. Implicit in the General Assembly's grant of power to localities to levy a severance license tax is the power to authorize such acts as are reasonable to collect the tax.4 The probative question is whether the acts authorized
by the ordinance are a reasonable mode of exercising the implied power to collect this tax.  

Before turning to your specific questions, I believe it essential to first determine if the county may designate the commissioner of the revenue as the officer responsible for issuing the license and exercising the other functions specified in the ordinance.

Section 15.1-40.1 provides that the duties of the commissioner of the revenue shall be prescribed by general law or special act. Section 58-874 is one general statute which imposes duties upon the commissioners of the revenue, including the duty to review the list of all persons licensed by the commissioner of the revenue and assess for the current license year any person who has without a license conducted any business for which a license is required. Additionally, § 58-864 requires the commissioner of the revenue to ascertain and assess all subjects of taxation in his county or city. Accordingly, I am of the opinion that the commissioner of the revenue is the appropriate official to be designated by a county for issuing any business license for severing coal or gases pursuant to the provisions of § 58-266.1:1.

Your first question is whether the board of supervisors can authorize you to revoke a license issued under the ordinance. Section V of the ordinance provides in pertinent part:

"Whenever any person fails to comply with any provision of this ordinance the Commissioner of Revenue may hold a hearing after giving such person ten days notice in writing, specifying the time and place of hearing and requiring him to show cause why his license should not be revoked or suspended or his application for renewal denied. He may revoke or suspend or deny reissuance of any one or more of the licenses held by such person."

I am of the opinion that the authorization to revoke a license is a reasonable mode of exercising the implied power to enforce collection of the severance tax. I further believe that the board may properly delegate to you this power to revoke the license for cause (where a person fails to comply with any provision of the ordinance).  

The second question is whether the board may authorize you to place operators under oath. Section XI of the ordinance states in relevant part:

"In the event any operator fails to make a return as provided [herein]...it shall be the duty of the Commissioner...[to make an assessment based on an estimate for the taxable period]. The Commissioner [may require such operator to appear before him] and the Commissioner may require such operator...to answer interrogatories under oath...."
It is my opinion that this section speaks, not to the act of your personally administering an oath to the operator, but to a methodology of obtaining information through interrogatories answered under oath. An attestation of the truthfulness of these answers before any official (e.g., a notary) authorized by law to administer oaths would be sufficient. The board is properly interested in the accuracy of any response and this requirement is a reasonable one calculated to enhance accuracy. Moreover, § 58-860 expressly authorizes the commissioner to summon the taxpayer to appear and answer, under oath, questions touching on tax liability.

The third question is whether the board has the power to authorize you to require coal operators to file a bond with you. Section XII of the ordinance states:

"The Commissioner of Revenue may, when in his judgment, it is necessary and advisable to do so in order to secure the collection of the tax levied by this ordinance, require any person subject to such tax to file with him a bond secured by a surety company authorized to do business in this State as surety, in such reasonable amount as the Commissioner of Revenue may fix, to secure the payment of any tax penalty or interest due or which may become due from such person...."

There is authority to the effect that the filing of an indemnity bond frequently is made a prerequisite to the grant of a municipal license. Such a requirement has also been deemed to be reasonable. Accordingly, I am of the opinion that a bond requirement is a reasonable means of ensuring the collection of the tax in this case. I am further of the opinion that this is a lawful delegation of power, because the discretion of the commissioner of the revenue is essentially ministerial and not legislative. See Thompson, supra, at 367, 383.

The last question presented is one of power to issue jeopardy assessments as contemplated in the ordinance. Section XIII of the ordinance reads as follows:

"If the Commissioner of Revenue is of the opinion that the collection of the taxes imposed by this ordinance will be jeopardized by delay, he shall make an assessment of the tax...Such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired...."

Jeopardy assessments constitute an unusual and extraordinary measure to collect taxes. Specific provisions were enacted authorizing jeopardy assessments in the case of sales tax and then later for income tax in this State. No like provision appears in the State licensing laws. I am unable to find any support for the proposition that the authority to impose jeopardy assessments may be reasonably implied from the
authority to collect taxes. In the absence of such support and in the absence of facts supporting the exercise of such authority, I must question the validity of Section XIII of the Wise County Severance License Ordinance.

1Section 58-266.1:1 reads as follows: "The governing body of any county or city may levy a license tax on every person engaging in the business of severing coal or gases from the earth. Such tax shall be at a rate not to exceed one per centum of the gross receipts from sale of coal or gases severed within such county. Such gross receipts shall be the fair market value measured at the time such coal or gases are utilized or sold for utilization in such county or city or at the time they are placed in transit for shipment therefrom, provided that if the tax provided herein be levied, such county or city cannot enact the provisions of § 58-774 relating to a tax on gross receipts.

Any county or city enacting a license tax under this section may require producers of coal or gas and common carriers to maintain records and file reports showing the quantities of and receipts from coal or gases which they have produced or transported."

2See 1973-1974 Report of the Attorney General at 413, holding that a county's requirement of monthly reports was necessarily implied in order to effectuate the power to levy a severance tax.

3See Richmond-Ashland v. Commonwealth, 162 Va. 296 at 307, 173 S.E. 892 at 896 (1934), stating that "where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power..." and 13B M.J. Municipal Corporations § 62 (1978).

4So long as the discretion vested in the official is subject to a condition(s) established by the licensing ordinance, the delegation of power will be valid. See 9 McQuillen Municipal Corporations § 26.65 (3d ed. Rev. 1978) and 51 Am.Jur.2d Licenses and Permits § 144 (1970).

5Cf. Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930) holding a provision of an ordinance invalid which authorized the chief of police to revoke the driving permit of any driver who in his opinion was unfit since no uniform rule applicable to all persons was prescribed.

6See, also, 51 Am.Jur.2d Licenses and Permits (1970) wherein, under a grant of power to regulate, a requirement that a licensee execute a bond is deemed reasonable.

7In Thompson, the Court suggested in dicta that it would sustain a portion of an ordinance which provided: "And no [driving] permit shall be issued to such person unless such examination shall disclose that he or she possesses such ability and knowledge as, in the judgment of the chief of police, qualifies such person to receive such permit..." 155 Va. at 372.
See, also, 9 McQuillen Municipal Corporations § 26.63 (3d ed. Rev. 1978) stating that "licensing ordinances will be construed, if possible, as not vesting legislative power and absolute discretion in enforcement officials with respect to the grant or issuance of a license."

Section 58-441.32 (enacted in 1966) and § 58-151.0105 (enacted in 1979) respectively.

TAXATION. SITUS. GARBAGE DISPOSAL FIRM OWNING AND REGULARLY SERVICING DUMPSTERS IN SEVERAL LOCALITIES HAS SITUS UNDER § 58-266.5 ONLY AT LOCATION WHERE IT MAINTAINS OFFICE.

April 21, 1983

The Honorable Ann C. White
Commissioner of the Revenue for the City of Chesapeake

You have asked several questions concerning business license taxation of a garbage disposal firm by the City of Chesapeake and neighboring localities.

First, you have asked whether, for local business license purposes, a private garbage disposal firm has a situs at more than one location. You have stated that the firm has its only office located in the City of Chesapeake. Further, it "has its only telephone at this office, conducts its business out of this office, and stores its trucks at this office. It has several garbage dumpsters located in different cities and earns its gross receipts by providing these dumpsters for use by others and emptying them of garbage periodically."

You question the authority of other localities where the dumpsters are located to assess a business license fee based on the mere presence of the dumpster without any other business contacts.

Section 58-266.5(a) of the Code of Virginia addresses your question, stating in part as follows:

"[T]he situs for the local license taxation for any licensable business, trade, occupation or calling, shall be the city, town or county...in which the person so engaged has a definite place of business or maintains his office...." (Emphasis added.)

In order to gain an understanding of the current statute, it is helpful to examine prior versions of the statute and the reasons that led the legislature to make changes. The 1972 statute provided for, in addition to the "definite place of business" and "maintenance of an office" standards, taxation by a locality when "principal and essential acts of... business" occurred within that locality. Subsection (g) stated that the phrase "principal and
essential acts...of business" includes collection and delivery of articles at customers' locations. Thus, the statute, at that time, contemplated taxing a business in each locality in which it had at least as much contact as pick-up articles within that locality. In 1974, however, the legislature made an apparent effort to simplify administration of the business license tax when it deleted the provision allowing taxation by a locality when principal and essential acts of business occurred in that locality.

Under the present language of § 58-266.5(a), the determination of tax situs in this case focuses on whether the garbage disposal firm maintains "a definite place of business" at each dumpster site. The Supreme Court has recognized that a diaper service which collects and delivers diapers at locations in several jurisdictions "has a place of business or office only..." in the locality where it cleans the diapers. Stork Diaper Service, Inc. v. City of Richmond, 210 Va. 705, 708, 173 S.E.2d 859 (1970). Based on the Stork standard of contact, the mere location of a dumpster and the collection of refuse from that dumpster are insufficient contacts with a locality to constitute "a definite place of business."

Accordingly, based on the facts described in your letter and the foregoing analysis, it is my opinion that for local business license purposes the private garbage disposal firm has a situs only in the City of Chesapeake.

Second, you have asked whether Chesapeake is entitled under § 58-1164 to assess taxes currently on the revenues generated during this and the last three preceding years by dumpsters located in other cities and not reported to Chesapeake. As stated above, the disposal firm has only one situs; therefore, the license tax provided for in § 58-266.1(A) is properly assessed by Chesapeake on gross receipts generated by all dumpsters. Section 58-1164 provides that if a local license tax has been underassessed in any of the last three years, the commissioner of the revenue shall currently assess the omitted taxes with penalty and interest. It is my opinion that Chesapeake may assess omitted license taxes on gross receipts generated by dumpsters located in other localities for the last three preceding years as directed by § 58-1164.

Finally, you have asked whether the garbage disposal firm is entitled to a refund of license taxes paid to all localities other than Chesapeake. I assume that the facts in the prior years are legally indistinguishable from the present facts. As stated above, the firm has only one situs; therefore, the license tax under § 58-266.1(A) is properly assessed by Chesapeake only. Sections 58-1141, 58-1142, and 58-1152.1 provide procedures for allowing the tax-collecting officer of a locality to refund amounts that the commissioner of the revenue has certified were incorrectly assessed for the last three preceding tax years. It is my opinion that the garbage disposal firm may make an application for a
refund of license taxes paid to all localities other than Chesapeake for the last three preceding years in accordance with the procedures in §§ 58-1141, 58-1142 or under an ordinance adopted pursuant to § 58-1152.1.

1 In reaching this conclusion, I am aware of an Opinion of my predecessor which concluded that "[a] continuous and regular course of dealing at one location would seem to constitute each such location a 'definite place of business....'" (Emphasis added.) 1978-1979 Report of the Attorney General at 279. The facts of that Opinion involved the assignment of employees to particular buildings to perform service maintenance contracts. Thus, those facts are distinguishable. To the extent that the holding of that Opinion conflicts with this Opinion, however, it is expressly overruled.

TAXATION. SITUS. PERSONAL PROPERTY OF COLLEGE TEACHER TAXED TO JURISDICTION WHERE SCHOOL IS LOCATED SO LONG AS TEACHER LIVES THERE FOR FULL SCHOOL YEAR.

January 25, 1983

The Honorable G. M. Weems
Treasurer of Hanover County

You have asked two questions concerning situs for assessment of personal property taxes as set out in § 58-834 of the Code of Virginia. First, you ask where the tax situs is of a vehicle operated by a student or teacher whose home is in another county but who keeps the vehicle in Hanover County for more than six months. Second, you inquire whether Hanover County must make a refund to a taxpayer who was, on January 1, a county resident but, within six months thereafter, moved into another jurisdiction and pays taxes to that jurisdiction.

The determination of the situs of property for tax purposes and the decision whether a tax assessment should be abated and a refund made are primarily the duties of the commissioner of the revenue. The questions you have asked have been answered by prior Opinions of this Office which I will outline for the use of the commissioner in making these determinations.

With regard to the situs for tax purposes of vehicles operated by teachers, I assume from your letter that the teachers' permanent residences are in another county and that they also reside in Hanover County during the school year. In that case, the proper situs for personal property taxes is the locality where the school is located so long as the vehicle is located there for the full school year. See 1973-1974 Report of the Attorney General at 385.
If, on the other hand, the situation is that the teacher resides elsewhere but merely drives into Hanover County each day of the school year, the situs is where the vehicle is normally garaged or parked. See 1972-1973 Report of the Attorney General at 292.

With regard to your second question, there have been several Opinions of this Office dealing with the issue. Most relevant is an Opinion in the 1974-1975 Report of the Attorney General at 480. The situs question raised concerned circumstances where a taxpayer moves from one locality to another during the first three to four months of the year. The Opinion held that under § 58-834, the situs is where the vehicle is normally garaged, docked or parked, and the date on which that factual determination is to be made is January 1. See 1979-1980 Report of the Attorney General at 353.

In a situation where the property owner resides in one place throughout the year but garages, parks or docks the property at more than one location, this Office has stated that when the property is not located in any one place for a "significant portion of the year (e.g. 6 months)" it is taxed in the jurisdiction of the owner's residence. See 1979-1980 Report of the Attorney General at 353. In the case which you describe, however, both residence and location of the vehicle coincide as of January 1, the tax day. Accordingly, if the taxpayer resided in Hanover County and, as of January 1, a determination was made that he normally kept his vehicle in Hanover County, he is taxable in your county regardless of his subsequent removal from Hanover County. The locality to which he moves would have no right to tax him for that tax year.1

1I call your attention to § 58-835.1 which permits certain counties and cities to adopt procedures for proration of taxes and refunds. Hanover County does not have such an ordinance.

TAXATION. SITUS OF CABLEVISION CORPORATION WHOSE PRINCIPAL OFFICE IS IN NEIGHBORING LOCALITY. TAXABLE NEXUS DETERMINED BY REFERENCE TO § 15.1-23.1.

July 27, 1982

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

You ask whether a cablevision corporation whose principal office is located twelve miles beyond the city will have a taxable situs in your locality if it pays two local banks to accept cablevision payments from local subscribers. More specifically, you ask whether such an arrangement would
constitute the maintenance of a "branch office" under § 58-266.4 of the Code of Virginia.

Section 58-266.4 refers to the situs of local license taxation for practitioners of professions. I do not believe it is applicable to a cablevision corporation such as you have described.

I call to your attention, however, § 15.1-23.1 which permits your city council to grant a license, franchise, or certificate of public convenience and necessity to a cablevision corporation desiring to do business in the city and to "impose a tax thereon." The authority to impose the tax under § 15.1-23.1 is not limited by any reference to the situs of the principal office of the cablevision corporation.

TAXATION. SITUS OF TANGIBLE PERSONAL PROPERTY. TRAILER DOES NOT ACQUIRE SITUS UNDER § 58-834 IN LOCALITY WHERE IT IS ON JANUARY 1ST IF IT IS CASUALLY THERE OR INCIDENTALLY THERE IN COURSE OF TRANSIT.

January 26, 1983

The Honorable L. Wayne Carter
Commissioner of the Revenue for the City of Salem

You have asked for my opinion concerning the following factual situation.

A trucking company has a home office in Henry County and, although it does not have a terminal or office in the City of Salem, it does use that city as a "drop point." During the last several years, the company has had an average of 15 different trailers per day located in the city. You ask whether the city should be entitled to tangible personal property tax on these trailers.

The controlling statute is § 58-834 of the Code of Virginia which provides in pertinent part that:

"The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district, town or city in which such property may be physically located on the tax day...."

Section 58-835 fixes January 1st of each year as tax day.

In Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957), the Supreme Court of Virginia construed the phrase "physically located on the first day of the tax year" contained in § 58-834, holding that the statutory language "means something more than simply the place where the property is" on January 1. It does not include "property which is casually there or incidentally there in the course of transit...." Hogan, supra, at 735. Thus, in determining
the situs of personal property for tax purposes, it is the ordinary location of the property that controls, that is, the place where the property is ordinarily kept or maintained. See 1980-1981 Report of the Attorney General at 358.

Section 58-834 also provides that the "situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked...." A trailer pulled by a tractor truck does not fall within the definition of that personal property just mentioned. It does have one thing in common with motor vehicles, travel trailers, boats and airplanes - it is made to move from place to place. Thus, it is subject to the same "situs for taxation" problem as this type of personal property.

In a prior Opinion found in the 1978-1979 Report of the Attorney General at 283, the Attorney General stated "[t]his Office has consistently held that the proper situs for taxation is the place where the vehicle customarily is garaged, and not the location of the business that owns it."

It is my opinion that the answer to your question is governed by a factual determination as to the place where the trailers are ordinarily garaged or kept. In my opinion if these trailers use the City of Salem as the company assigned location where they are kept when not in use, then they would be taxable by the city. On the other hand, if they are merely "dropped" in the city in transit to be picked up at a later time and taken to another destination, then they cannot be said to be located in the city for tax purposes.

TAXATION. TANGIBLE PERSONAL PROPERTY. PRORATION OF TAX ON MOBILE HOMES UNDER § 58-829.3.

August 9, 1982

The Honorable G. M. Weems
Treasurer of Hanover County

You have asked two questions relating to the taxation of mobile homes used as full-time residences when they are removed from one taxing locality to another after January first. Section 58-829.3 of the Code of Virginia provides that cities and counties may prorate their tangible personal property taxes on mobile homes, on a quarterly basis, for mobile homes delivered or moved into such localities after January first. This authority to prorate was granted by the General Assembly in a 1976 amendment to § 58-829.3. See Ch. 567, Acts of Assembly of 1976. You first ask if the power to prorate taxes permits such mobile homes to be exposed to double taxation, in the sense that the first locality (where the mobile home was located on January first) will collect its tax for the entire tax year while the second locality is permitted to assess its tax for a portion of the
tax year. You also ask if the first locality may prorate its tax based on the amount of time the mobile home was actually in that locality.

Prior to the 1976 amendment to § 58-829.3, this Office had opined that "personal property is subject to tax in only one jurisdiction for a particular tax year..." and that jurisdiction is the locality where such personal property had its situs on January first. See 1974-1975 Report of the Attorney General at 480, 481. Taxation in the first jurisdiction prohibited the second jurisdiction from assessing its tangible personal property tax. Id. The 1976 amendment to § 58-829.3 ended this prohibition by empowering the second jurisdiction to impose its tax on a prorated basis.

Except for limited localities, the General Assembly did not relieve the affected taxpayer from any portion of the first jurisdiction’s tax. Consequently, I am of the opinion that the General Assembly thus intended to permit both localities to collect a tangible personal property tax for the tax year; that is, the first jurisdiction is required to impose and collect a tax for the entire tax year,1 and the second jurisdiction is empowered to impose and collect its tax on a prorated basis. Accordingly, your first inquiry is answered in the affirmative as to the right to expose the taxpayer to two taxes during the tax year. To the extent that such taxation may constitute double taxation, it is not prohibited by the Fourteenth Amendment to the United States Constitution. See Citizens Nat. Bank v. Durr, 257 U.S. 99 (1921); St. Louis Southwestern R. Co. v. Arkansas, 235 U.S. 350 (1914). This Office has previously recognized that tangible personal property may be subjected to taxation in more than one jurisdiction and that such "double taxation" is permissible. See Reports of the Attorney General 1976-1977 at 291; 1974-1975 at 528; 1957-1958 at 274.

Chapter 433, Acts of Assembly of 1982 added § 58-835.1, effective July 1, 1982, which authorizes certain cities and counties to provide for monthly proration of personal property taxes on motor vehicles, trailers and boats, including abatement of taxes assessed and refund of taxes already paid for property which loses its situs in the city or county after tax day. If the first taxing jurisdiction comes within those so permitted, it could prorate its tax based on the amount of time the mobile home was actually in that locality. Until such time as the General Assembly changes the law, this possibility of multiple taxation of the same property will exist.

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1In the hypothetical question you have raised, the first jurisdiction has not enacted a proration taxing ordinance under § 58-829.3, and this Opinion has proceeded on that basis.
TAXATION. TANGIBLE PERSONAL PROPERTY AND MERCHANTS' CAPITAL. PERSONAL LIABILITY OF OWNER AS OF JANUARY ONE OF TAX YEAR.

August 3, 1982

The Honorable Fields R. Young, Jr.
Treasurer for Grayson County

You have asked certain questions with respect to the collection of delinquent tangible personal property and merchants' capital taxes in a situation where the original owner of such property has sold the property to new owners after the assessment and notice date for 1981 taxes. Specifically, you ask which parties are now liable for the delinquent taxes and which sections of the Code of Virginia provide for their collection.

Section 58-20 of the Code of Virginia provides that property owned by an individual shall be taxed to that individual. Furthermore, a lawful assessment imposes a personal liability upon the owner against whom the taxes are assessed. See City of Richmond v. Monument Ave. Dev. Corp., 184 Va. 152, 157, 34 S.E.2d 223, 225 (1945). The owner, as of January 1, 1981, is the person liable for the taxes for 1981. See § 58-835.

In order to effect collection of the original owner's personal liability, the full range of collection powers made available to the treasurer under Title 58 may be employed to the extent that their terms allow. Among these applicable provisions are §§ 58-921, 58-922, 58-965, and 58-1001 through 58-1021.1.

The property involved, having passed out of the possession of the delinquent owner, is not liable for the delinquent taxes, unless the treasurer has assessed a tax against each specific item of property. Chambers v. Higgins, 169 Va. 345, 350-351, 193 S.E. 531, 533 (1937); see, also, §§ 58-1001 and 58-1009. Such specific assessments constitute liens on each specific piece of personal property for the taxes due thereon. Drewry v. Baugh & Sons, 150 Va. 394, 401, 143 S.E. 713, 715 (1928). Failure to assess against specific pieces of property will defeat the lien if the property has passed out of the possession of the original owner. See United States v. Waddill, Holland & Flinn, 323 U.S. 353, 359-360 (1945).

TAXATION. TAX CREDIT AVAILABLE UNDER NEIGHBORHOOD ASSISTANCE ACT.

April 8, 1983

The Honorable Robert C. Scott
Member, Senate of Virginia
You have asked for my opinion on several matters concerning the Neighborhood Assistance Act (the "Act"), §§ 63.1-320 through 63.1-325 of the Code of Virginia. Your questions relate to whether seven different types of donations would qualify for the tax credit available under that Act.

The Act declares that the public policy of the Commonwealth of Virginia is to encourage investment by business firms for neighborhood assistance, community services, and other specified activities to benefit impoverished people or individuals living in impoverished areas. See § 63.1-322. To qualify for the tax credit, the Act requires that a business firm must have engaged in the specified activity and that impoverished people or an impoverished area must be the beneficiary of the activity. See § 63.1-323. The activity cannot be a part of the business firm's normal course of business. See § 63.1-324. If the above and all other prerequisites of the Act are complied with, a business firm may generally receive a tax credit of fifty percent of the total amount invested. See § 63.1-324. There is, however, a cap on the total credit granted under the terms of the Act. See § 63.1-323.

Assuming that all other prerequisites of the Act are met, I shall now respond to whether the following donations would qualify for the tax credit.

Your first example involves the fee simple donation of real estate. If the object of this donation is to help provide for a "community service" (see § 63.1-321(1)), such as a day care center on the property, or for a form of "crime prevention" (see § 63.1-321(9)), or for construction of a gymnasium on the property for teenage persons, or for "job training" (see § 63.1-321(7)), or for a skills learning center, I am of the opinion that such a donation would be eligible for the tax credit.

Your next example involves the rent-free use of real estate as a donation. If this donation is part of a project to provide a "community service," "crime prevention," or any of the other activities defined in § 63.1-321, it would qualify for a tax credit for the reasons stated above.

You also inquire if a donation of materials and supplies used in renovation would qualify under the Act. The donation of materials and supplies used in renovation would be an activity encompassed by the definition of "neighborhood assistance", as provided in § 63.1-321(5). It would therefore be eligible for the tax credit.

You next ask whether the donation of labor used in renovation by a volunteer group such as the Jaycees would qualify. The Jaycees would not be a "business firm" as defined by § 63.1-321(6). Such a donation would, therefore, not be tax deductible.
You then ask whether the donation of labor used in renovation by a contractor using his workers would qualify. If the contractor is a "business firm", as defined by § 63.1-321(6), and the labor donated is not donated in the "normal course of business", as defined by § 63.1-321(10), this activity would be eligible for a tax credit. This would mean that the labor donated by the contractor's workers would be provided during the time they ordinarily would be working for the contractor.

You then ask whether the rent-free use of a hotel room by a hotel on a "space available" basis would qualify. Depending upon its use, this type of activity could qualify as a "community service" as defined by § 63.1-321(1) and, therefore, would be eligible for the tax credit. Proper guidelines would have to be established so that the provision of such a room would be made on request at a reasonable hour so as to disallow the tax credit for rooms which, in the normal course of events, would have remained unoccupied until the next rental day.

Your final inquiry involves the rent-free use of a hotel room donated for a specific term by a hotel. Assuming the other criteria of the Act specified in the second paragraph of this Opinion are met, this activity would qualify as a "community service" as defined by § 63.1-321(1) and would be eligible for a tax credit.

Note that the Secretary of Human Resources or his designee has the authority to approve specific program proposals of business firms or neighborhood organizations under the Act pursuant to § 63.1-323. The determination whether a proposal meets the criteria established by the Act must, of necessity, be made on a case-by-case basis. The Secretary has delegated this responsibility to the Commissioner of the Department of Social Services.

1The term "normal course of business" as used in the Act is addressed in an Opinion to the Honorable W. H. Forst, State Tax Commissioner, dated January 14, 1983.

TAXATION. TAX CREDIT POSSIBLE UNDER NEIGHBORHOOD ASSISTANCE ACT TO CONSTRUCT LIBRARY.

June 17, 1983

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You have asked for my opinion on several questions related to the Neighborhood Assistance Act (the "Act"), §§ 63.1-320 through 63.1-325 of the Code of Virginia. Your questions relate to whether a tax exempt neighborhood organization can utilize the provisions of the Act to solicit
funds from business firms to build a library in an impoverished area on publicly-owned property, resulting in a tax credit to the businesses which donate funds.

The Act declares that it is the public policy of the Commonwealth to encourage investment by business firms for neighborhood assistance, community services, and other specified activities to benefit impoverished people or individuals living in impoverished areas. See § 63.1-322. To qualify for the tax credit, the Act requires that a business firm must have engaged in the specified activity and that impoverished people or an impoverished area must be the beneficiary of the activity. See § 63.1-323. I assume for purposes of this Opinion that the library qualifies as a project which may be approved under the Act. The investment may be given by a business firm to a nonprofit neighborhood organization which would then utilize the funds for an approved project. See § 63.1-323. If all requisites of the Act are met, a business firm may generally receive a tax credit of fifty percent of the total amount invested. See § 63.1-324. There is, however, a limit on the total credit granted under the terms of the Act. See § 63.1-323. The Secretary of Human Resources (the "Secretary") or his designee has the authority to approve specific program proposals of business firms or neighborhood organizations under the Act. See § 63.1-323. The Secretary has delegated this responsibility to the Commissioner of the Department of Social Services (the "Commissioner"). Prior to doing so, rules and regulations for the approval or disapproval of such proposals were properly promulgated by the Secretary. See § 63.1-323.

Your first inquiry is whether the real estate upon which the library is to be built must be owned by the tax exempt neighborhood organization, as opposed to the city, school board, or other entity. I am aware of no requirement in the Act which requires the tax exempt neighborhood organization to own the property on which a qualifying project is to be developed or implemented. However, the neighborhood organization must have some form of legal authority, such as a lease, to occupy and make improvements on the property.

Your second inquiry is whether the library must continue to be operated by the neighborhood organization following completion of the project. I am aware of no specific provision in the Act which specifies how long the neighborhood organization would have to continue the operation of the library upon its completion. However, each project sponsored by a business firm or a neighborhood organization must obtain annual approval to receive the tax credit. See Rule 10 of the Rules of the Neighborhood Assistance Act, promulgated pursuant to § 63.1-323. As part of that process, the Commissioner will have to evaluate each proposed project to determine if it complies with the true intent of the Act.1
Your third inquiry is whether $175,000 is the maximum tax credit for a project. The Act contains no limitation on the number of contributions or on the amount of tax credit that any one project can have. The only requirements applicable to this inquiry are that the request for the tax credit must have the prior approval of the Secretary or his designee and that the total amount of tax credit for all projects approved pursuant to this Act for Fiscal Year 1982-1983 shall not exceed $1,750,000. See § 63.1-323.

Your fourth inquiry is whether $175,000 is the maximum tax credit for one business. Section 63.1-324 states that $175,000 is, in fact, the maximum tax credit for one business each year. Any part of that $175,000 tax credit not used during the year in question may be carried over for the next five succeeding taxable years or until the tax credit is finally utilized, whichever is sooner. See § 63.1-324.

Your fifth inquiry is whether one business can donate a lump sum of $1,750,000 and receive a tax credit for $175,000 per year for five years or must the business donate $350,000 per year for five years. Rule 10 of the Rules of the Neighborhood Assistance Act states that "[p]rojects shall be approved for a period of one year..." and that "[a]ny proposal for renewal of the project shall follow the same procedures set forth in [the] rules [as] for an original proposal." Furthermore, § 63.1-324 provides that a business can receive a tax credit in an amount equaling fifty percent of the total amount invested during a taxable year, but further states that the maximum tax credit for a business in any one year is $175,000. Therefore, I am of the opinion that a business can only receive the fifty percent tax credit on a donation of up to $350,000 per year for an approved project and that requests for tax credits for succeeding years would have to be approved pursuant to § 63.1-323 and Rule 10 for each successive year.

Your sixth inquiry is whether more than one business can donate lump sums of $1,750,000 and receive tax credits of $175,000 per year for five years, or must the businesses donate $350,000 per year for five years. My response to your fifth inquiry is applicable here as well. Therefore, a maximum tax credit annually of $175,000 is potentially available to each business that contributes to an approved project and any contribution by each business in successive years would have to be approved annually.

Your seventh inquiry is whether a business that donated $1,750,000 in a lump sum would be assured of a tax credit of $175,000 per year for five years or would subsequent applications be required. My responses to your fifth and sixth inquiries are applicable to this inquiry as well. Subsequent applications for each successive year would be required and donations could then only be made to approved projects in order to receive the tax credit.
Your last inquiry is whether more than one tax exempt organization can participate in the same project. The example you gave indicated one tax exempt organization would purchase the land, another would construct the building, and another would furnish the library. As long as each organization meets the definition of "neighborhood organization" provided in § 63.1-321(4), there is no limitation on the number of tax exempt organizations that can participate in the same project. However, a business that contributes money to one or more of those qualifying organizations would only be entitled annually to a total of $175,000 in tax credits.

1 It is clear that the tax benefits for a business making a contribution to a neighborhood organization for a qualifying project pursuant to the Act are greater than if the business made that contribution directly to a municipality for the same project. Therefore, the Commissioner should not allow the Act to be used if it is the intent of a neighborhood organization at the inception of a project to turn it over to a municipality as part of its governmental function.

TAXATION. UNEMPLOYMENT COMPENSATION. URBAN ENTERPRISE ZONE ACT. UNEMPLOYMENT TAX CREDITS ALLOWED BY URBAN ENTERPRISE ZONE ACT NOT PROHIBITED BY FEDERAL OR STATE CONSTITUTION OR LAWS.

September 2, 1982

The Honorable Elmon T. Gray
Member, Senate of Virginia

You ask whether § 59.1-281 of the Code of Virginia, a part of Ch. 275, Acts of Assembly of 1982, is (1) constitutionally permissible, and (2) whether it is in conformity with federal laws regarding unemployment compensation taxes. This legislation is part of the Urban Enterprise Zone Act (the "Act"), § 59.1-270, et seq. For the reasons hereinafter discussed, I am of the opinion that your first inquiry may be answered in the affirmative and your second inquiry must be answered in the negative.

The purpose of the Act is to stimulate business and industrial growth in certain areas which will "result in neighborhood revitalization of such areas of the Commonwealth by means of regulatory flexibility and tax incentives." See § 59.1-272. To accomplish this goal, the Governor may declare certain areas of the Commonwealth to be urban enterprise zones where the income of at least 25% of the population is below 80% of the median income of the jurisdiction or the unemployment rate is 1.5 times the State average. See § 59.1-274. The economy may then be enhanced within these zones by the granting of certain tax credits and sales tax exemptions to qualifying business firms. Among the
tax incentives is authorization for unemployment tax credits (§ 59.1-281).

The Act will give a series of annual unemployment tax incentives to qualifying business firms within a designated urban enterprise zone. These particular tax incentives reduce the employers' State unemployment tax obligations. The creation of those tax incentives is well within the power of the General Assembly so long as the Assembly's action is reasonable. See Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970). Here, the desirability of promoting economic strength in certain underdeveloped areas manifestly provides a basis for concluding that the action is reasonable. State and federal constitutional prohibitions against special legislation or denial of equal protection do not prohibit classification for tax purposes, and the necessity for and reasonableness of classifications are primarily questions for the legislature. Martin's Ex'rs v. Commonwealth, 126 Va. 603, 102 S.E. 77 (1920), Town of Ashland v. Board of Supervisors for Hanover County, 202 Va. 409, 117 S.E.2d 679 (1961).

In an unemployment tax case the Virginia Supreme Court recognized that, under the Constitution, some businesses could be taxed while others could receive a total exemption. "It is well settled that a state may lay an excise tax on the operations of a particular kind of business and exempt some other kind of business closely akin thereto." Huffman Construction Company v. Unemployment Compensation Commission, 184 Va. 727, 743, 36 S.E.2d 641 (1946).

Accordingly, I am of the opinion that the Act does not violate constitutional guarantees.

Your second question is whether the particular section of the Act which grants unemployment tax incentives is in conformity with federal unemployment compensation laws. In considering this question, it is important to recall that two taxes are involved, one imposed by federal law and one by State law.

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301, et seq., levies a federal tax upon covered employers in the amount of 3.4% of the annual wages paid to all covered employees up to $6,000. However, 26 U.S.C. § 3302(a) grants these employers a credit against the federal tax for the actual amount of State unemployment tax paid. An additional tax credit against the federal tax may be allowed to employers under 26 U.S.C. 3302(b) which reduces their tax liability from 3.4%, less what they have actually paid for State unemployment taxes, down to 0.7%. The additional credit authorized by § 3302(b) is conditioned upon the State's unemployment tax law being in conformity with § 3303(a) of the federal act.
Section 3303(a) of FUTA provides in pertinent part:

"A taxpayer shall be allowed an additional credit under section 3302(b) with respect to any reduced rate of contributions permitted by a State law, only if the Secretary of Labor finds that under such law -- (1) no reduced rate of contributions to a pooled fund...is permitted to a person...having individuals in his...employ except on the basis of his...experience with respect to unemployment...."

Thus, in order for employers to obtain the tax credits against the federal tax as permitted under § 3302(b), § 3303(a) requires that the State must set the employer tax rate for State taxes at a certain specified level and not allow a reduction of such rate unless done so under recognized methods of experience rating.

Virginia does currently allow, for the State unemployment tax, such experience rated tax rate reductions based upon a statutory formula set forth in the Virginia Code (§ 60.1-84.1) and approved by the Secretary of Labor. As a result, Virginia employers pay State unemployment taxes at basic tax rates running from the State maximum of 6.2% down to 0.1% based upon their experience rating.

The allowance of unemployment tax credits as set forth in the Act at § 59.1-281 reduces an employer's State tax obligation and, therefore, would constitute a lowering of State tax rates. This lowering would be for reasons other than an experience rating system approved by the Secretary of Labor in accordance with § 3303.2 As a result, the Virginia Unemployment Compensation Act would no longer be in conformity with § 3303 of the federal act. If this situation continues unabated by the General Assembly at its 1983 session, it may result in the federal disallowance of the substantial, additional tax credits permitted under § 3302(b).

To summarize, although the Act is constitutionally permissible, it is not in conformity with federal law, thereby potentially preventing the additional tax credits authorized by § 3303 of the federal law to be allowed to Virginia employers.

1As noted in the Town of Ashland case, the provisions of the first paragraph of Art. 10, § 1 of the Constitution of Virginia (1971) concerning uniformity of taxation relate only to direct taxes on property. Those provisions are not applicable to a tax of this nature.

2The United States Department of Labor has notified the Virginia Employment Commission that, as a result of § 59-281, Virginia's rating system is not in conformity with § 3303 of the federal law. My opinion comports with that position.
TAXATION. USE VALUE ASSESSMENT AND TAXATION. WHEN IS USE VALUE ASSESSMENT AND TAXATION ORDINANCE "FIRST" ADOPTED.

August 25, 1982

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

You have asked three questions relating to use value assessment and taxation of real property. The first question involves the county's adoption of a land use value assessment and taxation ordinance pursuant to § 58-769.6 of the Code of Virginia, which ordinance contains an expiration clause: "[t]his ordinance shall be effective for all tax years beginning on and after January 1, 1982, for a period of one year with subsequent study and review." The board of supervisors has not yet acted to extend the operation of the ordinance beyond the current calendar year, and you ask whether such an extension is now barred for 1983 because § 58-769.6 specifically requires that use value assessment and taxation ordinances be adopted "not later than June thirty of the year previous to the year when such taxes are first assessed and levied...." (Emphasis added.)

The purpose of this requirement in § 58-769.6 is to allow local governments and the State Land Evaluation Advisory Committee ("SLEAC") sufficient time to set in motion the complicated machinery necessary for making assessments in accordance with land use before applications for such assessments are processed. See 1973-1974 Report of the Attorney General at 301. Because this ordinance was enacted prior to June 30, 1981, your locality and SLEAC have already completed the process of implementing the use value assessment and taxation machinery. Accordingly, the General Assembly's intent will not be violated if the board of supervisors, not having acted to extend the ordinance prior to June thirty of this year, chooses to act thereafter. Moreover, by use of the term "first" in § 58-769.6, the General Assembly referred to the year immediately preceding the year of the ordinance's initial effective date, i.e., 1982 in your case and not to later years. Therefore, I am of the opinion that the board of supervisors may extend the operation of the county's use value assessment and taxation ordinance for succeeding years, including 1983, even though the decision to extend is made after June thirty of this year. See 1974-1975 Report of the Attorney General at 463.

Your second question is whether a locality, at its option, may assess lands lying within an agricultural and forestal district at such lands' value for agricultural purposes as opposed to fair market value. Section 58-769.6 provides that lands used in agricultural production within an agricultural and forestal district established under §§ 15.1-1506 through 15.1-1513 "shall be eligible for...use value assessment and taxation whether or not a local land-use plan or local ordinance pursuant to § 58-769.6 has been adopted." (Emphasis added.) Section 15.1-1512(A) provides...
that "[l]and used in agricultural and forestal production within an agricultural and forestal district shall automatically qualify for an agricultural or forestal value assessment on such land pursuant to § 58-769.4 et seq." if the requirements for use value assessment and taxation are otherwise satisfied.6

Therefore, I am of the opinion that lands lying within an agricultural and forestal district automatically qualify for use value assessment and taxation, subject to the applicable provisions of §§ 58-769.4 through 58-769.16. The locality has no option to exercise in such an instance, once a landowner has become "associated"7 with an agricultural and forestal district.

Your third question is whether the existence of an agricultural and forestal district may be considered by an assessor in determining fair market value. In view of my response to your second question that lands within an agricultural and forestal district automatically qualify for use value assessment and taxation, subject to the provisions of §§ 58-769.4 through 58-769.16, the only lands in an agricultural and forestal district which will be assessed at fair market value are those properties which fail to satisfy use value assessment and taxation requirements, such as minimum acreage requirements under § 58-769.7(b) or production requirements under §§ 58-769.5(a) and 58-769.5(c), among others. Such property must be assessed at its fair market value. See Art. X, § 2 of the Constitution of Virginia (1971).

In ascertaining fair market value, the assessor is to consider all the elements which determine fair market value; that is, the price which property will bring when both a willing seller and willing buyer exist. See Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958); see, also, Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976); Smith v. City of Covington, 205 Va. 104, 15 S.E.2d 220 (1964). Certainly, possibilities of development, local governmental review9 of the district, special assessments and tax levies relief,10 limitations on State11 and local12 governmental regulation, and other relevant circumstances affect fair market value and should be considered by the tax assessor.

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1This ordinance was enacted prior to June 30, 1981.
2See § 58-769.11.
3See § 58-769.8.
4Applicants have a filing deadline of November first, subject to extension by ordinance. See § 58-769.8. Therefore, any such extension must occur with that time frame in mind.
5See, also, § 15.1-1512(A).
6See, also, § 15.1-1513.7(3).
7See §§ 15.1-1511 and 15.1-1513.
TOWNS. CHARTERS. COMMISSION ON LOCAL GOVERNMENT. UNINCORPORATED COLONIAL COMMON TOWN DOES NOT CONSTITUTE "LOCAL GOVERNMENT" AND HAS NO AUTHORITY TO PROVIDE PUBLIC SERVICES.

December 30, 1982

The Honorable A. George Cook, III
Chairman, Commission on Local Government

This is in reply to the Commission's request for my opinion concerning its responsibilities to "Botetourt Town" in Gloucester County. The questions presented are:

"(a) whether or not 'Botetourt Town' constitutes a local government eligible for assistance from the Commission and

(b) the scope, if any, of the 'Town's' authority to provide public services within the boundaries of the community delineated by Chapter LX of the Acts of the Colonial General Assembly in 1769."

As you know, inquiries concerning "Botetourt Town" have been considered in Opinions of this Office on two prior occasions. See 1981-1982 Report of the Attorney General at 395; 1980-1981 Report of the Attorney General at 43. More recently, by letter dated September 14, 1982, from William G. Broaddus, Chief Deputy Attorney General to M. H. Wilkinson, Executive Director of the Commission on Local Government, the above quoted questions were considered and your Commission was advised as follows:

(a) "Botetourt Town," as such, does not constitute a local government eligible for assistance from the Commission.

(b) The "Town" has no authority to provide public services.

After careful consideration of the prior Opinions, of the additional information submitted, and of the Commission's statutory authority and responsibilities, it is my opinion that the above answers to the questions presented are correct.

TOWNS. MAYOR. MAYOR OF TOWN OF MCKENNEY MAY VOTE ONLY IN CASE OF TIE. HAS NO VETO POWER. MAY NOT REFUSE TO SIGN COUNCIL ENACTMENT.
The Honorable Jay W. DeBoer  
Member, House of Delegates

This is in reply to your request for my opinion on the following questions concerning the legislative powers of the Mayor of the Town of McKenney:

1. When may the Mayor vote in a matter before Town Council?
2. May the Mayor veto an action of the council?
3. May the Mayor refuse to sign a by-law or ordinance which has been properly approved by the Town Council?

The functions, powers and duties of a municipal mayor are derived from and dependent upon constitutional, statutory and charter provisions, and he takes nothing beyond the powers expressly conferred or necessarily implied from the language used. See Hammer v. Commonwealth, 169 Va. 355, 365, 193 S.E. 496 (1937); 1981-1982 Report of the Attorney General at 397. There is no provision of the Virginia Constitution which grants mayors of towns the right to vote on matters before their councils, nor is there any provision of general law applicable to the Town of McKenney which grants such right. Thus, the mayor's voting privileges, if any, are defined by the town's charter.

Section 8 of the Charter for the Town of McKenney, relating to the powers of the mayor, provides in pertinent part as follows:

"All by-laws and ordinances, before they become valid and operative, shall have his signature, but the mayor shall vote only in cases where the vote is a tie."

In answer to your first question, because there is no constitutional or statutory provision which adds anything to the above quoted language from the charter, it is controlling. Accordingly, the Mayor of McKenney may vote on matters before the council only when the council's vote is a tie.

In answer to your second question, the town's charter also controls as to the presence or absence of a veto power, because neither the Constitution of Virginia (1971) nor any provision of general law nor any provision of general law confers upon town mayors the power to veto ordinances. See 1974-1975 Report of the Attorney General at 534. Because the charter does not specifically grant the Mayor of McKenney the power of veto, I am of the opinion that he may not veto an action of the council.

With respect to your third question, § 8 of the charter, quoted above, provides that all by-laws and ordinances, before they become valid and operative, shall have the
mayor's signature. Although there is no Virginia authority directly on point, a distinction frequently is drawn between a charter provision which requires merely the signature of the mayor as a ministerial act to furnish evidence of the authenticity of the enactment, and one which requires his signature expressly for the purpose of registering his approval of the measure. See 56 Am.Jur.2d Municipal Corporations §§ 357 (1971); 5 McQuillen Municipal Corporations §§ 16.37, 16.38 (3d ed.). Neither § 8 nor any other provision of the charter requires, by its terms, the mayor's approval of council enactments, and to hold that he may refuse to sign them would be, in effect, a holding that he has the power of veto, despite the General Assembly's failure to expressly so provide in the charter. I am of the opinion that the language of § 8 prescribes for the mayor a ministerial duty of signing council enactments for purposes of authentication, not approval. Accordingly, in answer to your question, I am of the opinion that the Mayor of McKenney may not refuse to sign a by-law or ordinance which has been properly approved by the town council.

1Article VII, § 2 of the Constitution of Virginia (1971), states that the General Assembly shall provide by general law for the organization and government of towns and may also provide for the organization and government of any town by special act. Thus, such powers as a town mayor must be found in general law or in the town's charter.

2The Town of McKenney has not adopted any of the optional forms of government authorized for municipalities in Ch. 19, Title 15.1, of the Code of Virginia, and therefore, none of the provisions therein relating to mayors would be applicable, such as, for example, § 15.1-924, which confers the voting power upon the mayor of a town which has adopted the Modified Commission Plan. See 1976-1977 Report of the Attorney General at 161.

3The charter was enacted by Ch. 308, Acts of Assembly of 1944.

4Section 123 of the Constitution of Virginia (1902) gave the veto power to town mayors. See Gill v. Nickels, 197 Va. 123, 87 S.E.2d 806 (1955). The provisions upon which the Court relied in Gill were not included in the 1971 Constitution. Therefore, "in the absence of a general law, the town charter must now specifically grant such power or else the mayor will be said not to possess the veto." II A. E. Howard, Commentaries on the Constitution of Virginia 847, n.9 (1974).

5Note, that while § 15.1-817 specifically sets out the veto power for mayors of cities which are subject to that chapter, there is no comparable provision conferring such power on mayors of towns.

6"The mayor has veto power only when and to the extent that it is given him by law, and the power cannot be enlarged by construction." 5 McQuillen, Municipal Corporations, § 16.42 (3d ed). See, also, Hammer v. Commonwealth, supra; Howard, Commentaries, n.4, supra.
UNCLAIMED PROPERTY ACT APPLICABLE TO UNCLAIMED RETIREMENT BENEFITS HELD BY VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM.

January 28, 1983

The Honorable C. J. Boehm
Treasurer of Virginia

You ask whether the Virginia Supplemental Retirement System ("VSRS") is required by The Uniform Disposition of Unclaimed Property Act, §§ 55-210.1 through 55-210.30 of the Code of Virginia (the "Act"), to report unclaimed employee contributions. If so, the funds would become payable to you and your office would attempt to locate the lawful owner. In the event that you are unable to locate the lawful owner, you would pay unclaimed funds into the Literary Fund.

The VSRS consists of a number of different funds. Some are held in the name of deceased persons whose beneficiary has asserted no claim for the funds. Others are held for persons who have reached an age entitling them to benefits, but have asserted no claim. Some funds are held for persons who have left State employment and have not requested the return of the monies. The latter may or may not have become vested.

Section 55-210.10:1 provides that employee benefit trust distributions are deemed abandoned to the State if the owner has not indicated an interest in the fund for a period of ten years after it becomes payable. This section was added to the Act in 1981 and provides the method by which such funds are to be abandoned to the State. A Section 55-210.2(b1) defines an "employee benefit trust distribution" in pertinent part as money distributable to a participant in a fund to provide retirement benefits. Of primary significance, the Act expressly defines "person" to include any "government or political subdivision." See § 55-210.2(g).2

Accordingly, absent some other provision of law to the contrary, the funds described above would be reportable in accordance with § 55-210.10:1.3

Article X, § 11 of the Constitution of Virginia (1971) provides that the General Assembly shall maintain a retirement system "to be administered in the best interest of the beneficiaries thereof and subject to such restrictions or conditions as may be prescribed by the General Assembly." This section has never been construed by a court, but one writer suggests that it creates an enforceable fiduciary obligation leaving a wide range of discretion to the General Assembly. A. Howard Commentaries on the Constitution of Virginia 1136 (1974). In Almond v. Day, 197 Va. 782, 785, 97 S.E.2d 660 (1956), the Virginia Supreme Court stated that "the State holds and enjoys a proprietary interest in the fund...."
Although § 51-111.24 describes the board of VSRS as the trustee of funds in the system and gives it "full power to invest and reinvest..." the funds, it is my opinion that the General Assembly retains the authority to require that unclaimed benefits be reported to the Treasurer under the unclaimed property law. Indeed, if as is stated in your letter, there are 88,000 unclaimed accounts, the General Assembly justifiably may conclude that efforts to locate the owners should be pursued through the mechanism of the Act. Section 55-210.12(e) requires the holder of unclaimed property to use due diligence to locate the owner prior to the time at which the presumption of abandonment arises.

I am aware of no case which litigates the right of any state to unclaimed retirement benefits, but court decisions from other jurisdictions construing other provisions of the uniform act are instructive. The fact that owners of funds are entitled to make claim at any time does not exempt them from coverage under the act. See Blue Cross of Northern California v. Cory, 174 Cal. Rpter, 120 Cal. App.2d (1981). The purpose of the Act is to provide a means for locating the owners and "to give the State, rather than the holders of unclaimed property the benefit of the use of it, most of which experience shows will never be claimed." Douglas Aircraft Co. v. Cranston, 374 P.2d 819, 568 Cal.2d 462 (1962).

In conclusion, I am of the opinion that monies held by the VSRS which are unclaimed for a period of ten years under the conditions set forth in § 55-210.10:1 must be reported to the Treasurer as unclaimed property. Funds which are vested and payable, as well as those which have not become vested, are to be treated in similar fashion.4

1Section 55-210.10:1 provides: "A. All employee benefit trust distributions and any income or other increment thereon are abandoned to this State under the provisions of this chapter if the owner has not, within ten years after it becomes payable or distributable, accepted such distribution, corresponded in writing concerning such distribution, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary of the trust or custodial fund or administrator of the plan under which such trust or fund is established.

B. An employee benefit trust distribution and any income or other increment thereon shall not be presumed abandoned to this State under the provisions of this chapter if, at the time such distribution shall become payable to a participant in an employee benefit plan, such plan contains a provision for forfeiture or expressly authorizes the trustee to declare a forfeiture of a distribution to a beneficiary thereof who cannot be found after a period of time specified in such plan, and the trust or fund established under the plan has not terminated prior to the date on which such
distribution would become forfeitable in accordance with such provision.

2 In the absence of § 55-210.10:1, which deals expressly with the funds in question, there are two general sections which could otherwise be applicable. Section 55-210.9 applies to unclaimed property held by public officers and § 55-210.10 applies to property not otherwise covered by the Act. The Act originally did not provide a separate section for employee benefit trusts, and the addition of § 55-210.10:1 thus had the effect of allowing these funds to be held longer prior to being presumptively abandoned. Section 55-210.30, the severability clause, provides that the invalidity of any provision shall not apply to funds or property held or payable pursuant to Title 51 of the Code. Although this appears expressly to include funds held by VSRS as reportable property, I find it unnecessary to base this Opinion on such an interpretation of this section.

3 Your letter mentioned § 51-111.15 as possibly creating an exemption, but that section merely exempts VSRS benefits from legal process and not from compliance with other requirements such as this Act.

4 The Act makes no exception for treating vested rights any differently, but conclusively assumes that if its owner does not indicate any interest for a ten year period of time, the property is abandoned. Collaborative efforts of the treasurer and the trustees of the VSRS would appear desirable to minimize future hardship to individuals who might seek pension benefits after their vested funds had been paid to the treasurer as provided in the Act.

TREASURER OF VIRGINIA. UNCLAIMED PROPERTY ACT NOT APPLICABLE TO UNCASHED CHECKS DRAWN ON STATE AGENCIES.

January 14, 1983

The Honorable C. J. Boehm
Treasurer of Virginia

You ask whether checks drawn on the Commonwealth but not presented for payment within one year are subject to the provisions of the Uniform Disposition of Unclaimed Property Act1 (§§ 55-210.1 through 55-210.30 of the Code of Virginia, the "Act").

Section 55-210.9 provides that intangible personal property held by a public officer which has been unclaimed for a period of five years is presumed abandoned. Under the terms of the Act, the holder of abandoned property has a duty to report it to the Treasurer as custodian for the lawful owner. Due diligence must be made to locate the lawful owner before the unclaimed proceeds are paid to the Literary Fund.

As a general proposition, checks not negotiated would constitute unclaimed intangible personal property reportable to the Treasurer. However, in the case of checks drawn on the Commonwealth and not paid within one year, § 2.1-190
requires the Treasurer to charge the agency's account and deposit the money to the general fund. There is no duty to locate the owner, although the statute does make provision for payment of a check subsequently negotiated.

Ordinarily, by applying rules of statutory construction, there would be no reason why §§ 55-210.9 and 2.1-190 could not be read together and interpreted to mean that after five years the Treasurer would treat the unclaimed monies paid into the general fund as abandoned property under the Act. In the case of appropriated funds, however, Art. X, § 7 of the Constitution of Virginia (1971) provides that no appropriation is valid for more than two years and six months after the end of the session of the General Assembly at which the law is enacted. Accordingly, prior to the lapse of five years the Treasurer would have lost authority to pay the unclaimed funds. See 1952-1953 Report of the Attorney General at 250. I am, therefore, of the opinion that the funds in question are not required to be reported under the Act as they are not subject to the Act.

\[1\] The Virginia Act was adopted in 1960. In 1981, the uniform act was revised extensively by the National Conference of Commissioners on Uniform State Laws and is now under consideration for adoption in a number of states.

**TREASURERS. BAD CHECK LIABILITY NOT IMPOSED UPON TREASURER.**

September 16, 1982

The Honorable Ellis D. Meredith
Treasurer of Montgomery County

You have asked whether a treasurer is personally liable for bad checks he accepts as tender in payment of taxes or other debts owed to the county. If the treasurer is not personally liable, then you also wish to know when an adjustment may be made in the General Fund account balance for these checks returned for insufficient funds.

Two prior Opinions of this Office have dealt with the question of bad checks accepted by local treasurers. In an Opinion found in the 1950-1951 Report of the Attorney General at 300, this Office held that the treasurer is not personally liable for a check accepted for taxes which eventually proves worthless. The second Opinion, found in the 1957-1958 Report of the Attorney General at 273, holds that taxes paid with a bad check have not been paid and that the taxes are still due and owing. All regular collection procedures for unpaid taxes will continue to apply. I concur in the former Opinions.\[1\] I find no basis for drawing a distinction between bad checks tendered in payment of taxes and bad checks tendered in payment for services rendered by a county agency. In neither case would the treasurer be personally liable.
Your second question is not a legal question. I have consulted with the Auditor of Public Accounts and secured his concurrence that you may make an adjustment to the General Fund account as soon as the check is returned for insufficient funds or you may delay such adjustment until reasonable efforts to have the drawer of the check make it good have proved unsuccessful. According to the Auditor of Public Accounts, the latter practice is most often observed by local treasurers.

For purposes of this Opinion, I assume that the treasurer was unaware that the check was bad when he accepted it and, further, that upon learning it was bad, the treasurer used reasonable steps to collect the taxes.

TREASURERS: DEPOSITORY SELECTION PURSUANT TO 58-943 SUBJECT TO APPROVAL OF COUNTY FINANCE BOARD OR, IF ABOLISHED, COUNTY BOARD OF SUPERVISORS.

June 23, 1983

The Honorable M. C. Moncure
Treasurer of Stafford County

You have asked whether a county treasurer continues to have the authority to select a depository or depositories as set forth in § 58-943 of the Code of Virginia in spite of a county ordinance establishing procurement procedures for banking services. You state that the Stafford County Board of Supervisors recently enacted a new purchasing ordinance specifically requiring competitive bidding of the county's banking services.

Section 58-943 provides, in pertinent part:

"The depository or depositories for the money received by a county treasurer shall be selected by the county treasurer and approved by the county finance board...."

(Emphasis added.)

Based on this statute, this Office has previously opined that under the traditional county board form of government the treasurer is to select the depository or depositories for the county monies received subject to approval by the county finance board or board of supervisors in those counties in which the finance board has been abolished. Information you have furnished indicates that Stafford County operates under the traditional county board form of government and that the county finance board has been abolished. Accordingly, I conclude that you are empowered to select the depository or depositories in question subject to the approval of the Stafford County Board of Supervisors. I am aware of no statute which would authorize the county to abrogate your power to select the depository granted by
§ 58-943.4 Therefore, to the extent, if any, a county ordinance does deprive the treasurer of his initial selection power, it would appear to conflict with § 58-943 and be, therefore, void ab initio.

It must be noted, however, that your selection of a depository or depositories must be done in compliance with the Virginia Public Procurement Act, § 11-35, et seq. (the "Act"). The Act applies to public bodies in the procurement of services and goods from nongovernmental sources. "Public body" is defined as "any legislative, executive or judicial body, agency, office, department...created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter." Section 11-37. (Emphasis added.) "Services" is defined as "any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies." Section 11-37. I believe it is clear from these definitions that, absent an applicable exception, the performance of your governmental duty of selecting the depositories in question would be subject to the Act.

Assuming no exception applies, you may wish to consider entering into a cooperative agreement with the county. Section 11-40 of the Act provides:

"Any public body may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies...for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to § 11-35C or §11-35D of this chapter shall comply with said alternative policies and procedures so adopted by said governing body of such county, city or town."

In accordance with this section, I am of the opinion that you may enter into an agreement with the County of Stafford whereby you would be bound by any alternative policies and procedures for competitive procurement which the county has adopted or may adopt pursuant to § 11-35(D). The selection of a depository, as distinguished from the competitive methods used to select, would still be determined by you.


2Under other forms of government, a different result may pertain. That is, where the act which authorizes the establishment of the particular form of government specifically imposes the duty of designating a depository on the board of supervisors, such a statute would appear to override § 58-943. See § 15.1-766(e) within the urban county
form of government, § 15.1-684.2 within the county manager plan form, § 15.1-640(e) within the county manager form and § 15.1-605(e) within the county executive form. See, also, 1975-1976 Report of the Attorney General at 40.

Section 58-940 provides for the establishment of a county finance board. The terminal paragraph of this section permits the board of supervisors, by ordinance, to abolish the finance board in which case all the powers of the finance board are vested in the board of supervisors. See 1955-1956 Report of the Attorney General at 222.

This Office has opined that constitutional officers are required to purchase through a central purchasing agency established by the board of supervisors under § 15.1-127 but that the needs and specifications are to be determined by those constitutional officers. See 1975-1976 Report of the Attorney General at 62. See, also, 1981-1982 Report of the Attorney General at 96. I find these holdings inapposite to the case at hand because, under the present situation, there is a specific statute, § 58-943, which controls the more general one, § 15.1-127. No such specific statute was under consideration in the prior Opinions. See, also, § 15.1-712 establishing a centralized purchasing system within the county board form of government. This general statute would also be controlled by the more specific authorization given the treasurer in § 58-943.

The exemptions to the Act are found in §§ 11-35(D), 11-41(B) through 11-41(F) and 11-45. I point out in particular the exemption for small purchases not expected to exceed $10,000 which may apply to your selection of a depository. See § 11-41(F).

See Opinion to the Honorable Ray L. Garland, Member, Senate of Virginia, dated December 7, 1982. This Opinion holds that pursuant to § 11-35(D) a school board may enter into a cooperative procurement program with a city which has adopted alternative procedures under § 11-35(D), "in which case the school board shall observe the same procurement practices." Id.

TREASURERS. IN ARLINGTON COUNTY ONLY TREASURER CAN APPOINT OTHERS TO HANDLE SALE OF DOG LICENSES.

September 27, 1982

The Honorable Charles G. Flinn
County Attorney for Arlington County

You have asked whether the county manager may designate someone other than the treasurer, such as members of the police department, to be responsible for the sale of dog licenses.

Section 29-213.10 of the Code of Virginia provides in pertinent part:

"Any person may obtain a dog license by making oral or written application to the treasurer of the county or
city in which such person resides, accompanied by the amount of license tax and certificate of vaccination as required by this chapter. The treasurer or other officer charged with the duty of issuing dog licenses shall only have authority to license dogs of resident owners or custodians who reside within the boundary limits of his county or city and may require information to this effect from any applicant. The treasurer may establish substations in convenient locations in the county or city and appoint agents for the collection of the license tax and issuance of such licenses."

(Emphasis added.)

By virtue of the foregoing statute, a county or city treasurer has the authority to appoint agents, including members of the police department, to collect the dog license tax and issue the licenses.

Whether others in local government, such as the county manager, can designate agents to collect the dog license tax depends upon the form of government of the local jurisdiction. The governing bodies of cities and towns may appoint a collector of taxes and levies and define their powers to include the collection of dog license taxes. See § 15.1-13. See, also, 1962-1963 Report of the Attorney General at 67, which deals with the authority conveyed by a city charter for someone other than a treasurer to issue dog licenses. Under three forms of county government, the Director of the Department of Finance is mandated to perform the functions of the county treasurer. Arlington County has adopted a fourth form of government, the county manager plan. See §§ 15.1-674 through 15.1-688. Under this form of county government the the position of treasurer may not be abolished. Section 15.1-685. I, therefore, find no authority for anyone other than the Treasurer of Arlington County to appoint agents to collect the dog license tax and issue the licenses. For this reason, I am of the opinion that the county manager is not empowered to appoint agents for the treasurer to collect the dog license tax, but, as indicated above, the treasurer has the power to make such appointments.

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TREASURERS. INVESTMENT OF PUBLIC SCHOOL FUNDS. ROLE OF SCHOOL BOARD.

July 6, 1982

The Honorable Ronald H. Williams
Treasurer for the City of Suffolk
You have asked three questions with respect to the authority of the city treasurer to make investments of idle or excess funds under the control of the school board. Your first question is whether school board members have any personal liability for public school funds in the custody of and invested by the city treasurer.

Section 22.1-89 of the Code of Virginia states that "[e]ach school board shall manage and control the funds made available to the school board for public schools and may incur costs and expenses." (Emphasis added.) Thereafter, § 22.1-116 provides that the "treasurer ... shall be charged with the responsibility for the receipt, custody and disbursement of the funds of the school board..." (Emphasis added.) Apparently, the members of the school board are concerned that the presence of the word "manage" in § 22.1-89 charges the school board with the additional duty of supervising and directing the city treasurer's investment of public school funds and with liability therefor should any such investment prove to be ill-advised.

In construing a similar provision in the Newport News City Charter which provided that the city had the power "[t]o provide for the control and management of the fiscal affairs of the city..." this Office previously opined that such language did not empower a city council "to permit or require..." the city treasurer to use certain depository banks. See 1974-1975 Report of the Attorney General at 535(2). Such a result attached because the city treasurer has "the sole responsibility for the investment and deposit of city funds..." in the absence of a legislative enactment to the contrary. Id. A treasurer's duties are prescribed by law and a treasurer may not surrender any of his powers to any other officer or escape any of his responsibilities by acting upon the advice or direction of other public officers. See Camp v. Birchett, 143 Va. 686, 126 S.E. 665, 129 S.E. 324 (1925); see, also, Mecklenburg v. Beales, 111 Va. 691, 69 S.E. 1032 (1911).

Therefore, I am of the opinion that the city treasurer is charged with the responsibility for the receipt, custody and disbursement of public school funds under § 22.1-116, and that the school board members incur no personal liability for any investments made by the city treasurer. The school board's charge to "manage and control" its funds must be construed in the context of living within its budgetary limits and its authority to determine how public school monies should be spent within those limits. See Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944); see, also, County School Board of Fluvanna County v. Farrar, 199 Va. 427, 100 S.E.2d 26 (1957).

Your second question is whether a master note arrangement with a local bank is a legal investment. The enclosures to your letter indicate that the funds are not insured by the Federal Deposit Insurance Corporation under
this arrangement. I am unable to conclude that such an investment comes within the purview of those investments authorized by §§ 2.1-327 through 2.1-329 and, therefore, I must opine that the protection provided by § 2.1-329.1 will not be available to a treasurer investing in such a master note arrangement. Such investments will be subject to the rule of strict liability. See 1977-1978 Report of the Attorney General at 467(2).

Your third question is whether a repurchase agreement is a legal investment. This Office has previously opined that a repurchase agreement, which is secured or collateralized by governmental securities which qualify under § 2.1-328, is a legally authorized investment. See 1973-1974 Report of the Attorney General at 418. I concur in this prior Opinion.

1Of course, the General Assembly may provide by law for exceptions to this broad general statement. See, e.g., §§ 58-940, 58-943, 58-943.1, and 58-943.2.

2Without resolving the question whether such master notes constitute commercial paper, I am advised that the Treasury Board has not approved master note arrangements as required under § 2.1-328.1.

Treasurers. Salaries of employees fixed by State Compensation Board may be supplemented by Board of Supervisors.

June 20, 1983

The Honorable Shirley G. Sutherland
Treasurer of Wythe County

This is in reply to your letter of June 13, 1983, requesting an Opinion whether the employees of the Wythe County Treasurer and the Wythe County Commissioner of the Revenue are classified as county or State employees for purposes of determining if they are entitled to an eight percent salary increase approved by the board of supervisors for county employees which will become effective July 1, 1983. You advise that the salaries of the employees of the treasurer and commissioner of the revenue are shared equally by the State and the county and that these employees will receive a four and one-half percent increase as fixed by the State Compensation Board.

For purposes of answering your inquiry, it is unnecessary to classify the employees as either State or county. The State Compensation Board fixes the salaries to be paid to employees of the county treasurers and commissioners of the revenue. See §§ 14.1-50 and 14.1-51 of the Code of Virginia.1 Such salaries are paid in the proportion of one-half by the county and one-half by the Commonwealth. See § 14.1-64. The board of supervisors is

In the circumstances you describe, the State Compensation Board has awarded a four and one-half percent increase to the employees of the treasurer and the commissioner of the revenue. The board of supervisors has approved an eight percent increase for "county employees," but will not supplement the salaries of the employees of the treasurer and commissioner of the revenue in order that their salary increase will also be eight percent.

It is my opinion that because their salaries are fixed by the State Compensation Board rather than the board of supervisors, such employees are not in the category of those other employees who are entitled to receive the eight percent salary increase authorized by the board of supervisors. Thus, they are only entitled to the four and one-half percent increase fixed by the State Compensation Board, unless the board of supervisors in a separate action authorizes a supplement to be paid entirely from county funds, as provided in § 14.1-11.4.2

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1For the purposes of this Opinion, I assume Wythe County is not operating under an optional form of organization and government as provided by Chs. 13 and 14 of Title 15.1. Thus, §§ 14.1-50 and 14.1-51 apply to this inquiry.

2This conclusion is based on the assumption that neither the treasurer nor the commissioner of the revenue have entered into an agreement with the governing body to include their employees in the county's personnel system, which would include a classification plan for service and uniform pay plan for all employees pursuant to §§ 2.1-114.5:1 and 15.1-7.1. If these employees are included in the county's personnel system through such an agreement, the above conclusion would not be the same.

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TRUSTS. "SPENDTHRIFT TRUST." LANGUAGE OF TRUSTOR NECESSARY TO CREATE SPENDTHRIFT TRUST UNDER § 55-19.

August 6, 1982

The Honorable Kenneth E. Calvert
Member, House of Delegates

You have asked whether the exact language of § 55-191 of the Code of Virginia must be used to create a "spendthrift trust" which will receive the protection of the last sentence of § 55-19.1.2 The latter provision prevents certain State officials from reaching the principal of such a trust to recoup public assistance benefits paid on behalf of a
beneficiary of the trust. Unlike this restriction on the trust res, there is no similar bar to reaching trust income.

The precursor\(^3\) to § 55-19 authorized the creation of spendthrift trusts in Virginia. Sheridan v. Krause, 161 Va. 873, 172 S.E. 508 (1934). It was a remedial change in the law and is not to be restrictively interpreted, strictly construed, or rigidly applied. Sheridan, supra, at 895, 902.

In order to determine the intent of the creator of the trust, the words of the trustor and the four corners of the instrument creating the trust must be examined. Carson v. Simmons, 198 Va. 854, 857, 96 S.E.2d 800, 803 (1957); Sheridan, supra, at 884. Where the primary or dominant purpose of the trustor, as expressed in the instrument creating the trust, is to provide for the support and maintenance of his beneficiary and that the trust property shall not be subject to the beneficiary's debts, the trust shall be given effect under § 5157 (now § 55-19). Sheridan, supra, at 902-904.

I am of the opinion that a spendthrift trust, entitled to protection of the principal granted by the last sentence of § 55-19, is created when the trustor's intent, as expressed in his trust instrument, is (1) to provide for his beneficiary's support and maintenance and (2) to protect the trust property from the beneficiary's debts and from alienation by the beneficiary. See In re Wilson, 3 Bankr. 439, 443 (W.D. Va. 1980). A trust, when it obviously comes within the spirit of § 55-19, falls within the terms of that statute even though it does not follow the precise language used. See Rountree v. Lane, 155 F.2d 471, 475 (4th Cir. 1946). However, omission of language equivalent to either of these two conditions prevents the trust from qualifying as a "spendthrift trust."

\(^1\)An estate, not exceeding five hundred thousand dollars ($500,000) in actual value, may be held "in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them...." (Emphasis added.)

\(^2\)"Nothing herein shall permit the invasion of a trust res created under § 55-19 of the Code."

\(^3\)Code of Virginia, § 5157 (1919).
February 8, 1983

The Honorable Ralph G. Cantrell, Commissioner
Virginia Employment Commission

You have requested my interpretation of § 60.1-52(g) of the Code of Virginia, which requires unemployment benefit claimants to be "actively seeking and unable to obtain... work" as a condition of eligibility for those benefits. Specifically, you ask whether contact and continuing follow-up with a union hiring hall, acting as agent for numerous employers, may satisfy the requirement. You also ask what effect the duration of unemployment and the degree of unionization in a labor market area may have upon the work search requirement.

Section 60.1-52(g) provides that an unemployed individual shall be eligible to receive benefits if:

"[h]e is able to work, is available for work, and is actively seeking and unable to obtain suitable work. Every claimant who is totally unemployed shall report to the Commission the names of employers contacted each week in his effort to obtain work. This information may be subject to employer verification by the Commission through a program designed for that purpose." (Emphasis added.)

Assuming, as stated in your inquiry, the existence of a bona fide principal-agent relationship between several employers and a union hiring hall, then I am of the opinion that an employee contacting the union hiring hall may list those employers as those contacted. There remains, however, the question of whether such contact satisfies the statutory requirement that the claimant "actively" seek employment.

This statutory language manifests the General Assembly's concern that an individual's search for work be vigorous, substantial and well documented. This intent is consistent with decisions of the Virginia Supreme Court construing the pertinent section. To be available for work, a claimant must actively and unrestrictedly endeavor to obtain suitable employment in the market where he resides and be willing to accept any suitable work which may be offered without attaching conditions not usual and customary in that occupation. Virginia Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951).

The Virginia Court has not conclusively spoken to what number or type of job contacts constitute an active and unrestricted search for work. Other courts have so spoken with particular reference to union hiring halls and business agents.

The prevailing view is that a union contact unaccompanied by personal efforts of the claimant will not satisfy the work search requirement. This is especially so
in periods of depressed union hiring or in areas where a claimant, acting realistically and in good faith, would realize that his opportunities for union hiring are scarce. See Guidice v. Bd. of Rev. of Division of Employment Security, 82 A.2d 206, 14 N.J. Super. 335 (1951), (cloth printer); Hyman v. South Carolina Employment Security Commission, 108 S.E.2d 554, 234 S.C. 369 (1959), (carpenter's union) and Worsnop v. Bd. of Rev. Division of Employment Security, 223 A.2d 38, 92 N.J. Super. 260 (1966), (national maritime union). The Worsnop opinion states, "The further requirement that the claimant must demonstrate that he 'is actively seeking work' means that he must do more than being passively available for work." 23 A.2d at 41.

A union hiring hall, by its function, has a limitation on the employment available to the membership because it excludes those employers who hire only non-union employees. Thus, as a practical matter, if no union shop employer is hiring, the employee's search for work is "restrictive" because he has limited his search to only employers hiring union employees. Such a limitation is not consistent with the Supreme Court's opinion that the statutory language requires the search to be unrestrictive.

Accordingly, in these situations in which the claimant's exclusive reliance upon the union hiring hall has the restrictive effect just discussed, I must conclude that the claimant has not met the requirements of the Code that he actively seek employment.

You have also inquired what effect the duration of unemployment and the degree of unionization in a job market area may have upon the work search requirement. The requirement to be "actively seeking" work does not set a rigid and inflexible standard, but creates a duty upon the administering officer or board to make a case-by-case determination based upon a reasonable requirement for a particular claimant in his job market. See, e.g., Brown v. Bd. of Rev. of Illinois, 289 N.E.2d 40, 8 Ill. App.3d 19 (1972).

The Brown decision notes that when a person is on a layoff known to be of short duration, he should not be held to the same standard as one who has suffered an indefinite layoff. Also the decision expressly mentions that the duration of unemployment for union members may be considered in evaluating the efficiency of their work search effort.

For these reasons, I am of the opinion that Virginia Employment Commission personnel must make case-by-case work search determinations based upon the labor market circumstances of an individual claimant in order to determine whether the claimant is actively seeking employment. Further, for layoffs of known, short duration, a certifying officer may in the use of sound discretion apply a less demanding standard than for periods of longer or indefinite unemployment. The degree of unionization in the union
claimant's labor market area can and should be considered as factors in determining the sufficiency of his union job contact in his search for work.

UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT. AUTHORIZES COMMONWEALTH TO REQUIRE REPORTING OF AND SUBSEQUENT PAYMENT OF UNCLAIMED PAYMENTS TO HOSPITALS, DOCTORS AND SUBSCRIBERS OF HEALTH INSURANCE.

December 10, 1982

The Honorable Adelard L. Brault
Member, Senate of Virginia

You have asked whether the Virginia Uniform Disposition of Unclaimed Property Act1 authorizes the Commonwealth of Virginia to take custody of unclaimed payments made to health care providers and plan subscribers of a hospital, medical or surgical plan.2 You specifically mention two such plans, Group Hospitalization, Incorporated ("GHI") and Medical Service of the District of Columbia ("MSDC"). You state that GHI is a plan for furnishing prepaid hospital and related services3 while MSDC is a plan for furnishing prepaid medical, surgical and related services.4

In 1960, Virginia enacted the Uniform Disposition of Unclaimed Property Act (the "Act"),5 The Act is custodial in nature. The State is a custodian of the unclaimed property in perpetuity; the owner retains his right to present his claim at any time, no matter how remote.6 Thus, this Act is not an escheat type statute in which the right of the owner is foreclosed and title to the property passes to the State.

The Act provides that certain property shall be deemed abandoned7 and that the holders thereof shall report such property to the State Treasurer.8 After such report, the holders are required to pay or deliver the property to the State Treasurer.9

For the reasons set forth below, it is my opinion that the Act has always and continues to apply to health care plans.

From the effective date of the Act, January 1, 1961, to July 1, 1982, such plans were covered under § 55-210.10. This section states:

"All intangible personal property, not otherwise covered by this chapter, including any income or increment thereon and deducting any lawful charges, that is held or owing in this State in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven years after it became payable or distributable, and for which the records of such holder indicate that the last known address of the owner
is in this State, is presumed abandoned."\(10\) (Emphasis added.)

The clear and unambiguous meaning of the quoted language leads to only one logical interpretation: any entity holding unclaimed intangible personal property in the ordinary course of its business is covered by this Act.\(11\) Support for this viewpoint is found in the comments of the Commissioners\(^1\) on Section 9 of the Act which is identical to § 55-210.10 absent the 1981 amendment thereto.\(^1\)\(^3\) These comments are particularly persuasive because the Act specifically states that it shall be construed "to effectuate its general purpose to make uniform the law of those states which enact it."\(^1\)\(^4\) The Commissioners' Note to Section 9 reads in pertinent part:

"Section 9 is the omnibus section covering all other intangible personal property not otherwise covered by the more specific provisions of the Act.... A wide variety of items will be embraced under this section, including by way of illustration, money, stocks, bonds... amounts due and payable under the terms of insurance policies not covered by Section...." (Emphasis added.) 8 U.L.A. 133-134 (1972).

The obvious intent of Section 9, and therefore § 55-210.10, was to create an all-encompassing, omnibus provision which would include the unclaimed payments in question. This result has been upheld by courts in two other jurisdictions.\(^1\)\(^5\)

Effective July 1, 1982, sixteen health care plans were expressly made subject to the Act as one of the enumerated entities, an "insurance corporation."\(^1\)\(^6\) For the period beginning July 1, 1982, therefore, §§ 55-210.2(e) and 55-210.4 which specifically deal with insurance corporations are dispositive of your inquiry. Section 55-210.2(e), the amended section, reads:

"'Insurance corporation' means any person, association or corporation which sells contracts of insurance within this State and any other organization licensed with the State Corporation Commission under Title 38.1 of the Code of Virginia." (Emphasis added.)

Prepaid health care plans are organizations licensed under Title 38.1 and would, therefore, fall within this definition.\(^1\)\(^7\)

Section 55-210.4(a) provides in part: "Unclaimed funds... held and owing by an insurance corporation shall be presumed abandoned if the last known address... [of the payee] is within this State...." The term "unclaimed funds" is defined as "all moneys held and owing by any insurance corporation unclaimed and unpaid for more than seven years after the moneys became due and payable...." See § 55-210.4(b).
Accordingly, in light of the plain meaning of the language of the quoted sections, it is my opinion that for the period beginning July 1, 1982, the Act applies to the unclaimed payments held by health care plans such as GHI and MSDC pursuant to §§ 55-210.2(e) and 55-210.4.

Based on the foregoing considerations, your inquiry is answered in the affirmative because, as stated above, I conclude that the Act has always and continues to apply to health care plans.

1Section 55-210.1, et seq., of the Code of Virginia.
2These plans are licensed pursuant to § 38.1-810, et seq. The plans are generally referred to as prepaid medical care policies. For a monthly premium the subscriber contracts with the plans for certain hospital, medical, surgical and related services. Based on claims filed by the subscriber, the plans pay the health care providers. In limited circumstances specified in the policy, the plans also make payments to subscribers. See House Document no. 6, Va. House and Senate Doc. at 5-8 (1950).

The unclaimed payments relate to uncashed checks made payable to health care providers for services performed and to subscribers in those limited circumstances where the plans call for payment to subscribers.

3This type of plan is provided for in § 38.1-810 which states: "A hospital or a group of hospitals may conduct through a nonstock corporation as agent for them a plan or plans for furnishing prepaid hospital and similar or related services."

4The authorization for this medical and surgical plan is found in § 38.1-811 which provides: "A group of physicians may conduct through a nonstock corporation as agent for them a plan or plans for furnishing prepaid medical or surgical services, or both, and similar or related services."


6Section 55-210.20.
7Sections 55-210.3 through 55-210.10:2.
8Section 55-210.12.
9Section 55-210.14.
10For the reasons set forth below, the uncashed checks were not otherwise covered by the Act before a 1982 amendment to the Act discussed infra.

Only two definitions arguably applied to health care plans for the period before July 1, 1982: "insurance corporation," § 55-210.2(e), and "business association," § 55-210.2(b).

The term "insurance corporation" was limited to life insurance companies during this time. See Ch. 47, Acts of Assembly of 1981 and Ch. 330, Acts of Assembly of 1960. Consequently, it did not apply to prepaid health care plans.

The definition of "business association" does, on the other hand, appear to include such plans. See § 55-210.2(b). However, the specific provision, § 55-210.6, deeming what
property held by business associations is presumed abandoned does not include uncashed checks.

Thus, the uncashed checks fall within the omnibus provision of § 55-210.10 because they constitute intangible personal property not otherwise covered by the Act.

National Conference of Commissioners on Uniform State Laws.

A 1981 amendment inserted the language "and for which records of such holder indicate that the last known address of the owners is in this State." Chapter 47, Acts of Assembly of 1981.

Section 55-210.29.

In Louisiana Hospital Service, Inc. v. Collector of Revenue, 293 So.2d 663 (La. App. 1974), the court ruled that a prepaid health care plan must comply with the provisions of the Act because uncashed checks issued by the plan were intangible personal property within the omnibus section. Likewise, the court in Blue Cross of Northern California v. Cory, 120 Cal. App.3d 723, 174 Cal. Rptr. 901 (1981) held that Blue Cross was subject to the Act pursuant to the omnibus provision because the payee's right to receive money was intangible personal property held or owing in the ordinary course of Blue Cross' business).

By making specific provisions for coverage of the plans, the 1982 amendment has the effect of removing the plans from coverage under the omnibus section, § 55-210.10, because it applies only to "intangible personal property...not otherwise covered by this chapter."

Prior to the 1982 Amendment, § 55-210.2(e) was limited to life insurance companies. See fn. 10, supra.

Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 214 S.E.2d 146 (1975) states that the ordinary meaning of words appearing in a statute will be used unless the legislature has definitely indicated otherwise.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT. COMMONWEALTH CANNOT BE REQUIRED TO BEAR COST OF BLOOD TESTS UNDER STATUTE WHERE PATERNITY IS AT ISSUE.

February 15, 1983

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

You have asked whether the Commonwealth of Virginia must pay the costs of establishing paternity when an obligor, under the Virginia Revised Uniform Reciprocal Enforcement of Support Act ("RURESA"), asserts the defense that he is not the father of the child for whom support is sought. See § 20-88.12, et seq., of the Code of Virginia. The costs in question are usually incurred in obtaining the results of generic blood grouping tests which are administered to establish the likelihood of paternity.

Section 20-88.26:1 provides that when paternity is at issue in RURESA matters, that issue may be adjudicated within
the limits provided in § 20-61.1. Section 20-61.1 allows for the admission of certain types of blood tests as proof of paternity.

In absence of a statute specifically providing for taxing of costs against the Commonwealth, § 14.1-201 would preclude a judgment against the Commonwealth. Section 20-88.22:01 provides for the payment of fees and costs in these proceedings. If the obligor is found to be the putative father, it would be appropriate to charge such costs to him.

I, therefore, am of the opinion that the Commonwealth of Virginia cannot be required to bear the costs of blood tests as a responding state under its RURESA statutes where paternity of the child whose support is sought is at issue.

1Section 20-88.22:01 reads as follows: "An initiating court shall not require payment of either a filing fee or other costs from the obligee but may request the responding court to collect fees and costs from the obligor. A responding court shall not require payment of a filing fee or other costs from the obligee but it may direct that all fees and costs requested by the initiating court and incurred in this State when acting as a responding state, including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligor, be paid in whole or in part by the obligor. These costs or fees do not have priority over amounts due to the obligee."

UNIFORM STATEWIDE BUILDING CODE. BUILDING PERMITS. FEES. COUNTIES, CITIES AND TOWNS. COUNTY ORDINANCE FOR ENFORCEMENT OF BUILDING CODE MAY SET BUILDING PERMIT FEE FOR PROJECTS UNDER CONSTRUCTION DIFFERENT FROM FEE FOR PROJECTS NOT YET BEGUN.

November 3, 1982

The Honorable B. Randolph Boyd
Commonwealth's Attorney for Charles City County

This is in reply to your recent request for my opinion on the propriety of Charles City County's fee schedule for building permits. You state that the county ordinance for enforcement of the Uniform Statewide Building Code has a fee schedule for issuing building permits which is based on the value of the construction for which the permit is sought. The fee schedule in the ordinance also distinguishes between permits issued prior to construction and those issued for projects already under construction without having obtained the required building permit. You ask the following question:
"Is it proper to set a fee for building permits for projects that are already under construction based upon a rate that is twice the rate for permits for which construction has not begun?"

Section 36-105 of the Code of Virginia places responsibility for enforcement of the Uniform Statewide Building Code on localities and provides that fees may be levied to cover the costs of enforcement and appeals. A prior Opinion of this Office discusses the general rules applicable to a local governing body in its setting of such regulatory fees and holds that the cost of construction is a proper basis for determining building permit fees "if the resulting fees generate revenue in proportion to the expenses involved in enforcement and administration of the building code." See 1979-1980 Report of the Attorney General at 360.1

In my opinion, the same general rules apply to the present question. If the costs of inspection and enforcement of a building permit on a project already under construction generally may be distinguished in their amounts from those relating to projects not yet begun, then different fees for the permits involved are justified. In either case, the governing body is accorded wide discretion in setting the fee amount and will not be interfered with unless its action is plainly unreasonable. To avoid having the ordinance regarded as a revenue measure rather than as a valid police power regulation,2 the particular permit fee set for each category of construction projects should not be out of proportion to the enforcement expense involved. See 1979-1980 Report of the Attorney General at 360, supra.

You note in your letter that the Charles City ordinance, in setting separate permit fees, proceeds from the rationale that it is more difficult to properly inspect a partially or completely constructed building in each of its components than it is to inspect a building from the beginning as it is erected. You also relate that a comparison of the actual receipts from building permit fees with the expenses of operating the building inspector's office clearly establishes that the fee schedule is not intended as a revenue measure. Under these circumstances, it would appear that the board of supervisors acted properly and within the discretion allowed it when it adopted the building permit fee schedule you describe.

1Compare 1970-1971 Report of the Attorney General at 86. (A graduated fee system for building permits under § 15.1-491 was proper, in that the board of supervisors "could reasonably determine that the schedule...was necessary to cover the cost of issuing the building permits.")

2Other factors which may be looked to in determining the validity of an ordinance in this regard include: the stated purpose of the statute which authorizes the regulatory
ordinance; whether the board of supervisors, in adopting the ordinance and fixing the fees, gave consideration to the varying costs of regulation; whether the ordinance requires compliance with certain conditions in addition to payment of the fee; whether any of the amounts collected are allocated to the expenses involved, rather than being paid into the general treasury. See County of Loudoun v. Parker, 205 Va. 357, 136 S.E.2d 805 (1964); Board of Supervisors of Fairfax County v. American Trailer Co., 193 Va. 72, 68 S.E.2d 115 (1951); City of Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 18 S.E.2d 890 (1942); Chambers v. Higgins, 169 Va. 345, 193 S.E. 531 (1937). See, generally, 51 Am. Jur.2d Licenses and Permits §§ 113-116 (1970).

UTILITIES. ELECTRIC COOPERATIVES. BOARD OF DIRECTORS. ELIGIBILITY FOR ELECTION.

June 7, 1983

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your letter of May 23, 1983, regarding § 56-222 of the Code of Virginia which pertains to the board of directors of electric cooperatives. You have inquired as to the impact of the 1983 amendment to § 56-222 upon the operation and management of electric distribution cooperatives in the Commonwealth and upon Old Dominion Electric Cooperative ("Old Dominion"). Specifically, you question whether § 56-222, as amended, would permit a publicly-held, investor-owned corporation (such as a utility company) to take over the operation and management of a cooperative through the election of directors of the cooperative. You also ask whether § 56-222 applies to Old Dominion, inasmuch as its member-cooperatives are located in several states in addition to Virginia.

Prior to the recent amendment of § 56-222, only "members" of a cooperative could serve as directors. Old Dominion's membership includes distribution cooperatives which, under Virginia law, are corporations. See § 56-209, et seq. The question therefore arose as to how corporations, such as distribution cooperatives, not being natural persons, could serve as directors of Old Dominion. Section 56-222, as amended, eliminates this question by permitting directors of a cooperative to be elected from the officers, directors or employees of a corporate member. Thus effective July 1, 1983, in the case of Old Dominion, the distribution cooperatives which are members of Old Dominion may have their officers, directors, employees or members represent the distribution cooperatives on the board of directors of Old Dominion.

As to the question of whether a publicly-held, investor-owned corporation may utilize § 56-222, as amended, to elect its representatives as directors of the cooperative
of which it is a member, several other statutory provisions of the Electric Cooperatives Act, § 56-209, et seq., must be considered. Section 56-225 provides in pertinent part as follows:

"[N]o person shall become or remain a member [of the cooperative] unless such person shall use electric energy supplied by such cooperative and shall have complied with the terms and conditions in respect to membership...."3

Because a director of a cooperative can only be elected from the cooperative's members or certain persons designated by members, a corporation which does not use electricity supplied by the cooperative would not qualify for membership; therefore, it could not designate its officers, directors or employees to be eligible for election to the cooperative's board of directors.

In the event that a publicly-held, investor-owned corporation does use electricity supplied by the cooperative and meets the other qualifications for membership in the cooperative,4 it may become a member of the cooperative and obtain the same voting rights as other members. Even under these circumstances, however, § 56-224 states, in part, that each member of the cooperative "shall be entitled to only one vote at the meetings of the members of the cooperative." In an election of directors for the cooperative, the corporation would therefore have no greater voting power than any other individual member of the cooperative,5 and the corporation's designated nominee would be subject to the approval of the members voting in the election just as would any other nominee.

The amendment to § 56-222 does not appear to have been intended to place a corporate member of a cooperative in a preferred status over an individual member in terms of board representation, but rather to provide a practicable mechanism by which a corporate member may effect its representation.6 In the ordinary situation where a cooperative serves both individual and corporate members, the corporation could seek a position on the board of the cooperative as could any individual member. However, the corporate member would have no greater right to representation on the board than any individual member, and if the individual member could seek a single seat on the board, the corporate member would have a similar opportunity to elect a single director. If a cooperative provided that each member could seek more than one position on the board of directors, such as is the case with Old Dominion where each member-cooperative may be represented by two directors, a corporate member would also be entitled to seek two positions. In either case, the publicly-held, investor-owned corporation would have the same rights as any other member of the cooperative, and would not, by virtue of § 56-222, have the opportunity to elect a controlling number of directors.
You have also asked whether § 56-222 is applicable to Old Dominion inasmuch as its membership includes distribution cooperatives located in other states. Old Dominion is a Virginia corporation organized under Ch. 9 of Title 56. As a corporation created under Virginia law, it remains subject to the laws of the Commonwealth, including § 56-222 and the amendments thereto.

1The amended § 56-222 (effective July 1, 1983) provides, in part, as follows: "The directors shall be elected from the members of the cooperative or from the officers, directors, employees designated by a member or membership of a member." See Ch. 420, Acts of Assembly of 1983.

2Electric cooperatives in the Commonwealth are primarily engaged in the distribution to their member-consumers of electricity purchased from other sources. Old Dominion is a generation and transmission cooperative whose purpose is to act as the wholesale supplier of electricity to distribution cooperatives. Old Dominion's fourteen member-cooperatives are located in Virginia, Maryland and Delaware. Old Dominion is currently seeking to become the power supplier to its member-cooperatives through the purchase of generation and transmission facilities from the Virginia Electric and Power Company. See In Re Application of Virginia Electric and Power Company and Old Dominion Electric Cooperative for Approval of Sale and Purchase of a Portion of North Anna Nuclear Facilities, State Corporation Commission, Case No. PUE830020.

3The term "person" used in this section is defined to include corporations. See § 56-209(c).

4See § 56-225.

5See § 56-222, which provides that the directors of a cooperative shall be elected by its members.

6While the categories of persons from which the corporation may designate are stated in plural terms, the amending language seeks only to define the groups from which the corporation may choose representatives rather than to delineate the number of board positions the corporation may seek.

7Old Dominion was incorporated in Virginia on September 23, 1948.

8Electric Cooperatives Act, § 56-209, et seq.

UTILITIES. HIGH VOLTAGE ELECTRIC TRANSMISSION LINES. AUTHORITY TO APPROVE OR DISAPPROVE.

October 21, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia

This is in response to your recent letter requesting my opinion whether there is any authority in State law for the State government to issue a moratorium on the construction of
765 kilovolt (kv) electric power transmission lines. Appalachian Power Company proposes to construct such a line in Floyd County. A citizens group, Citizens for the Preservation of Floyd County, opposes construction of the line.

Regulatory authority over certain electric power transmission lines, including 765 kv lines, is vested in the State Corporation Commission (the "Commission") by §§ 56-46.1 and 56-265.2 of the Code of Virginia. Before such a line may be constructed it must be first approved by the Commission, and the Commission's approval of a line must take into account the need for it and its environmental impact. No statutes of the Commonwealth vest any authority in any other State agency to issue a moratorium on transmission lines which are subject to the Commission's jurisdiction.

Similarly, there is no authority in local governments to impose such a moratorium. The Virginia Supreme Court has said:

"In enacting Code § 56-46.1, the General Assembly recognized that environmental concerns should be considered in constructing high voltage transmission lines. Moreover, in vesting jurisdiction with the Commission to approve such lines, the General Assembly specifically preempted local zoning ordinances. This not only evinces the General Assembly's view that such construction should be governed by statewide uniform regulations but also takes into account the practicality that such lines often traverse several counties." Board of Supervisors of Fairfax County v. Virginia Electric and Power Company, et al., 222 Va. 870, 873-74, 284 S.E.2d 615 (1981).

Accordingly, the General Assembly has vested solely in the Commission discretion whether to permit construction of such lines. Even though such discretion might be exercised by rulemaking pursuant to § 12.1-28, the Commission has previously exercised its jurisdiction on a case-by-case basis. I am advised that the line to which your constituents object has been approved by the Commission, and the Commission's decision has been affirmed by the Virginia Supreme Court. Citizens for the Preservation of Floyd County v. Appalachian Power Co., 219 Va. 540, 248 S.E.2d 797 (1978).

VETERINARIANS. STATUTE AUTHORIZING BOARD OF VETERINARY MEDICINE TO GRANT LICENSES TO PRACTICE VETERINARY MEDICINE AND CERTIFICATES TO ACT AS ANIMAL TECHNICIAN DOES NOT AUTHORIZE GRANTING OF TEMPORARY PERMITS.

November 23, 1982

John A. Mayo, D.V.M., President
Virginia Board of Veterinary Medicine
You have asked whether the Virginia Board of Veterinary Medicine (the "Board") has the statutory authority to promulgate a regulation prescribing the requirements for a temporary permit to practice veterinary medicine or animal technology and to issue such permit pursuant to that regulation.

The statutes governing the practice of veterinary medicine in Virginia are found in Ch. 19 of Title 54 of the Code of Virginia, and the specific powers which the General Assembly granted the Board are enumerated in §54-784.03. These powers include the power to establish the qualifications necessary for licensure to practice veterinary medicine in the State, the power to establish the qualifications necessary to act as an animal technician in this State, and the power to grant licenses to practice veterinary medicine and certificates to act as an animal technician. The regulations promulgated by agencies and boards may not exceed the statutory authority granted them by the legislature. 2 Am.Jur.2d Administrative Law §300 (1962).

A statute such as §54-784.03, which is plain and unambiguous on its face, is not subject to interpretation. When the legislature speaks plainly, it is presumed literally to mean what it says. See Lovisi v. Commonwealth, 212 Va. 848, 850, 188 S.E.2d 206, 208 (1972); Winston v. City of Richmond, 196 Va. 403, 407, 83 S.E.2d 728 (1954). See, also, 2A Sutherland Statutory Construction, Fourth Edition, §§45.02, 46.01 and 46.02. Section 54-784.03 does not specifically authorize the Board to issue temporary permits and there is no additional statute of Ch. 19 of Title 54 which authorizes them. I, therefore, conclude that the Board has no express statutory authority to issue temporary permits.

Whether the Board has the implied power to issue temporary permits pursuant to a regulation, in light of §54-784.03(13) which authorizes it "[t]o adopt such regulations to carry out and enforce the provisions of [Ch. 19] as may be necessary" (emphasis added), must also be answered in the negative. As there is no express grant of power to issue temporary permits in the Chapter, no regulations to carry out that power are impliedly necessary.

Furthermore, the General Assembly specifically authorized the granting of temporary permits to practice other health related professions in other portions of Title 54. See, e.g., §§54-152(1) (dentistry), 54-948 (behavioral science), and 54-524.26 (pharmacy). Whenever something provided in one portion of a statute is omitted in another portion of the same statute, the inference is that the omission is intended to be an exclusion. Sutherland, §47.23. As the General Assembly specifically authorized the issuance of temporary permits in other chapters of Title 54 but does not mention them at all in Ch. 19, I must conclude
that it did not intend to authorize the Board of Veterinary Medicine to issue them.

VIRGINIA ANTIQUITIES ACT: PRIVATE LANDOWNER CONSENTING TO DESIGNATION OF LAND AS STATE ARCHAEOLOGICAL SITE OR ZONE IS BOUND BY ACT AND CANNOT UNILATERALLY WITHDRAW CONSENT THERETO.

July 26, 1982

Mr. H. Bryan Mitchell, Executive Director
Virginia Historic Landmarks Commission

You have asked whether, after an archaeological zone has been established with the express written consent of a landowner, other than a State agency, under the Virginia Antiquities Act (the "Act"), § 10-150.1 et seq., of the Code of Virginia: (1) the requirements of the Act would apply to the owner and (2) the owner or a subsequent owner could later withdraw such consent and thereby void the archaeological zone.

The Act gives the Virginia Historic Landmarks Commission (the "Commission") the authority to designate State archaeological sites and State archaeological zones on private property or on property owned by any locality or local or regional board or authority. See § 10-150.7. Such designation must take place with the advice and comments of the Archaeological Advisory Committee and with the express prior written consent of the owner.1 Property owned by localities or any local or regional board or authority is not considered "State-controlled land" under § 10-150.3(J) and is, therefore, subject to the same restrictions as private property.

Once an archaeological site or zone has been designated by the Commission, "any person" including a landowner is subject to the provisions of the Act. See §§ 10-150.5 and 10-150.10. The owner of property so designated must thus comply with the Act. This includes the necessity for applying for a permit pursuant to § 10-150.5 to conduct a field investigation. The Act contains no exemption for private landowners who have consented to the designation of their property. Although the General Assembly could have excluded private landowners who have consented to designation of their property from the application of certain provisions of the Act, it has not done so. Cf. § 10-150.13(D) of the Virginia Cave Protection Act which exempts the owner of a cave from certain restrictions. I therefore conclude that the Act is applicable to the owner of a State archaeological site or zone.

I am further of the opinion that, once an owner has consented to the designation of his property under the Act, neither he nor his successor in interest may later withdraw such consent and unilaterally void the designation. After
the owner has voluntarily consented to such designation, absent specific statutory authority to the contrary, both the Commission and the landowner must mutually agree to the withdrawal of the designation. To permit otherwise would circumvent the intent of the General Assembly which declared that "it is in the public interest...to identify, evaluate, preserve and protect sites and objects of antiquity...when these sites and objects are located...on designated State archaeological sites or zones..." See § 10-150.2. I, therefore, answer your second question in the negative.

1For purposes of this Opinion, the term owner is used to include localities, local and regional boards and authorities and private persons and entities.

VIRGINIA CONFLICT OF INTERESTS ACT. ACCEPTING MONEY FOR SERVICES WITHIN SCOPE OF COMMONWEALTH'S ATTORNEY'S OFFICIAL DUTIES NOT PROHIBITED BECAUSE IT CONSTITUTES PART OF COMPENSATION FOR PERFORMING DUTIES OF OFFICE.

November 16, 1982

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

This is in reply to your letter of October 29, 1982, requesting my opinion concerning the applicability of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), to a situation involving your office.

You advised that you and the assistants in your office receive, pursuant to § 14.1-11.4, supplemental compensation, over and above the salary approved by the State Compensation Board, and supplemental office expenses from the City of Lynchburg in return for prosecuting violations of the Lynchburg City Code at both the district and circuit court levels. Additionally, pursuant to § 15.1-66.4, from time to time you have been appointed by the Circuit Court for the City of Lynchburg to represent the sheriff in civil actions in which he has been made a defendant and which arise out of his official duties. Your fee, awarded by the circuit court, is paid by the city which is then reimbursed from the State treasury in the proportions set out in § 14.1-64.

You have asked the following:

"1. Do either or both of these situations constitute a receipt of consideration in addition to compensation for services performed within the scope of my official duties in violation of § 2.1-349(4) of the Code?

***
2. Do either of these arrangements constitute a contract with a governmental agency of which I am an officer in violation of § 2.1-349(1) of the Code?

***

3. Do these arrangements constitute a contract with a governmental agency other than that of which I am an officer requiring disclosure pursuant to § 2.1-349(2) to be made?

I shall answer your questions seriatim.

1. Your first question is answered in the negative. 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 15.1-8.1 requires the Commonwealth's attorney to prosecute warrants and indictments which may result in felony convictions and further provides that the Commonwealth's attorney "may in his discretion prosecute Class 1, 2 and 3 misdemeanors, or any other violation..." which would result in confinement in jail or a $500 fine or both. Neither the Code of Virginia nor the Lynchburg City Charter requires the Commonwealth's attorney to prosecute violations of city ordinances, but by agreement, the Commonwealth's attorney may do so. Thus, the service comes within the scope of the Commonwealth's attorney's official duties, and accepting a salary supplement would not violate § 2.1-349(a)(4), because it constitutes a part of the compensation for performing the duties of his office.

Moreover, the General Assembly, in enacting § 14.1-11.4, has specifically authorized a governing body of a city to supplement the compensation of a Commonwealth's attorney above the salary established in Title 14.1 of the Code. Additionally, the appointment of the Commonwealth's attorney to represent the sheriff is expressly authorized by § 15.1-66.4, which provides in pertinent part:

"In the event that any...sheriff...is made defendant in any civil action arising out of the performance of his official duties, [the sheriff]...may make application to the circuit court of the county or city in which he serves to assign counsel for his defense in such action. The court may, upon good cause shown, make such orders respecting the employment of an attorney or attorneys, including the Commonwealth's attorney, as may be appropriate, and fix his compensation. Reimbursement of any expenses incurred in the defense of such charge may
also be allowed by the court. Such legal fees and expenses shall be paid from the treasury of the county or city, and reimbursement shall be made from the State treasury in the proportions set out in § 14.1-64."

(Emphasis added.)

Accepting the assignment and compensation in such cases would not be violative of § 2.1-349(a)(4) because the General Assembly has expressly authorized the employment and acceptance of compensation. Such special legislation would control in this case. 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.3

2. Your second and third questions are answered in the negative. Section 2.1-349(a)(1) provides:

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

(1) Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant...."

For the purposes of the Act, the Office of the Commonwealth's attorney is a separate agency from both the governing body of the city and the circuit court of the city.4 Therefore, any contract, if in fact there exists a contract, between the Commonwealth's attorney and either of the other two agencies would not come within the prohibition of § 2.1-349(a)(1).

Section 2.1-349(a)(2) provides:

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

(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after
competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding...."

The Act defines "contract" very broadly to include any agreement to which a governmental agency is a party and which involves the payments of moneys appropriated to such governmental agency. See § 2.1-348(c). The agreement you have with the city to prosecute violations of city ordinances and the implied agreement to pay you a fee for representing the sheriff may fall within this definition of a contract. Even so, the provisions of § 2.1-349 would not apply in these cases, for the General Assembly has expressly authorized the Commonwealth's attorney to undertake the assignments and to be compensated by the local governing body.5

In summary, I am of the opinion that the agreements you describe would not violate the provisions of § 2.1-349(a)(1) or 2.1-349(a)(4), and compliance with the disclosure and bidding requirements of § 2.1-349(a)(2) would not be required.

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2Section 14.1-11.4 provides in pertinent part: "Notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the...attorney for the Commonwealth... above the salary of any such officer...in such amounts as it may deem expedient. Such additional compensation shall be wholly payable from the funds of any such county or city."
5See fn. 3, supra.

VIRGINIA CONFLICT OF INTERESTS ACT. ARCHITECT MEMBER OF BOARD OF ZONING APPEALS WHO CONTRACTS WITH ANOTHER GOVERNMENTAL AGENCY MUST COMPLY WITH DISCLOSURE REQUIREMENTS AND MAKE SURE THAT CONTRACTING AGENCY COMPLIES WITH BIDDING REQUIREMENTS.

May 20, 1983

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

This is in reply to your request for an Opinion whether, under the following circumstances, there has been a violation of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), and, if so,
whether any such violation was a "willful" violation of the Act.

You have advised that a professional architect who was serving on the county planning commission and the county board of zoning appeals entered into a contract with the board of supervisors for architectural services. The architect disclosed his interest pursuant to § 2.1-353 to the county administrator, who advised him that nothing further was required. The architect made oral disclosures to the board of supervisors and some members of the board of zoning appeals had actual knowledge of the contract. No written disclosure was made to the board of supervisors, planning commission and board of zoning appeals. The contract was not let after public bidding, nor did the administrative head or the governing body of the county make a written determination that the contract should be let without competitive bidding.

Section 2.1-349(a)(2) provides that no officer or employee of a governmental agency (which would include a member of the board of zoning appeals) shall contract or have a material financial interest in a contract with another governmental agency except under certain circumstances. The two requirements that must be complied with in order to fall within the exception are:

(1) Written disclosure by the officer of his interest in the contract must be made in advance to his agency and to the governmental agency with which the contract is proposed to be made, and

(2) (i) The contract is let after competitive bidding, or (ii) the governing body or the administrative head of the governmental agency with which he wishes to contract determines in writing and as a matter of public record that the property or services that are the subject of the proposed contract in the public interest should not be acquired through competitive bidding.

If the architect did not make written disclosure of his contract with the county, in advance, to the county and to the board of zoning appeals, I am of the opinion that he would not be in compliance with the first requirement in § 2.1-349(a)(2). The fact that members of the board of supervisors and the board of zoning appeals may have had actual knowledge of this contract does not affect this determination.

Compliance with the second requirement, i.e., that the contract be let after competitive bidding or that the bidding requirement be waived in writing as a matter of public record, is also necessary if the exception is to apply. The act that is restricted by § 2.1-349(a)(2) is the officer's or employee's contracting with a governmental agency other than his own. It is, therefore, incumbent upon the officer or employee to ensure that the requirements of § 2.1-349(a)(2) are complied with before the contract is entered into. The
officer cannot assume the governing body has taken the action. Consequently, I am of the opinion that because it was the duty of the architect to ascertain that the bidding or waiver requirements were fulfilled, his failure to do so before entering into the contract resulted in a violation of the Act.

Whether the above violations were willful and, therefore, subject to prosecution under § 2.1-3542 requires a factual determination. Based on the facts as you have presented them, I believe there is sufficient basis to justify going forward to determine whether a willful violation occurred. The fact that the officer conferred with the county administrator would militate against a determination of willful violation, despite the fact that such reliance was ill-placed. Additional factors militating against such a finding are that the contract was let by the board in a public session and there is no indication that the architect tried to conceal any information. The Act places this determination on the attorney for the Commonwealth, however, and I am unable to give a definitive opinion on this aspect of your inquiry.

1 As a general rule, the planning commission is considered an advisory agency rather than a governmental agency and, therefore, would not be governed by this section of the Act. See 1981-1982 Report of the Attorney General at 407. I assume that the Stafford County Planning Commission does not exercise any sovereign powers or duties, thereby becoming a "governmental agency" as defined in § 2.1-348(a).

2 Section 2.1-354 provides, in part: "Any officer or employee who willfully violates any of the foregoing provisions of this chapter shall be guilty of malfeasance in office or employment. Any officer, employee or public official who willfully violates any of such provisions shall be guilty of a misdemeanor, and upon conviction thereof, shall, in addition to any other fine or penalty provided by law, forfeit his office or employment."

VIRGINIA CONFLICT OF INTERESTS ACT. CAMPAIGN CONTRIBUTION DOES NOT IN ITSELF CREATE MATERIAL FINANCIAL INTEREST.

January 3, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

This is in reply to your letter requesting an opinion regarding the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"). You have asked the following:

"Where a person elected to a city council has, prior to assuming public office, accepted a campaign contribution
from a local businessman actively involved in construction and development, which contribution was properly disclosed in campaign reports and prominently mentioned in the local press, and the contributor thereafter petitions the city council of which the above councilman is a member for a rezoning of his property and the newly elected councilman votes on the petition for rezoning, has such councilperson violated the Virginia conflict of interest statute."

Section 2.1-352 requires that:

"[a]ny 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."

In order to invoke § 2.1-352 the councilman must have a material financial interest in the transaction before the council. Section 2.1-348(f) defines "material financial interest" to include

"a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Notwithstanding the foregoing:

(1) ownership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business...."

Assuming that the councilman has no interest in either the land to be rezoned or any adjacent land, and if he does not have a material financial interest in the campaign contributor's business, i.e., he does not receive more than five thousand dollars per year from the business or does not own five percent or more of the business, he would not have a material financial interest in the transaction before the council. The acceptance of a campaign contribution does not in itself create a material financial interest.

Accordingly, if the councilman is deemed to have had no material financial interest in either the subject of the transaction or the business of the person before the council, he did not have a material financial interest in the transaction, and he would not have been required to disqualify himself from voting on the petition for rezoning. Therefore, such vote did not violate the Act.
1982-1983 REPORT OF THE ATTORNEY GENERAL


VIRGINIA CONFLICT OF INTERESTS ACT. CITY COUNCILMAN'S OFFICE SUPPLY COMPANY MAY NOT SELL SUPPLIES TO CITY COUNCIL.

January 17, 1983

The Honorable Martin R. Roberts
Treasurer for the City of Radford

This is in reply to your recent letter requesting an Opinion whether your office or any other city office may purchase supplies from an office supply company which is partly owned by a member of the city council or whether such purchase would be prohibited under the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act").

First, the sale would not be prohibited unless the purchasing agency is the city council. Section 2.1-349(a) provides, in part:

"No officer or employee of any governmental agency shall:

(1) Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant; or

(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding...."
By virtue of § 2.1-349(a)(1), the sale of supplies by the council member's company to the city council would be prohibited if the council member has a material financial interest\(^1\) in the office supply company.\(^2\)

Second, assuming that the city councilman has a material financial interest in the office supply company, sales of supplies to other agencies of city government, such as the office of the treasurer\(^3\) or the fire department\(^4\) would be permitted pursuant to § 2.1-349(a)(2) if the disclosure and bidding requirements are met. The councilman must disclose his interest in writing to the council and to the purchasing governmental agency and the contract is let after competitive bidding or the purchasing agency dispenses with the bidding requirements.\(^5\)

In summary, I am of the opinion that, assuming the councilman has a material financial interest in the office supply company, the city council may not purchase supplies from the company but that other governmental agencies may do so if the disclosure and bidding requirements (or waiver thereof) of § 2.1-349(a)(2) are met.\(^6\)

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\(^1\)I assume the councilman's interest in the business exceeds five percent. Section 2.1-348(f) defines "material financial interest" to include "a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Notwithstanding the foregoing:

(1) Ownership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business...."


\(^3\)See 1980-1981 Report of the Attorney General at 87, which held that the office of the treasurer of a town is a separate governmental agency from the town council.

\(^4\)See 1978-1979 Report of the Attorney General at 298, which held that the city council and the fire department are separate governmental agencies.


\(^6\)Although not material to your inquiry, I must point out the additional disclosure required by § 2.1-353. This section requires any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the agency of which he is an officer or employee to make written disclosure of the existence of such interests to the attorney for the Commonwealth.
VIRGINIA CONFLICT OF INTERESTS ACT. CONTRACTS BETWEEN MEMBER OF BOARD OF SUPERVISORS AND MEMBER WHO OWNS COMPUTER DATA PROCESSING SERVICE PROHIBITED. MEMBER MAY CONTRACT WITH OTHER COMPONENT AGENCIES OF COUNTY.

March 22, 1983

The Honorable Joseph L. Howard, Jr.
County Attorney for the County of Washington

This is in reply to your letter inquiring whether a conflict of interests would exist if the owner of a business with which the governing body of Washington County is presently contracting is elected to the Board of Supervisors of Washington County.

You state that the county currently utilizes the service of a computer data processing center which is owned, operated and managed by the individual in question. The business also contracts with the county school board, the department of social services and other county agencies.

You first asked whether the board of supervisors must discontinue utilizing the business' services on January 1, 1984, when the term as a member of the board commences if the owner of the business is elected to the board of supervisors.

The General Assembly of 1983 enacted the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act") and repealed the current Virginia Conflict of Interests Act (the "COIA"), §§ 2.1-347 through 2.1-358. For purposes of this Opinion, I assume the Governor will sign the measure and the Act will be effective on July 1, 1983.

Section 2.1-606(A), a portion of the Act, provides as follows:

"No person elected or appointed as a member of the governing body of a county, city or town shall have 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."

Consequently, if the owner of the business in question is elected to the board of supervisors, a contract with the board of supervisors for furnishing the computer data processing services will be prohibited when he takes office.
You next ask whether it would be proper for the board of supervisors to continue utilizing the services of the data processing center until June 30, 1984, inasmuch as the funds for the service had been budgeted prior to the time the owner of the center would take office as a member of the board.

There is no provision in the Act to except existing contracts from the prohibition of § 2.1-606(A) on the sole ground that it was in existence prior to the time the contracting party became a public official. There is an exception in the Act for existing contracts entered into prior to July 1, 1983, which were in compliance with the COIA at the time of their formation and thereafter. Section 2.1-608(B) reads as follows:

"The provisions of this chapter shall not apply to those employment contracts or any other contracts entered into prior to July 1, 1983, which were in compliance with the Virginia Conflict of Interests Act, Chapter 22 of Title 2.1 of the Code of Virginia at the time of their formation and thereafter. Those contracts shall continue to be governed by the provisions of that Act."

Because a member of the board of supervisors may not have an interest in a contract with the board by virtue of present § 2.1-349(a)(1), the grandfather exception is inapplicable. Consequently, your second question is answered in the negative.

Finally, you ask if it would be proper for the Washington County School Board, Department of Social Services, and other independent agencies to continue to contract with the data processing center after the election of the owner of the center to the board of supervisors.

Contracts between an officer or employee and a governmental agency other than the one of which he is a part are treated differently in the new Act than under the existing COIA. Compare §§ 2.1-349(a)(2)1 and 2.1-606(A). Under present § 2.1-349(a)(2), there would be no prohibition against a contract between the member of the board and a component part of the county government, such as the school board, provided the disclosure is made by the member and the contracting agency takes the requisite action as required in that section. Under the new Act, § 2.1-606(A) not only prohibits contracts with the governing body, but prohibits any contract between the member and any governmental agency (1) 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 (2) if the board of supervisors appoints a majority of members of the governing body of the governmental agency.

In view of the express prohibition in the foregoing section, I am of the opinion that in the case in question the member could no longer contract with other component agencies of the county if the agencies are subject to the ultimate
control of the governing body or the board of supervisors appoints a majority of the governing board of the other agencies. Conversely, however, if the component agencies are independent of the control of the governing body and the board of supervisors does not appoint the governing board, the prohibition in § 2.1-606(A) would not apply.

As pointed out in my reply to your second question, § 2.1-608(B) provides an exception to the prohibition against contracts entered into prior to July 1, 1983, which were in compliance with the COIA at the time of formation and thereafter. As indicated above, contracts between a member of the board of supervisors and other component units of the county government would be permissible under § 2.1-349(a)(2), if the conditions specified therein are met. Consequently, unlike the existing contracts with the governing body itself, contracts entered into prior to July 1, 1983, with other component parts of the county would be permissible under the new Act, because they are permissible under existing COIA.

Section 2.1-349(a)(2) prohibits contracts between a member of a board of supervisors and an agency other than the governmental agency of which he is an officer unless written disclosure of the existence of the interest of such officer be made in advance, both to the governmental agency of which he is an officer and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding.

VIRGINIA CONFLICT OF INTERESTS ACT. COUNTY ADMINISTRATOR APPOINTED UNDER § 15.1-704 MUST MAKE REAL ESTATE DISCLOSURES REQUIRED BY § 2.1-353.1.

April 13, 1983

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

This is in reply to your letter of April 5, 1983, in which you request my opinion on the applicability of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act") to two factual situations.¹

You first inquire if the county administrator appointed pursuant to § 15.1-704 must make a disclosure of his real estate holdings as required by § 2.1-353.1.
Counties which operate under the "county board form" pursuant to Art. 5, Ch. 14 of Title 15.1 appoint an executive secretary pursuant to § 15.1-704. That section provides that after July 1, 1973, the official known as executive secretary shall be called county administrator. Consequently, the two titles are synonymous.

Section 2.1-353.1, a part of the Act, provides, in pertinent part, as follows:

"[C]ounty managers or executives and city or town managers and their immediate families (or spouse or any other relative who resides in the same household) shall make annual disclosure of all their real estate interests or holdings in the county, city or town from which they are elected or by which they are employed, as well as their holdings in any corporation, partnership or any other business association or entity whose primary purpose is to own or develop real estate and which has real estate interests in such county, city or town." (Emphasis added.)

The foregoing section makes no distinction between the various forms of county government in requiring the members of the boards of supervisors and other officials and employees therein specified to make annual disclosures of all their real estate interest or holdings in the county. Manifestly, whether called a "county manager" or "executive," the person occupying the position is required by the section to make such a disclosure. Accordingly, I answer your first inquiry in the affirmative.

You also inquire if the tiebreaker for the board of supervisors, who is employed as the plant engineer at a senior high school, would be in violation of the Act if he voted on any matter dealing with the school system, including salaries.

According to the job description for the plant engineer enclosed with your letter, the person is responsible for overall maintenance for the physical plant of the school but does not have any administrative responsibility beyond maintaining records and supplying the supervisor of maintenance with an itemized list of budgetary needs.

The only provision in the Act which might create a conflict of interests between the individual's functions as a member of the board while acting as tiebreaker and his responsibilities as school plant engineer, would likely be in a consideration of a transaction coming before the board which involves the school system. Section 2.1-352 provides, in pertinent part, as follows:

"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."

The probative questions in applying the foregoing section are (1) whether a material financial interest exists, and (2) whether the transaction be one not of general application. If both questions are answered in the affirmative, the foregoing section requires a disclosure of such interests and a disqualification from voting or otherwise participating in the transaction.

Being employed by the school system, the tiebreaker would have a material financial interest in the transactions before the board by virtue of having a "material financial interest" in his contract with the school board. See § 2.1-348(f)(1) and Opinion of the Attorney General to the Honorable Roy A. West, Mayor, City of Richmond, dated September 3, 1982; 1978-1979 Report of the Attorney General at 304 (involving school teacher/member of city council).

Whether a transaction be one not of general application must be determined on a case-by-case basis. If the transaction be one which involves school matters generally, it would constitute a matter of general application. On the other hand, however, if the transaction be one which pertains specifically to the functions of the plant engineer, it would constitute a matter "not of general application." The Supreme Court of Virginia has recently held that the selection of school board members is not a transaction of general application as to either a school principal or a general supervisor of instruction under the particular facts of that case. Ambrogi v. Koontz, 224 Va. 297 S.E.2d 660 (1982). In holding that the members of the board of supervisors, who were so employed, were required to abstain from voting under § 2.1-352, the Court based its decision on the rationale that, as employees of the school board, they had a material financial interest in the appointment of school board members because their contracts of employment were negotiated individually with the school board.

In view of the foregoing, I am of the opinion that the county tiebreaker who is employed by the school board may participate in transactions coming before the board which involve school matters, including budgetary matters relating to salaries, so long as the matter be one of general application. Whether a matter be one of general application must be determined on a case-by-case basis.

1Effective July 1, 1983, the Act will be replaced by the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634. The conclusions reached in this Opinion will be
unchanged by the new legislation, despite the differences in some terminology and section numbers.

VIRGINIA CONFLICT OF INTERESTS ACT. EXCEPTION TO PROHIBITION AGAINST MEMBER OF GOVERNMENTAL AGENCY HAVING MATERIAL FINANCIAL INTEREST IN CONTRACT. SALE OF REAL ESTATE.

August 20, 1982

The Honorable Anthony P. Giorno
County Attorney for Patrick County

This is in reply to your letter of August 12, 1982, in which you ask if the Board of Supervisors of Patrick County is faced with a conflict of interests situation due to the fact that the board has taken an option to purchase real estate to be utilized to develop an industrial park in the county, and one of the owners of the land is a member of the Patrick County Industrial Development Authority. The industrial development authority is appointed by the board of supervisors and will play a role in developing the industrial park.

The Virginia Conflict of Interest Acts (§§ 2.1-347 through 2.1-358 of the Code of Virginia) prohibits an officer or employee of any governmental agency from having a material financial interest in any contract with one's own agency, as well as with any governmental agency other than the one of which he is an officer or employee, except under certain conditions. By virtue of § 2.1-349(b)(1) the prohibitions against such contractual interests do not apply to the sale, lease, or exchange of real property between an officer or employee and a governmental agency, provided the officer or employee does not participate in any way on behalf of the agency in such sale, lease, or exchange.

I am of the opinion that there is no prohibition against the county board of supervisors taking an option on land owned in part by a member of the industrial development authority, because the member did not participate in the contract on behalf of the board of supervisors.

At such time as the industrial development authority has before it a transaction involving the land which is owned by a member of the authority, it will be necessary for such member to disclose his interest in the transaction and disqualify himself from voting thereon or participating in any consideration thereof in behalf of the authority as required by § 2.1-352. Additionally, inasmuch as such member knows or has reason to believe that his material financial interest will be substantially affected by the actions of the authority, he should disclose that interest to the attorney for the Commonwealth as required by § 2.1-353.
The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

This is in reply to your letter of May 4, 1983, requesting an Opinion regarding the application of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), to the following situation.

The vice-chairman of the Chesapeake Industrial Development Authority (the "Authority") has been a member of the Authority since 1968 and has also been an employee of the Virginia National Bank (the "Bank") earning more than $5,000 per year. In 1969, the Authority voted to deposit funds in a checking account at the Bank. Since 1973, the Authority has, on several occasions, voted to authorize the vice-chairman to invest Authority funds at his discretion. He then invested those funds through the Bank's investment department.

Section 2.1-348(f)(3) excepts contracts with financial institutions from the Act, insofar as the prohibitions against officers and employees having an interest in certain contracts are concerned. We are here concerned only with the questions of the officer's disclosure and disqualification in transactions involving the deposit of those funds.

In your letter you ask several questions concerning the obligation of the officer under the Act to disclose his interest in the Bank and to disqualify himself from certain transactions. You have asked the following:

"(1) Was it a violation of Section 2.1-352, if the Vice-Chairman either voted to grant himself discretion to invest these funds or exercised that discretion by investing them with and through the Bank?

(2) If the Authority specifically authorized the investment of funds with the Bank and the Vice-Chairman merely carried out that decision, would he be participating in consideration of that decision so as to violate Section 2.1-352? For the purpose of this question, I assume that the Vice-Chairman would disclose his interest and formally abstain from voting on the question.

(3) Is the two year statute of limitations under Section 19.2-8 the appropriate one?

(4) Do the forfeiture provisions of Section 2.1-355 apply against a third party, such as the Bank, or where the violations are not shown to be willful?"
I will address your questions in the order you have presented them.

First, § 2.1-352 provides, in part:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency."

In determining whether the vice-chairman would be required to comply with the disqualification and disclosure requirements of § 2.1-352, it is necessary to ascertain (1) if he has a material financial interest in the transaction, and (2) if the transaction is "not of general application." If so, the vice-chairman must disclose his interest and refrain from voting on or participating in any consideration thereof on behalf of such agency.

There appear to be three transactions for which such a determination must be made:

Transaction 1 - Vote by the Authority whether to invest funds through the Bank.

Transaction 2 - Vote by the Authority whether to authorize the vice-chairman to invest funds at his discretion.

Transaction 3 - Decision by vice-chairman regarding where to invest the funds.

First, it is necessary to determine if the officer would have a material financial interest in the transactions involving the Bank. By virtue of the vice-chairman's receipt of more than $5,000 per year from the Bank, he would be deemed to have a material financial interest in the Bank. Consequently, the vice-chairman would have a material financial interest in any matter pertaining to the Bank that involves the Authority, including the decision whether to invest its funds through the Bank, provided, however, as noted above, such an interest does not prevent the Authority from contracting with the Bank. See § 2.1-348(f)(3).

On the other hand, if the question before the Authority is whether to give authorization to the vice-chairman to invest funds at his discretion and he does not stand to gain or lose financially by the outcome of this vote, he would not have a material financial interest in the transaction. However, in carrying out the discretionary act of investing the funds, his material financial interest in the Bank would
again influence whether he should refrain from acting on behalf of the Authority.

I am of the opinion that, on the facts given, the vice-chairman has no material financial interest in Transaction 2, (authorizing him to exercise discretion) and, consequently, on that matter he would not be required to comply with the disclosure and disqualification provisions of § 2.1-352. However, further consideration must be given to Transactions 1 and 3 because of his material financial interest in the Bank.

As indicated above, the second prong of the two-fold test is whether the transaction is one of general application. Whether a transaction is one "not of general application" must be determined on a case-by-case basis. Both Transactions 1 and 3 affect the interests of the vice-chairman specifically, i.e., the outcome of each decision will be that the Bank either will receive the funds or it will not. Consequently, I conclude that Transactions 1 and 3 are "not of general application" and the vice-chairman must comply with the disclosure and disqualification requirement of § 2.1-352 on those transactions.

In summary, the vice-chairman may not vote on the question of whether to invest the Authority's funds with the Bank. Additionally, although he is not required to refrain from voting on whether he may be authorized to invest funds on behalf of the Authority, he may not exercise this authorization by deciding to invest the funds through the Bank in which he has a material financial interest.

Turning to your second question, in that situation the vice chairman is performing only a ministerial duty to fulfill this authority's directive. I rely on your assumption that the vice-chairman complied with the disclosure and disqualification provisions of § 2.1-352 on the question of whether to invest the funds in the Bank. Accordingly, where the Authority has specifically directed the investment of funds with the Bank, he could lawfully perform any ministerial duties in furtherance of the Authority's wishes. Directing the Bank to handle the funds at the direction of the Authority would be such a ministerial duty and he would not be in violation of the Act. Therefore, I answer your second question in the negative.

Your third question concerning the applicable statutes of limitation is answered in the affirmative. Section 19.2-8 provides in part:

"Prosecution of nonfelonious offenses which constitute malfeasance in office shall commence within two years next after the commission of the offense."

I am unaware of any other statute of limitations regarding prosecution for malfeasance. Consequently, because § 2.1-354 provides that a willful violation of the Act shall
constitute malfeasance in office or employment, I am of the opinion that the two-year limitation period, provided in § 19.2-8 is applicable.

Your fourth question is answered in the affirmative. Section 2.1-355 provides in part:

"In addition to any other fine or penalty provided by law, or by the regulations of the governmental or advisory agency of which he is an officer or employee, any money or other thing of value derived from a violation of this chapter shall be forfeited...." (Emphasis added.)

I am of the opinion that any money or other thing of value which is derived from a violation of the Act is to be forfeited, whether it is in the hands of the public officer or employee or in the hands of a third party. The statute makes no exception for money or other thing of value held by a third party. Therefore, I conclude that any commissions that the Bank made as a result of handling investments for the Authority are required to be forfeited pursuant to § 2.1-355, in those instances in which it is determined that a violation of the Act occurred. Further, unlike the language of §§ 2.1-354 and 2.1-354.1, which does speak to "willful violations" of the Act, § 2.1-355 speaks only of a "violation" of the Act. Consequently, the forfeiture provisions apply even where a violation is not shown to be willful.

1Since January 1981 two such decisions have been made by the Authority authorizing the vice-chairman to reinvest funds in a treasury note and a certificate of deposit at his discretion.

2As you note, § 2.1-348(f)(3) exempts from the provisions of § 2.1-349, proscribing certain contracts, a material financial interest in a financial institution. As will be developed in this Opinion, the exemption does not apply to other sections of the Act.

3See Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated March 10, 1983.

4See § 2.1-348(f)(1) which defines material financial interest to include aggregate annual income of $5,000 or more, excluding dividend and interest income from a firm, partnership or other business.

5The definition of material financial interest requires a personal and pecuniary interest on the part of the officer or employee of a governmental agency.


7This conclusion is based on the assumption that he has no personal and pecuniary interest in being so authorized.

8The Bank would be allowed to retain expenses of making the investments. See Dobbs, Handbook on the Law of Remedies, at 266 (1973).
VIRGINIA CONFLICT OF INTERESTS ACT. HEALTH CARE CONSULTANTS HAVE MATERIAL FINANCIAL INTEREST IN RENDERING OF HEALTH SERVICES AND CANNOT BE MEMBERS OF HEALTH SERVICES COST REVIEW COMMISSION.

December 16, 1982

The Honorable Joseph L. Fisher
Secretary of Human Resources

This is in reply to your inquiry whether two members of the Virginia Health Services Cost Review Commission (the "Commission") may serve as "consumer" members of the Commission under § 9-156 of the Code of Virginia if their regular employment is as health care consultants. In one case, the individual is a partner in a health care consulting firm, and, in the other, the individual is an employee of such a consulting firm. In neither case does the individual's firm presently do business in Virginia.

While the Commission has many functions, for purposes of this opinion it suffices to state that the Commission assists in reviewing the cost to health care providers of providing services and the charges actually made to purchasers of those services. The Commission consists of eleven members. In order to ensure that the Commission considers a balanced view, the General Assembly specified that three members must be involved in the administration of health care institutions, one must be an employee of a prepaid hospital service plan, one must be an employee of a commercial insurer which underwrites accident and sickness insurance and one must be the State Commissioner of Health or his designated representative. The remaining five members must be consumers. See § 9-157.

A consumer member of the Commission must satisfy three statutory criteria. See § 9-156(2). First, he cannot be a provider of health services or be involved in the administration of such services. Secondly, he cannot have a fiduciary obligation to a health care institution, a health agency, or any organization whose principal activity is an adjunct to the provision of health services. Third, he can have no material financial interest in the rendering of health services. The criteria were obviously designed to ensure that the consumer representatives, unlike the other members, are completely independent of the health care industry.

Taking these criteria seriatim, the two Commission members are not providers of health care and do not participate in the administration of health care services. Thus, the first criterion is satisfied. Likewise, the second criterion is met because neither member has a fiduciary obligation to any health care institution, health agency, or other organization whose principal activity is an adjunct to the provision of health care services. A fiduciary obligation connotes more than a simple business relationship.

While the third criterion concerning a "material financial interest in the rendering of health services" does not refer to the Virginia Conflict of Interests Act (the "Act"), see §§ 2.1-347 through 2.1-358, the term "material financial interest" is used in that Act and reference to it will be helpful in discerning the meaning of the third criterion. As used in the Act, the term means a personal and pecuniary interest accruing to an individual as the result of ownership of an interest of five percent or more of a firm, partnership, or other business, or as the result of an annual income of five thousand dollars or more from a firm, partnership, or other business. I assume that each Commission member in question has an annual income that exceeds five thousand dollars and, of course, that income is derived from fees paid by health care providers. While their income is not derived from Virginia health care providers, it does mean that they are not independent of the health care industry as contemplated by the General Assembly.

Based upon that understanding, I must conclude that these two Commission members do have a "material financial interest in the rendering of health services." Thus, they are disqualified from serving as "consumer" members of the Commission.

VIRGINIA CONFLICT OF INTERESTS ACT. LIBRARIAN AND DIVISION DIRECTOR OF STATE LIBRARY ARE PROPERLY DESIGNATED "PUBLIC OFFICIALS" REQUIRED TO FILE ANNUAL DISCLOSURE UNDER § 2.1-353.2.

October 26, 1982

The Honorable Donald Haynes
State Librarian

This is in reply to your recent letter asking whether employees of the State Library and members of the Library Board are excluded from the requirements of annual disclosure of financial interests under the provisions of § 2.1-353.2 of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act").

For the reason hereinafter discussed, the only personnel of the State Library affected by § 2.1-353.2 are the State Librarian and the Division Director.

Section 2.1-353.2 requires annual disclosure of financial interests by those officers or employees of the Commonwealth who are listed therein or specifically designated by the Governor as "public officials" for the purposes of this section of the Act. For those to whom this provision applies, this disclosure is to be made instead of
the disclosure of material financial interests required by § 2.1-353.1

Section 2.1-353.2(3) excludes from those persons who may be designated as public officials, "all persons appointed to advisory agencies and to boards and agencies whose functions are solely cultural, historical or educational." (Emphasis added.) I have been advised that the State Librarian (the "Librarian") and the State Library Division Director (the "Division Director") have been designated by the Governor as public officials for the purposes of the Act. The Librarian is appointed by the Library Board and both he and the Division Director are employees of the State. Therefore, they are not appointees to certain boards and agencies under § 2.1-353.2(3), and are subject to being designated as "public officials." No other employees of the State Library nor members of the Library Board have been so designated for the purposes of § 2.1-353.2.

I, therefore, am of the opinion that only the Librarian and the Division Director must make annual disclosure of financial interests pursuant to § 2.1-353.2 of the Act.

1Section 2.1-353 provides as follows: "Any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the governmental or advisory agency of which he is an officer or employee shall make written disclosure of the existence of such interest. The disclosures shall be made in writing to the Attorney General before entering upon the exercise of his duties as an officer or employee of an agency of local government; such disclosures shall be made thereafter during the month of January of each succeeding year. All such disclosures shall be a matter of public record. The disclosures required by this section shall also be made in writing to the agency of which the individual is an officer or employee."

2See § 42.1-13.

VIRGINIA CONFLICT OF INTERESTS ACT. LOBBYIST REPRESENTING VIRGINIA MORTICIAN'S ASSOCIATION NOT PROHIBITED FROM ALSO SERVING ON STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS.

November 30, 1982

Mr. Ben F. Davidson, President
Board of Funeral Directors and Embalmers

This is in reply to your recent letter requesting a determination of whether the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia, (the "Act") would prohibit a member of the Virginia State Board of Funeral Directors and Embalmers (the "Board") from serving as a registered lobbyist representing the Virginia Mortician's
Association (the "Association"). You have advised that the Board member is compensated by the Association for such services.\footnote{For purposes of this Opinion I will assume the member's income is in excess of $5,000 annually. Otherwise, he could not have a "material financial interest" in the Association. See § 2.1-348(f).}

The anti-contracting provisions of the Act, found in § 2.1-349(a), prohibit an officer or employee of a governmental agency from contracting with his own agency, or having a material financial interest in such a contract. Additionally, the section requires that certain disclosure and bidding requirements be complied with if an officer or employee of a governmental agency intends to contract with a governmental agency other than his own. The situation that you described does not involve a contract with a governmental agency and, thus, the provisions of § 2.1-349 are inapplicable.

Section 2.1-352 requires an officer or employee of a governmental 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, to disclose such interests to the governing body thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency. As applied to the instant case, if the Board were to consider a matter involving the Association, the Board member would be required to disclose his interest and disqualify himself from participating in the consideration of or voting on such matter.

Although there may be occasions where the Board would take a position which is not in accord with that of the Association, such differences, without more, would not bring such dual service within the prohibitions of the Act.

Accordingly, I am of the opinion that the Act would not prevent a Board member from also serving as a registered lobbyist for the Association.
This is in reply to your letter which we received on March 22, 1983, requesting an Opinion regarding the following questions:

"1. If a police officer must appear occasionally before a magistrate, can said magistrate and police officer be in a business venture together?
2. If the police officer never appears before said magistrate, may the two be in a business together?
3. Could said magistrate divest his interest in this business venture to his son who is over the age of 21 and resides outside of the magistrate's home?
4. If the answer to question #3 is in the affirmative, could the magistrate continue to be a maker or co-maker, or surety on any notes of the business venture?"

I am unaware of any specific provision of law which would prevent the magistrate and police officer from being in a business together. I would point out, however, that a magistrate is considered to be a judicial officer1 and although the Canons of Judicial Conduct do not specifically apply to magistrates, the reasoning behind the provisions of Canon 52 would be applicable to a magistrate and, in my opinion, should govern the conduct of magistrates in the situations described in your first and second questions.3

You did not indicate the nature of the business venture, but conceivably, the magistrate and police officer could have a conflict of interests in their official capacities. See § 2.1-352 of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act").4

Turning to your third question, if the magistrate divested himself of his interest in the business venture, and neither his spouse nor any other relative residing in the same household has an interest in the business venture with the police officer, I do not visualize any conflict under the Act with his official duties. Again, however, the magistrate should refer to the Canons for guidance.

As to your fourth question, I am of the opinion that personal pecuniary liability is tantamount to a "personal and pecuniary interest." While the provisions of the Act are not clear in this regard, the spirit of the Act and the provisions of the Canons regarding financial dealings strongly suggest that the magistrate should abstain from such involvement in the police officer's business venture.

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2Paragraph C of Canon 5 provides in part: "(1) A judge should refrain from financial and business dealings that tend
to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but shall not serve as an officer, director, manager, advisor, or employee of any business, except that he may act as an officer, director, or non-legal advisor of a family business." 215 Va., 859, 932.


4Effective July 1, 1983, the Act will be repealed and replaced by the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634.

VIRGINIA CONFLICT OF INTERESTS ACT. MATERIAL FINANCIAL INTEREST. COUNCIL MEMBER’S INTEREST IN SUPPLY COMPANY WOULD NOT EXTEND TO CONTRACTOR WITH WHOM SUPPLY COMPANY DOES BUSINESS MERELY BECAUSE OF PAST SALES BETWEEN TWO ENTITIES.

March 10, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

This is in reply to your recent letter regarding the applicability of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), to a situation involving a member of the Virginia Beach City Council. You have advised that the member is a principal shareholder in an insulating supply company which sells goods and services to builders and contractors, one of whom applied to council for a change of zoning on two sites. The first site is not owned by the contractor in question, nor has he indicated any interest in obtaining this parcel. The contractor has an option, however, on the second site, subject to rezoning. You have asked, based on this data, whether the council member would have been in violation of the Act had she elected to participate in and vote on the applications for rezoning.

Section 2.1-352 provides in part as follows:

"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."
In determining whether the council member would be required to comply with the disclosure and disqualification requirements of § 2.1-352, it is necessary to ascertain (1) if the member has a material financial interest in the transaction before the council, and (2) if the transaction is "not of general application." If so, the member must disclose her interest and refrain from participating in any consideration of or voting on the matter.

By virtue of her status as a principal shareholder in the supply company, which I assume exceeds five percent, the council member would be deemed to have a material financial interest in the supply company. Consequently, the council member would have a material financial interest in any matter involving the supply company that comes before the council. Not so clear, however, is the question of the member's interest in the contractor or transactions involving him. I am of the opinion that ownership of stock in the supply corporation does not give her an interest in the contractor's entity merely because of past sales between the two entities. If, on the other hand, the supply company has a contract for the sale of supplies or services to the contractor for use on the lots, or if the member has a direct material financial interest in the contractor, the member would be required to abstain in those transactions involving the contractor which are not of general application.

In the instant case, the transaction is the contractor's application for rezoning, a matter in which it does not appear that the member has an interest, despite the interest which the supply company may have. Consequently, the disclosure and disqualification requirements of § 2.1-352 would not apply. According to the facts you have provided, I am of the opinion that the disclosure and disqualification requirements of § 2.1-352 would not apply to the council member's consideration of the rezoning transaction.

Even though I conclude that disqualification was not indicated in this instance, I draw your attention to the provisions of § 2.1-353 which require annual disclosure of situations in which an officer has a material financial interest which may be substantially affected by actions of the agency of which he is an officer.

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1 See Opinion to the Honorable Roy A. West, Mayor, City of Richmond, dated September 3, 1982.
2 See § 2.1-348(f)(1) which defines material financial interest to include ownership of an interest of five percent or more of a firm, partnership or other business.
3 See § 2.1-348(f)(1) which defines material financial interest also to include aggregate annual income of $5,000 or more, excluding dividend and interest income from a firm, partnership or other business.
4 See Opinion to the Honorable William R. O'Brien, Member, House of Delegates, dated July 14, 1982, in which a member...
who directly sells insurance to land developers was held to have a material financial interest in transactions involving those clients.

A member may very well elect to abstain in instances which appear questionable in order to avoid the appearance of impropriety.

VIRGINIA CONFLICT OF INTERESTS ACT. MATERIAL FINANCIAL INTEREST IN TRANSACTION INVOLVING MEMBER OF OFFICER’S PROFESSIONAL CORPORATION BY VIRTUE OF OFFICER’S MATERIAL FINANCIAL INTEREST IN CORPORATION.

August 9, 1982

The Honorable Owen B. Pickett
Member, House of Delegates

This is in reply to your letter of July 26, 1982, requesting an Opinion regarding the Virginia Conflict of Interests Act (§§ 2.1-347 through 2.1-358 of the Code of Virginia) (the "Act").

Your letter states that a member of the city council is a lawyer who practices as a member of a professional corporation and who benefits from fees earned by such corporation. You ask the following:

"If a member of the professional corporation other than the councilman appears before the City Council of which the councilman is a member and the City Councilman who is a member of such firm disqualifies himself from participation in the discussion of, or decision on, such matter and does not participate in any way that could affect the disposition thereof, would such councilman be in violation of the Virginia conflict of interests laws."

Section 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."

Based on the information in your letter, the councilman would have a material financial interest in any transaction before the council in which another member of his professional corporation was involved. If the transaction is not one of general application, it will be necessary for him to disqualify himself from voting thereon. By disqualifying himself from voting on or participating in any
consideration of the transaction, he complies with the disqualification provisions of § 2.1-352. However, in order to be in complete compliance, he must also disclose his interest to the council. If both requirements are complied with, there is no violation of the Act.

\[1\] See § 2.1-348(f)(1) defining "material financial interest." The councilman would have a material interest in the transaction by virtue of his material financial interest in the professional corporation whose member appears before the council in regard to the transaction. See Opinion to the Honorable Willard M. Robinson, Jr., Commonwealth's Attorney for the City of Newport News, dated July 19, 1982.

VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF CITY COUNCIL EMPLOYED AS SCHOOL PRINCIPAL. § 2.1-352 REQUIRES DISCLOSURE AND DISQUALIFICATION WHEN COUNCIL VOTES ON SCHOOL BOARD APPOINTMENTS.

September 3, 1982

The Honorable Roy A. West, Mayor
City of Richmond

In your letter of August 23, 1982, you advised that the Commonwealth's attorney for the City of Richmond has rendered an opinion in which he concluded your employment as a middle school principal will bar your voting as a member of the City Council of the City of Richmond on school board appointments due to the Virginia Conflict of Interests Act. Pursuant to § 2.1-356 of the Code of Virginia, you have requested that this Office review the opinion of the Commonwealth's attorney.

Section 2.1-352 provides, in pertinent part,

"Any officer or employee of any governmental agency...who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency 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...."

Being employed by the city school board, you have a material financial interest in the transaction before city council (the appointment of school board members) by virtue of having a "material financial interest" in your contract with the school board.\[1\]

Notwithstanding the fact that you have a material financial interest in the transaction regarding school board

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\[1\] See § 2.1-348(f)(1) defining "material financial interest." The councilman would have a material interest in the transaction by virtue of his material financial interest in the professional corporation whose member appears before the council in regard to the transaction. See Opinion to the Honorable Willard M. Robinson, Jr., Commonwealth's Attorney for the City of Newport News, dated July 19, 1982.
members, you are not required to disqualify yourself unless
the transaction is one deemed to be "not of general
application." Whether a transaction is one of general
application must be decided on a case-by-case basis. Stated
another way, in determining whether § 2.1-352 applies, it is
necessary to ascertain (1) if the member of the agency has a
material financial interest in the transaction, and (2) if
the transaction is of general application. Therefore, if the
council member is deemed to have a material financial
interest in the transaction, and the transaction is not of
general application, he must comply with the disclosure and
disqualification requirements of § 2.1-352. If, however, the
member has a material financial interest in the transaction
but the transaction is one of general application, the law
permits the member to participate in the discussion and vote
on the question.

In a recent Opinion to the Honorable Willard M.
Robinson, Jr., Commonwealth's Attorney for the City of
Newport News, I concluded that a school teacher/member of
city council would not be precluded by § 2.1-352 from
participation in the appointment of school board members. It
is my view that, as a general rule, the relationship between
school teachers and the school board is not close enough for
decisions of the school board to apply to a particular
teacher, but will instead apply to teachers generally. In
prior Opinions applying § 2.1-352, this Office has drawn a
distinction in the members of the governing body who have a
material financial interest in contracts with the school
board involving teachers generally, as opposed to persons
employed at a higher level or in a position where school
board decisions affect only a few employees. See 1978-1979
Report of the Attorney General at 304, 305. In that Opinion,
the Attorney General stated

"The situation changes as higher level employees become
involved, and the material financial interest is
employment at levels where school board decisions affect
only a few employees, and salary matters are necessarily
directly related to the identity of a specific employee.
This Office has previously held that employment as
school principal makes for such a relationship between
the principal and the school board, that the appointment
of school board members is not a 'transaction of general
application' for a principal sitting on the governing
body. See Opinion to the Honorable Lloyd H. Hansen,
Commonwealth's Attorney for the City of Hampton, dated
June 10, 1971, and found in Report of the Attorney
General (1970-1971) at 436...."

In the prior Opinions, principals have been placed on a
different level from teachers vis a vis school boards,
because the relationship between principals and the school
board tends to bring the decisions of the school board on
salary and employment more directly related to the identity
of a specific employee. This construction of § 2.1-352 by
this Office has been consistent since the Conflict of
Interests Act was enacted in 1970. The General Assembly is presumed to be aware of that construction. Until some legislative change is made in § 2.1-352, I, therefore, concur in the opinion of the Commonwealth's attorney that a member of city council who is a school principal should disqualify himself from participating in the selection of the city school board.

"Material financial interest" is a personal and pecuniary interest accruing to the officer. Aggregate annual income of $5,000 or more from a business is a material financial interest in that business. See § 2.1-348(f)(1).

VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF CITY COUNCIL WHO SELLS INSURANCE AND HAS AS CLIENTS HOME BUILDERS AND LAND DEVELOPERS MUST DISCLOSE ANY MATERIAL FINANCIAL INTEREST HE HAS IN THOSE CLIENTS AND DISQUALIFY HIMSELF FROM CONSIDERATION IN MATTERS BEFORE COUNCIL CONCERNING HIS CLIENTS IF TRANSACTION NOT OF GENERAL APPLICATION.

July 14, 1982

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

This is in reply to your recent letter in which you inquired whether a conflict of interests exists involving a recently elected member of a local city council. The councilman-elect currently sells insurance and a number of land developers and home builders are among his clients. He has inquired through you whether there would be a conflict of interests which would prohibit him from voting on zoning matters which may be brought before council by one of his clients.

Section 2.1-352 of the Code of Virginia requires that an officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, disclose such interest to the governing board of his agency and disqualify himself from voting on or participating in any consideration of the transaction on behalf of such agency.

Section 2.1-348(f)(1) defines "material financial interest" to include "a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Notwithstanding the foregoing:

(1) Ownership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest
income, of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business...."1

Thus, if the councilman receives more than $5,000 in annual income from any of the clients in question, he has a "material financial interest" in any matter involving that client that comes before the council because he has a material financial interest in the client.

The determination of whether a transaction is "not of general application" must be made on a case-by-case basis. See 1977-1978 Report of the Attorney General at 480 and 1973-1974 Report of the Attorney General at 439. For example, if the zoning request involved only the property of a client, the transaction would be one that is not of general application. If, however, the client's parcel was just a small part of a large area under consideration, then the transaction may be one of general application.

To summarize, in determining whether § 2.1-352 applies, it is necessary to ascertain 1) if the member has a material financial interest in the transaction, and 2) if the transaction is of general application. Therefore, if the councilman is deemed to have a "material financial interest" in the transaction, (i.e., if he receives $5,000 or more in annual income, exclusive of dividend or interest income, from a client who brings a zoning request to the council) and the transaction is not of general application, then he must comply with the disclosure and disqualification requirements of § 2.1-352.2

In addition, I call your attention to § 2.1-353. That section requires an officer or employee of a governmental or advisory agency to make a written disclosure of any "material financial interest" which he believes, or has reason to believe, may substantially be affected by the actions of his agency. Such disclosure should be made to the Commonwealth's attorney of the locality.

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1I am assuming for the purposes of this Opinion that the developers or builders are corporations, partnerships or other business entities.
August 20, 1982

The Honorable Kenneth H. Jordan, Jr.
Sheriff of Mathews County

This is in reply to your letter received August 10, 1982, requesting an Opinion whether the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), would prohibit your step-son's employment as a deputy sheriff in Mathews County. I understand from the letter you enclosed that your step-son currently resides with you and earns more than $10,000 per year as a deputy sheriff.

Section 2.1-349(a)(1) provides in part that no officer or employee of any governmental agency shall:

"have a material financial interest in any contract...with the governmental agency of which he is an officer or employee...."

Section 2.1-348(f)(4) provides:

"The employment by the same governmental agency of an officer or employee and spouse or any other relative residing in the same household shall not be deemed to create a material financial interest except when one of such persons is employed in a direct supervisory or administrative position, or both, with respect to such spouse or other relative residing in his household and the annual salary of such subordinate is ten thousand dollars or more...."

If your step-son is deemed to be your "relative," you would have an impermissible material financial interest in a contract with your own agency.

The question is, therefore, whether your step-son is deemed to be a "relative" for the purposes of § 2.1-349(a)(1). It was the express purpose of the General Assembly in passing the Act to "[p]rohibit those contracts or business relations between public officials and the government which are likely to be influenced by official position or which may create suspicions of unfairness." Thus, one must construe the Act in a manner that will prevent any suspicions of unfairness, and the term "relative" should be construed broadly in order to further that purpose.

"Relative," as used with a restrictive meaning refers to only those who are connected by blood. When used generically, it "includes persons connected by ties of affinity [marriage] as well as consanguinity [blood]...." In this instance, the term must be construed in a broad sense and would include persons connected by marriage, i.e., a step-father/step-son relationship.
Accordingly, I am of the opinion that by virtue of your step-son's employment as deputy sheriff in your office you have a material financial interest in a contract with your own agency which is prohibited under § 2.1-349(a)(1).

3Id.

VIRGINIA CONFLICT OF INTERESTS ACT. SCHOOL BOARD MEMBER WHOSE WIFE IS TEACHER MAY VOTE ON SCHOOL BUDGET.

February 25, 1983

The Honorable Glenn B. McClanan
Member, House of Delegates

This is in reply to your letter of February 21, 1983, requesting an opinion regarding the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"). You have described a situation in which the wife of a member of the Virginia Beach school board is a teacher employed by that school board. You have asked whether the member may vote on the school budget.

Section 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." (Emphasis added.)

This Office has held that a member of a governing body whose wife is employed by the school board has a material financial interest in the governing body's consideration of the school budget.1 Likewise, I am of the opinion that a school board member, whose wife is a teacher and employed by the same school board, would have a material financial interest in the consideration of the school budget and would be required, pursuant to § 2.1-352, to disclose his interest and disqualify himself if consideration of the budget is deemed to be a matter "not of general application." Such determination must be made on a case-by-case basis.

This Office has held that although an officer may have a material financial interest in a transaction, if the matter
is of general application, disclosure and disqualification under § 2.1-352 would not be required. Conversely, this Office has held that an officer who has a material financial interest in the transaction may not vote if such matter is not of general application.

Whether a matter is "not of general application" changes as higher level employees become involved and the material financial interest is employment at levels where school board decisions affect relatively few employees, and salary matters are necessarily directly related to the identity of a specific employee. In the instant case, the material financial interest is employment at a general salary level where all employees within a class are treated equally and the matter before the board, i.e., the budget, is not directly related to the identity of a specific employee.

I am, accordingly, of the opinion that the transaction in the instant case is one of general application, based on the assumption that there is no specific provision related to the compensation to be paid to the school board member's wife. Therefore, the school board member need not refrain from participating in the consideration of the budget.

You have also asked in what ways, if any, the member's actions are restricted as long as his spouse is a teacher in the school system. The question can only be answered on a case-by-case analysis of a given factual situation. Generally, however, his actions will not be restricted unless the board has before it a transaction involving his spouse in a matter which does not have general application.


2See 1977-1978 Report of the Attorney General at 480, which held that a city council member whose wife is a city employee may vote on the city budget; 1971-1972 Report of the Attorney General at 464, which held that a member of the board of supervisors whose wife is a teacher in the county may vote on appointments to the school board; Opinion to the Honorable Willard M. Robinson, Jr., Commonwealth's Attorney for the City of Newport News, dated July 19, 1982, which held that a city council member who is also a teacher in the city schools may vote on appointments to the school board.

3See, for example, Opinion to the Honorable Roy A. West, Mayor, City of Richmond, dated September 3, 1982 and 1970-1971 Report of the Attorney General at 436 which held that a city council member who is also a school principal in the city may not participate in the selection of the city school board.

VIRGINIA CONFLICT OF INTERESTS ACT. SCHOOL SUPERINTENDENT'S SECRETARY MAY KEEP JOB EVEN THOUGH HUSBAND IS SUBSEQUENTLY APPOINTED TO SCHOOL BOARD, IF SHE WAS PREVIOUSLY REGULARLY EMPLOYED.

June 30, 1983

The Honorable Arthur R. Giesen, Jr.
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion regarding the following situation. Recently, the husband of the secretary of long standing to the superintendent of schools was appointed to the school board. Your question is whether the secretary can keep her job now that her husband is a member of the school board.

Section 2.1-349.1 of the Code of Virginia, which is part of the Virginia Conflict of Interests Act (the "Act"), generally prohibits a spouse from being employed by the same school division where the other spouse is a member of the school board. The third paragraph of § 2.1-349.1, however, exempts from this general prohibition:

"any person within such relationship or relationships who has been regularly employed or employed as a substitute teacher or teacher's aide by any school board prior to the taking of office of any member of such board...." (Emphasis added.)

Accordingly, if the secretary had been regularly employed by the school board prior to the appointment of her husband to the board, the general prohibition of § 2.1-349.1 would not apply and the continued employment of the secretary would not be in violation of the Act. You have indicated in your letter that the secretary has been employed by the school board for many years, and, therefore, I am of the opinion that she would be considered to have been regularly employed prior to the appointment of her husband to the school board; hence, she may continue to be employed by the school board.

1Section 2.1-349.1 provides, in part: "It shall not be lawful for the school board of any county, city or of any town constituting a separate school division to employ or pay any...school board employee from the public funds...if such...employee is the...spouse...of any member of the school board."

2The Comprehensive Conflict of Interests Act, effective July 1, 1983, contains identical language to § 2.1-349.1 and would not, therefore, affect the result of this Opinion.
The Honorable V. Thomas Forehand, Jr.
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion regarding the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"). You have asked two questions:

"May a substitute teacher's aide in a public school system in Virginia who has served in that capacity on a regular basis (at least fifty days annually) for three years continue such employment in that system following the appointment of the employee's spouse as a member of the school board of that same jurisdiction? May the substitute teacher's aide be employed as a full-time teacher's aide in that same system after the spouse's appointment?"

Section 2.1-349.1 generally prohibits a spouse from being employed by the same school division where the other spouse is a member of the school board. The third paragraph of § 2.1-349.1 exempts from this general prohibition:

"any person within such relationship or relationships who has been regularly employed or employed as a substitute teacher or teacher's aide by any school board prior to the taking of office of any member of such board...provided, however, that a person employed as a substitute teacher may not be employed to any greater extent than such person was employed by such school board in the last full school year prior to the taking of office of such board member or division superintendent or to the inception of such relationship or relationships." (Emphasis added.)

In 1972, this Office, in interpreting the statute as it read at that time, held that a substitute teacher who had been substituting on a regular basis could not be considered "regularly employed" for purposes of being exempt from the Act. In 1975, the General Assembly amended § 2.1-349.1 to expressly exempt a substitute teacher from the prohibition. A 1980 amendment added teacher's aides to those who may be exempt from the employment prohibitions contained in the first paragraph of § 2.1-349.1. It is noteworthy that neither the 1975 amendment nor the 1980 amendment requires the substitute teacher or teacher's aide be regularly employed for the exemption to apply. Additionally, this Office has held that the rationale for this exemption is to except from the prohibition of the statute (formerly § 22-206) those persons whose qualifications have been considered and passed upon favorably by a school board on
which there was no member who was related to the teacher in any of the degrees mentioned.\(^3\)

In view of the legislative history of this statute, I think it clear that the General Assembly has drawn a distinction between teachers and substitute teachers or teacher's aides. Therefore, a teacher's aide or a substitute teacher's aide may continue to be so employed after her spouse is appointed to the school board.

The answer to your second question is governed by the same rationale as the first. The prohibition in § 2.1-349.1 against employing to a greater extent after the appointment of the spouse applies only to substitute teachers. The General Assembly having limited this prohibition to substitute teachers, there is no prohibition against a substitute teacher's aide subsequently being employed to a greater extent than she was employed in the last full school year prior to the taking of office of such school board member. I, therefore, am of the opinion that the substitute teacher's aide may be employed as a full-time teacher's aide after the spouse's appointment to the school board.

Both your questions are accordingly answered in the affirmative.

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1Section 2.1-349.1 provides in part: "It shall not be lawful for the school board of any county...constituting a separate school division to employ or pay any teacher or other school board employee...if such teacher or other employee...is the...spouse...of any member of the school board."

2See 1971-1972 Report of the Attorney General at 142 and 463. These Opinions were based on the following language of § 2.1-349.1 as it read at that time. "This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships."


VIRGINIA CONFLICT OF INTERESTS ACT. SCHOOLS. TEACHER WHOSE CAREER IS INTERRUPTED FOR FAMILY REASONS MAY RESUME FULL-TIME TEACHING IN DIVISION WHERE HUSBAND IS SUPERINTENDENT.

August 4, 1982

The Honorable Thomas J. Michie, Jr.
Member, Senate of Virginia
This is in reply to your letter of July 19, 1982, inquiring whether a teacher, whose career is interrupted for family reasons, may resume full-time teaching in a division where her husband is currently superintendent of schools. Under the circumstances you describe, the wife had been employed as a full-time teacher in a different county of this State prior to her marriage to the current superintendent who took office as superintendent during the period his wife was not teaching. At the time of their marriage, the husband was a principal in the same county as the wife.

Section 2.1-349.1 of the Code of Virginia generally prohibits a spouse from being employed by the same school division where the other spouse is superintendent of schools.\(^1\) The third paragraph of § 2.1-349.1 exempts from this general prohibition:

"[A]ny person within such relationship...who has been regularly employed...by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed...by any school board prior to the inception of such relationship...."

Although this couple is within the prohibited degree of relationship, they may fall within one of the stated exemptions allowing the wife to be employed in the same school division as her superintendent-husband.

First, a determination must be made whether the teacher has been "regularly employed" for the purposes of the exemptions of § 2.1-349.1. This Office has held that the phrase "regularly employed" should not be construed to mean that such person must have been employed during the most recent, or the next preceding, school session and that once a teacher has been regularly employed by any school board of this State and has for justifiable circumstances retired from the teaching profession for a period of time, it is not the intention of the statute that such person be prevented from being re-employed merely because a relative within the prohibited degree has in the meantime become a member of the school board.\(^2\) I conclude, therefore, that in the instant case, because the wife had been employed as a teacher for several years before leaving the profession to raise a family, she is deemed to have been "regularly employed" for the purposes of § 2.1-349.1.

Second, we must determine if the language of the above-quoted portion of the exemption from § 2.1-349.1 allows a teacher to have been regularly employed by any school board [prior to the appointment as a school board member or division superintendent, or prior to the inception of such relationship] in order to be exempt from the employment prohibition of this section. This Office has held that employment by any school board in Virginia prior to the inception of such [prohibited] relationship is sufficient to exempt a teacher from the prohibitions of § 2.1-349.1.\(^3\)
Likewise, this Office has held that employment by any school board in Virginia prior to the taking of office by the relative within the prohibited degree is sufficient to exempt a teacher from the prohibitions of this section. In accordance with these Opinions, I conclude that employment of the teacher by any school board prior to the inception of the relationship or prior to the relative's taking office as school board member or division superintendent is sufficient to exempt the teacher from the prohibition against employment of § 2.1-349.1.

Accordingly, I am of the opinion that, under the circumstances you describe, the wife of the current superintendent of schools may be employed by the same school division as her husband.

1Section 2.1-349.1 provides: "It shall not be lawful for the school board of any county...constituting a separate school division to employ or pay any teacher...if such teacher...is the...spouse...of the superintendent...."

2See 1959-1960 Report of the Attorney General at 316. In that Instance, the teacher had taught for two terms and was out of the teaching profession for approximately seventeen years before she sought a teaching position in a division where her father had become a member of the school board six years before her return to teaching. The rationale was that the phrase is intended to except from the provisions of the statute those persons whose qualifications have been considered and passed upon favorably by a school board on which there was no member who was related to the teacher in any of the degrees mentioned.

31957-1958 Report of the Attorney General at 235. Please note that although pre-1971 Opinions refer to § 22-206 rather than § 2.1-349.1, the pertinent language of both statutes is the same.


VIRGINIA CONFLICT OF INTERESTS ACT. STATE TROOPER WHO HAS MATERIAL FINANCIAL INTEREST IN SCHOOL SUPPLY COMPANY MAY SELL TO SCHOOL BOARD.

September 15, 1982

The Honorable Frederick H. Creekmore
Member, House of Delegates

This is in reply to your letter which we received on September 10, 1982, inquiring whether a Virginia State trooper who enters into a private business which will sell school supplies may, without violating the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia, (the "Act"), sell such supplies to a school board.
Sales between the trooper and a school board are governed by § 2.1-349(a)(2), which provides:

"No officer or employee of any governmental agency shall:

(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding...."

The State trooper is an employee of a governmental agency, and in order for him to comply with § 2.1-349(a)(2), he must disclose to both his agency, i.e., the Department of State Police, and any governmental agency, such as a school board, with which he may contract to sell school supplies, that he has a material financial interest in such contract. Additionally, he must comply with the bidding requirements as set forth in § 2.1-349(a)(2).

Based upon the foregoing analysis, I am of the opinion that the Act would not prohibit the State trooper from contracting with other governmental agencies as long as he complies with the disclosure requirements and the head of the governmental agency with which he contracts complies with the bidding requirements of § 2.1-349(a)(2).

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1Section 2.1-348(f) defines material financial interest to be a personal and pecuniary interest accruing to an employee, including "[o]wnership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business...."

2Additional disclosure may be required by § 2.1-353. This section requires any officer or employee who has a material financial interest which he believes or has reason to believe may be substantially affected by actions of the agency of which he is an officer or employee to make written disclosure of the existence of such interest to the Attorney General.
I assume that the trooper will comply with any requirements and regulations of the Department of State Police concerning employment in second jobs.

VIRGINIA CONFLICT OF INTERESTS ACT. SUBSTANTIAL COMPLIANCE WITH DISCLOSURE AND BIDDING REQUIREMENTS REGARDING CONTRACTS WITH OTHER GOVERNMENTAL AGENCIES EXISTING AT TIME OF APPOINTMENT TO GOVERNMENTAL AGENCY.

August 11, 1982

The Honorable J. Robert Bray, Executive Director
Virginia Port Authority

This is in reply to your letter of July 30, 1982, requesting an Opinion regarding the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act").

Specifically, you ask:

1. "In the event that a person is appointed to serve as an officer of a governmental agency, and, at the time of his appointment, he has contracts or a material financial interest in contracts with other governmental agencies, may that person achieve compliance with the Act by disclosing such contracts to each agency and by obtaining from the contracting agency the required written statement, if the contract was not let after competitive bidding?"

2. "In the event that an officer of a governmental agency is employed by a large company with several branch offices in Virginia and in other states, and that person's duties and authority pertain only to the operations of certain branch offices, do the disclosure and bidding requirements of § 2.1-349(a)(2) apply to contracts with other governmental agencies procured by branch offices of the company other than those under that person's authority?"

Section 2.1-349(a)(2) provides:

"No officer or employee of any governmental agency shall:

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(2) Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in
advance, both to the governmental agency of which he is
an officer or employee and to the governmental agency
with which such contract or subcontract is proposed to
be made, and either (i) such contract be let after
competitive bidding, or (ii) such contract be for
property or services which, in the judgment of the
governing body or administrative head of the
governmental agency, made in writing and as a matter of
public record, in the public interest should not be
acquired through competitive bidding...."

You state that the newly appointed officer has a
material financial interest in contracts with governmental
agencies other than his own that existed at the time of his
appointment. Therefore, the disclosure and bidding
requirements of § 2.1-349(a)(2) must be satisfied. Because
the contract has already been let, however, compliance with
the advance disclosure requirements is not possible. The
question is, therefore, whether there is any way to cure the
prohibited interest which results from the continuation of
this contract.

I am of the opinion that substantial compliance with the
requirements of § 2.1-349(a)(2) can be achieved by disclosing
the existence of the material financial interest in the
contract to both governmental agencies, and, if the contracts
were not let through competitive bidding, having the
administrative head of the governmental agency with which
such contract is proposed to be made make a statement in
writing that in its judgment, it is not the type of contract
that in the public interest should be let through competitive
bidding.

In reference to your second question, I believe that
where the officer has no contracting authority,
§ 2.1-349(b)(3) would exclude from the disclosure and
bidding of § 2.1-349(a)(2) those contracts procured by branch
offices of the officer's company.2

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1Section 2.1-349(b)(3) states:
"The provisions of paragraphs (1) and (2) of subsection
(a) of this section [i.e., § 2.1-349] shall not be
applicable:

***

(3) To officers or employees whose sole interest in a
contract or subcontract with the governmental agency is by
reason of employment by the contracting firm, partnership or
other business, unless such officer or employee participates,
or has authority to participate, in the procurement or the
letting of such contract, in which event the provisions of
such paragraphs shall be applicable...."

2I assume that the officer has no authority to participate
in the procurement or the letting of the contract. If so,
the requirements of § 2.1-349(a)(2) would apply.
July 19, 1982

The Honorable Willard M. Robinson, Jr.
Commonwealth's Attorney for the City of Newport News

This is in reply to your letter of July 1, 1982, requesting an Opinion whether a member of city council, who is also a school teacher, may vote on the appointment of school board members.

Section 2.1-352 of the Code of Virginia provides:

"Any officer or employee of any governmental agency... who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency 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...."

The teacher, being employed by the city school board, has a material financial interest in the transaction before council (the appointment of school board members) by virtue of having a material financial interest in her contract with the school board.1

Nevertheless, although the teacher has a material financial interest in the vote regarding school board members, she is not required to disqualify herself unless the matter is deemed to be "not of general application." Whether a transaction is not of general application must be decided on a case-by-case basis.

To summarize, in determining whether § 2.1-352 applies, it is necessary to ascertain (1) if the member has a material financial interest in the transaction, and (2) if the transaction is of general application. Therefore, if the council member is deemed to have a "material financial interest" in the transaction, and the transaction is not of general application, then she must comply with the disclosure and disqualification requirements of § 2.1-352. If, however, the member has a "material financial interest" in the transaction but the transaction is one of general application, then the Act permits the member to participate in the discussion and to vote on the question.

This Office has held that the consideration and vote by the board of supervisors on a school budget is a matter of general application and, therefore, a board member need not disqualify himself because his wife is a teacher. See 1971-1972 Report of the Attorney General at 464 and 1969-1970
In two previous Opinions, this Office has suggested that members of the governing board of a locality who have a material financial interest in a contract with the school board may still vote on appointments to the school board. See 1978-1979 Report of the Attorney General at 304 and 1977-1978 Report of the Attorney General at 480. Under the facts which you present, I am of the opinion that the appointment of school board members by the governing body is, with respect to the teacher serving on the governing body, a transaction of general application. Accordingly, I conclude that § 2.1-352 does not preclude the teacher from participation in the appointment of school board members.

1Aggregate annual income of $5,000 or more from a business is a material financial interest in that business. See § 2.1-348(£)(1). We assume for the purpose of this Opinion that the teacher receives more than $5,000 per year from the school board.

VIRGINIA CONFLICT OF INTERESTS ACT. TRANSACTION OF GENERAL APPLICATION IF IT WILL AFFECT CLASS OF OWNERS.

February 3, 1983

The Honorable Charles C. Lacy
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion from our Office on the following questions:

"1. The legality of the current method by which the Town of Hillsville charges for water and sewer service to owners of mobile home parks, apartments, and multi-family dwellings having a common meter.

2. Ability of current Council members who own, or have immediate family members who own such units to vote on changes which would be favorable to property owners in their class."

In response to your first question, the question of legality of the method of charging for metered and unmetered water and sewerage service for the Town of Hillsville was answered in the affirmative in an Opinion of this Office addressed to the Honorable W. Ward Teel, Member, House of Delegates, dated April 9, 1982.1

Your second question is governed by the provisions of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act").
Section 2.1-352 requires an officer or employee of a governmental 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, to disclose such interest to the governing body thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency. If a council member has a material financial interest in a transaction of the council, i.e., discussion and/or vote on charges for water and sewer service, any such member would be required by § 2.1-352 to disclose his interest and disqualify himself from participating in and voting if such transaction is "not of general application."

Whether a transaction is "not of general application" must be determined on a case-by-case basis. If a councilman's interest is affected to the exclusion of the interests of the rest of the community, the transaction would be "not of general application." As a transaction affects a broader segment of the community, it becomes a transaction of general application.

Accordingly, I am of the opinion that if the proposals considered by the town council will affect a class of owners, even though the councilman's interest will also be affected, the transaction would appear to be of general application and, therefore, § 2.1-352 would not require his disqualification.

2Section 2.1-348(f) defines "material financial interest" to include "a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Notwithstanding the foregoing:
    (1) Ownership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business...."

VIRGINIA CONFLICT OF INTERESTS ACT. TREASURER OF CITY. SPOUSE MAY NOT BE EMPLOYED AS DEPUTY IF SALARY EXCEEDS $10,000 ANNUALLY.

March 22, 1983

The Honorable Willard M. Robinson, Jr.
Commonwealth's Attorney for the City of Newport News
This is in reply to your request for my opinion on the applicability of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act") to the following factual situation:

The Treasurer of the City of Newport News recently married a deputy treasurer in his office who had been an employee of the office for eight years. Both parties have salaries in excess of $10,000 per year.

Section 2.1-349(a)(1) provides, in pertinent part, that no officer or employee of a governmental agency shall have a material financial interest in any contract with the governmental agency of which he is an officer or employee other than his contract of employment.

Section 2.1-348(f) provides that "material financial interest" shall include a personal and pecuniary interest accruing to an officer or employee or to his spouse. Accordingly, an officer and his spouse are treated as one for purposes of applying the Act. Section 2.1-348(f)(4) provides an exception for employment by the same governmental agency of an officer or employee and spouse unless one of them is employed in a direct supervisory or administrative position, or both, with respect to said spouse and the annual salary of such subordinate is $10,000 or more. 1

Under the factual situation outlined in your letter, the foregoing exception would not be applicable, because the treasurer stands in direct supervisory position to his deputy and the deputy earns in excess of $10,000 annually.

This conclusion is consistent with a number of prior Opinions of this Office which have been expressed since the Act took effect in 1970. See Reports of the Attorney General 1980-1981 at 87; 1978-1979 at 303; 1972-1973 at 485; 1970-1971 at 422.

The fact that the individuals in question became married several years after the initial employment does not avoid the prohibition against having a material financial interest in contracts under § 2.1-349(a)(1). See 1973-1974 Report of the Attorney General at 434. Also inapplicable is the "grandfather clause" provided in § 2.1-248(f)(5) for employment contracts with the same governmental agency prior to June 30, 1971.2 Here, the spouse was not employed by the office of the treasurer prior to June 30, 1971.

In view of the clear language of the prohibition of the Act and the consistent position of this Office over the years, I am of the opinion that the employment by the treasurer of his spouse is prohibited by § 2.1-349(a)(1).

1 Section 2.1-348(f)(4) reads as follows: "The employment by the same governmental agency of an officer or employee and
spouse or any other relative residing in the same household shall not be deemed to create a material financial interest except when one of such persons is employed in a direct supervisory or administrative position, or both, with respect to such spouse or other relative residing in his household and the annual salary of such subordinate is ten thousand dollars or more...."

Section 2.1-348(f)(5) reads in pertinent part as follows: "The provisions of this chapter relating to personal service or employment contracts shall not apply to any persons who were regularly employed by the same governmental agency or unit of government on or prior to June thirty, nineteen hundred seventy-one, with regard to personal service or employment contracts with such governmental agency or unit of government."

VIRGINIA CONFLICT OF INTERESTS ACT. VIRGINIA HEALTH SERVICES COST REVIEW COMMISSION. MEMBERS MAY SERVE ON BOARDS OF DIRECTORS OF HOSPITALS SO LONG AS THEY HAVE NO MATERIAL FINANCIAL INTEREST IN A CONTRACT OR TRANSACTION INVOLVING SUCH HOSPITALS.

September 16, 1982

The Honorable Joseph L. Fisher
Secretary of Human Resources

This is in reply to your inquiry relating to the legality of members of the Virginia Health Services Cost Review Commission serving on boards of directors of hospitals. The Virginia Health Services Cost Review Commission (the "Commission"), created by § 9-157 of the Code of Virginia, is composed of eleven members appointed by the Governor. From the copy of a letter addressed to you by the chairman of the Commission, it appears that two consumer members of the Commission serve on a board of directors of a local hospital. Neither member has a financial interest in the hospitals in question, and both abstain from participation in commission action concerning those facilities.

Although the Commission has certain advisory functions, many of the powers and duties provided in Ch. 26, Title 9 require an exercise of some sovereign power of State government; hence, the Commission is a "governmental agency" within the purview of § 2.1-348, a portion of the Virginia Conflict of Interests Act (the "Act"). Consequently, the proscriptions and requirements of the Act are applicable to the members of the Commission. There is, however, no prohibition in the Act against an officer serving on the board of directors of a hospital, or any other corporate entity, so long as he has no "material financial interest" in a contract or a transaction involving his governmental agency.
So long as the members of the Commission have no financial interest in the hospitals in question, either individually or through their spouses or any other relative residing in the same household, there is no legal prohibition against such members continuing on the boards of directors of the hospitals. This view is consistent with a prior Opinion of this Office found in the 1970-1971 Report of the Attorney General at 433, relating to members of the Board of Health serving without fee on the board of an organization which does business with the State Health Department.

1A material financial interest includes a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household. Ownership of an interest of five percent or more in a firm or aggregate annual income, exclusive of dividend income and interest income, of $5,000 or more from a firm is deemed to be a material financial interest in such firm. See § 2.1-348(f).

VIRGINIA CONFLICT OF INTERESTS ACT. VOTE ON SCHOOL BUDGET IS MATTER OF GENERAL APPLICATION AS TO ASSISTANT PRINCIPAL WHO IS ALSO MEMBER OF LOCALITY'S GOVERNING BODY.

March 2, 1983

The Honorable John C. Brown
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion whether a member of a local governing body who is also an assistant principal in the school system in that locality may:

1. vote on the city's general appropriation to the school board, and

2. vote on appointments to the school board.

Section 2.1-352 of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (the "Act"), provides in part:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency." (Emphasis added.)
1982-1983 REPORT OF THE ATTORNEY GENERAL

This Office has previously held that a member of a city council who is also a principal of one of the schools in his city may vote on the school budget, but may not participate in the appointment of school board members. This conclusion was based on the finding that the school budget is a matter of general application as to the principal, but the selection of school board members is not of general application as to the principal. The Supreme Court of Virginia has also held that the selection of school board members is not a transaction of general application as to either a school principal or a general supervisor of instruction.

I am of the opinion that where the position of assistant principal is held by a person whose duties are solely or principally administrative in nature and who would accede to the duties of the principal in his absence, the position closely resembles that of principal of a school and would be subject to the same disclosure and disqualification requirements as principals. Accordingly, I am of the opinion that an assistant principal who is also a member of the city council may vote on the city's general appropriation to the school board, but may not vote or otherwise participate in the selection of school board members.


VIRGINIA FIRE COMMISSION. AUTHORIZED TO ALLOCATE FUNDS.

September 23, 1982

The Honorable Joseph F. Thomas, Jr.
Acting Executive Director, Department of Fire Programs

This is in reply to your request of September 15, 1982, to advise which officials within the Department of Fire Programs (the "Department") (Ch. 25, Title 9 of the Code of Virginia) have authority to allocate or disburse funds appropriated to that Department. More specifically, the questions are:

1. Does the Virginia Fire Commission (the "Commission") possess the authority to allocate and disburse all funds, or is that authority vested in the executive director of the Department?

2. Does the Administrative Process Act govern the allocation of grant funds and funds specifically allocated by the General Assembly for fire service training facilities?
By the enactment of Ch. 154, Acts of Assembly of 1981, the Office of Fire Services Training was combined with the Virginia State Fire Services Commission to form the Department of Fire Programs, effective July 1, 1982. The Department is designated as the State agency to receive and disburse any funds available to the Commonwealth under the Federal Fire Prevention and Control Act. Section 9-153.1 provides for the appointment of the Virginia Fire Commission and § 9-155 enumerates the powers and duties of the Commission. The powers and duties are directed primarily at planning, developing standards, evaluating programs and promoting the coordination of the efforts of fire service organizations in the State. Additionally, the Commission is responsible for the making of recommendations to the Governor, General Assembly, and local governments. The express powers for disbursement of funds are set forth in subsection (3) of § 9-155 and § 9-155.1. The power regarding grants reads as follows:

"To establish criteria for the disbursement of any grant funds received from the federal government and any agencies thereof and any other source and to disburse such funds in accordance therewith...." Section 9-155(3).

Section 9-155.1 authorizes the Commission to allocate available funds to counties, cities, and towns within the Commonwealth for the purpose of assisting such counties, cities, towns and volunteer fire companies in the construction, improvement or expansion of fire service training facilities.

Section 9-154 provides for the appointment of an executive director of the Department and enumerates the powers of such director. The executive director is responsible for the day-to-day activities of the Department and is empowered to do all acts necessary to carry out the purposes of Ch. 25, Title 9, within the limits of available appropriations. No express or implied authority has been given to him which indicates that such appropriations may be allocated by him.

Although the enumerated powers of the Commission do not expressly state that it has the full authority to allocate all funds, I am of the opinion that such authority is implied by powers and duties conferred by § 9-155. In merging all functions related to fire prevention and control in the Department of Fire Programs, governed by the Commission, it can be assumed that the General Assembly intended all appropriations for the operation of the Department be disbursed under the direction of the Commission.

Turning to your second inquiry, the Administrative Process Act (§§ 9-6.14:1 through 9-6.14:20) governs the enactment of regulations and the issuing of case decisions by agencies of the Commonwealth. The allocation of appropriated funds or grants does not fall within the definition of "case
decision" or "regulation" as contemplated in § 9-6.14:4. Accordingly, I am of the opinion that the Administrative Process Act does not govern the allocation of grant funds and funds appropriated by the General Assembly for fire service training facilities.

1"B. The executive director shall have the following powers: 1. To employ such staff as is necessary to carry out the powers and duties of this chapter, within the limits of available appropriations; 2. To accept on behalf of the Department grants from the United States government and agencies and instrumentalities thereof and any other sources. To these ends, the director shall have the power to execute such agreements in accordance with the policies of the Commission; 3. To do all acts necessary or convenient to carry out the purpose of this chapter and to assist the Commission in carrying out its responsibilities and duties; and 4. To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, including, but not limited to, contracts with the United States, other states, agencies and governmental subdivisions of the Commonwealth; 5. To appoint a director of fire services training."

VIRGINIA FREEDOM OF INFORMATION ACT. CONSTRUCTION OF "REPORTS SUBMITTED TO POLICE IN CONFIDENCE."

October 4, 1982

The Honorable Bernard S. Cohen
Member, House of Delegates

This is in reply to your letter of September 22, 1982, concerning the construction of the phrase "submitted in confidence" which appears in § 2.1-342(b)(1) of the Code of Virginia and is part of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1, (the "Act"). According to your letter, a report was prepared by one police officer and submitted to the chief of police at the latter's request. You state that the report is otherwise subject to disclosure under the Act.

Section 2.1-342(b)(1) specifically exempts from the mandatory disclosure provisions of the Act:

"Memoranda, correspondence, evidence and complaints related to criminal investigations, reports submitted to the state and local police and the campus police departments of public institutions of higher education as established by Chapter 17 of Title 23 (§ 23-232 et seq.) of the Code of Virginia in confidence...." (Emphasis added.)
As a general rule, words in a statute should be given their usual, commonly understood meaning. The term "police" is defined generally as "the department of government concerned primarily with maintenance of public order, safety and health and enforcement of laws." Accordingly, I am of the opinion that the language, "reports submitted to the...police...in confidence..." in § 2.1-342(b)(1), encompasses reports submitted by persons outside of the police department to the police department rather than to internal reports submitted by one police officer to another. To conclude otherwise would be contrary to the purpose of the Act as expressly stated by the General Assembly.

1980-1981 Report of the Attorney General at 58. See, also, The Covington Virginian, Inc. v. Woods, 182 Va. 538, 79 S.E.2d 406 (1944). Webster's New Collegiate Dictionary (1976). Such reports may be exempt under other provisions of the Act, for example, memoranda and reports related to criminal investigations or personnel matters would be exempt. Section 2.1-340.1 requires that the Act "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person."

VIRGINIA FREEDOM OF INFORMATION ACT. CONTRACT FOR EMPLOYMENT WHICH HAS BEEN SIGNED IS OFFICIAL RECORD FOR PURPOSES OF ACT.

March 7, 1983

The Honorable Shirley F. Cooper
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion regarding the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). The letters accompanying your request state that the College of William and Mary has recently named a new dean to the School of Business Administration who will take office on July 1, 1983. You have presented two questions:

1. Is the new dean's salary public information before he takes office at the college since an employment contract has been reached?

2. Must the college respond to a request for such information within ten working days of the request?
Section 2.1-342(a) provides that all "official records" shall be open to inspection and copying, except as otherwise specifically provided by law. The contract of employment would be deemed to be an "official record" for the purposes of the Act.

Section 2.1-342(c) provides in part:

"Neither any provision of this chapter nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this title 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 whatsoever. The provisions of this subsection, however shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less."

The foregoing provision has been interpreted by this Office to require disclosure of public officials' and employees' salaries and positions exceeding $10,000. See 1980-1981 Report of the Attorney General at 394. The General Assembly has not taken any action to change that Opinion. Accordingly, I am of the opinion that the signed contract is an "official record" and it must be made available for public inspection.

In answer to your second question, § 2.1-342(a) sets forth the procedure to follow in responding to requests for inspection. It provides in part that "[a]ny public body covered under the provisions of this chapter shall make an initial response to citizens requesting records open to inspection within fourteen calendar days from the receipt of the request by the public body." It further provides that if a determination regarding availability of the records cannot be made within the fourteen-day period, the public body may so advise the requestor and it shall have ten additional days to make such determination. Accordingly, I am of the opinion that the college must respond to a request under the Act within fourteen calendar days after its receipt of such request.

VIRGINIA FREEDOM OF INFORMATION ACT. CRIMINAL FILES IN CIRCUIT COURT CLERK'S OFFICE SUBJECT TO DISCLOSURE WITH CERTAIN EXCEPTIONS.

January 14, 1983

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

This is in reply to your recent letter requesting an Opinion whether criminal files, both felony and misdemeanor, filed in your office are open for public inspection.
Section 2.1-342 of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), provides in pertinent part:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records."

(Emphasis added.)

Additionally, § 17-43 provides, in part:

"The records and papers of every court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided." (Emphasis added.)

We must, therefore, look to other sections of the Code to ascertain whether the records in question are exempt from disclosure.

First, § 2.1-342(b)(1) excludes from the disclosure requirements of the Act, "[m]emoranda, correspondence, evidence and complaints related to criminal investigations...." Therefore, if active investigative records were contained in the clerk's files, disclosure of such records would not be mandated by the Act.1

Second, § 19.2-389 restricts the dissemination of criminal history record information.2 Sections 9-1843 and 9-1874, when read together, provide that court records of public criminal proceedings are not subject to the restrictions of § 19.2-389 which authorizes the dissemination by the Central Criminal Records Exchange of criminal history record information only to certain specified persons and entities. Additionally, § 19.2-299 provides that pre-sentence reports made by probation officers are to be sealed upon the entry of a sentencing order and may only be made available by court order or to certain specified persons or criminal justice agencies. Thus, pre-sentence reports contained in the clerk's files may not be made public.

Third, Art. 12, Ch. 11 of Title 16.1 governs the dissemination of records concerning juveniles. If the clerk's files contain juvenile records which may not be made public pursuant to Title 16.1, such records shall retain their confidentiality and are not subject to the Act.

In summary, if the clerk's files contain pre-sentence reports made pursuant to § 19.2-299 or protected information regarding a juvenile, the records containing such information would not be subject to disclosure under either the Act or §§ 17-43,5 Similarly, if the clerk's file contains memoranda, correspondence, evidence and complaints related to active criminal investigations, such records would not be subject to the mandatory disclosure provisions of the Act.6 All other
records in the clerk's file would be subject to disclosure under the Act.

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Section 9-169 defines "criminal history record information" to mean "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom. The term shall not include juvenile record information which is controlled by Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 of this Code, criminal justice intelligence information, criminal justice investigative information, or correctional status information."

3Section 9-184 provides in pertinent part: "B. The provisions of this article [regarding the criminal justice information system] do not apply to original or copied...(ii) court records of public criminal proceedings...."

4Section 9-187 provides: "Criminal history record information shall be disseminated, whether directly or through an intermediary, only in accordance with § 19.2-389."

5See Opinion rendered December 15, 1982, to the Honorable William P. Robinson, Jr., Member, House of Delegates, which holds that if records contain information which by law may not be made public, the Act would not require their disclosure.

6Id.

VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE. EXEMPTION FROM MANDATORY DISCLOSURE OF RECORDS RELATING TO CRIMINAL INVESTIGATIONS.

August 31, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

This is in reply to your letter of August 18, 1982, in which you inquire how a citizen's group which has established a Community Watch Program may obtain a list of items of privately owned personal property held by police agencies, which have not been claimed or identified by the owners. The purpose in obtaining the list is to include it in a newsletter in hopes of aiding in the identification and return of the items to the rightful owners.

Records maintained by police agencies are "official records" within the contemplation of the Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia), and except as otherwise specifically provided by law, would be open to inspection and copying by any citizen of the Commonwealth. Expressly excepted from the provisions
of such mandatory disclosure, however, are memoranda, correspondence, evidence and complaints relating to criminal investigations. See § 2.1-342(b)(1). Accordingly, I am of the opinion that law enforcement agencies would not be required to release the list of unclaimed personal property so long as such items are related to a criminal investigation.

You have also requested my advice as to any procedure which may be utilized by the citizen's group to obtain such information. The foregoing conclusion should not be interpreted as a suggestion that police authorities are not at liberty to voluntarily release such information. Although not subject to mandatory disclosure, such records may be released by police agencies if such dissemination is in the public interest and does not interfere with a criminal investigation. Accordingly, I suggest that the citizen's group address a request to each police agency which may have such a list of unclaimed property, with a view toward obtaining a voluntary release of such information in an effort to locate the rightful owners.

VIRGINIA FREEDOM OF INFORMATION ACT. EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE. MAY NOT MEET AS A BODY WITH EMPLOYEES REGARDING SPECIFIC COMPLAINTS.

August 20, 1982

The Honorable Regina V. K. Williams, Director
Department of Personnel and Training

This is in reply to a letter from your office and subsequent discussions with a member of your staff inquiring whether the Virginia Equal Employment Opportunity Committee (the "Committee") may have confidential hearings with applicants and employees regarding discrimination in the Commonwealth's employment practices. You indicate that concerns have been expressed about employees who may have encountered discriminatory actions but who would feel threatened if they filed charges of discrimination.

Section 2.1-116.14 of the Code of Virginia charges the Committee with the broad responsibility of "monitoring the Commonwealth's equal employment opportunity practices so as to assure that such practices fulfill the Commonwealth's obligations of providing equal opportunity to all employees and applicants." This section also requires the Committee members to "refer employees who have work related discrimination complaints to the Director of Equal Opportunity and Employee Programs." (Emphasis added.) Thus, an employee may either file a complaint with the Director or may file a grievance pursuant to §§ 2.1-116.14 and 2.1-114.5:1. On the other hand, there is no provision for an applicant with discrimination complaints to be referred to the Director by the Committee, nor for an applicant to be
records in the clerk's file would be subject to disclosure under the Act.

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2Section 9-169 defines "criminal history record information" to mean "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom. The term shall not include juvenile record information which is controlled by Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 of this Code, criminal justice intelligence information, criminal justice investigative information, or correctional status information."

3Section 9-184 provides in pertinent part: "B. The provisions of this article [regarding the criminal justice information system] do not apply to original or copied...(ii) court records of public criminal proceedings...."

4Section 9-187 provides: "Criminal history record information shall be disseminated, whether directly or through an intermediary, only in accordance with § 19.2-389."

5See Opinion rendered December 15, 1982, to the Honorable William P. Robinson, Jr., Member, House of Delegates, which holds that if records contain information which by law may not be made public, the Act would not require their disclosure.

6Id.

VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE. EXEMPTION FROM MANDATORY DISCLOSURE OF RECORDS RELATING TO CRIMINAL INVESTIGATIONS.

August 31, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

This is in reply to your letter of August 18, 1982, in which you inquire how a citizen's group which has established a Community Watch Program may obtain a list of items of privately owned personal property held by police agencies, which have not been claimed or identified by the owners. The purpose in obtaining the list is to include it in a newsletter in hopes of aiding in the identification and return of the items to the rightful owners.

Records maintained by police agencies are "official records" within the contemplation of the Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia), and except as otherwise specifically provided by law, would be open to inspection and copying by any citizen of the Commonwealth. Expressly excepted from the provisions of
of such mandatory disclosure, however, are memoranda, correspondence, evidence and complaints relating to criminal investigations. See § 2.1-342(b)(1). Accordingly, I am of the opinion that law enforcement agencies would not be required to release the list of unclaimed personal property so long as such items are related to a criminal investigation.

You have also requested my advice as to any procedure which may be utilized by the citizen's group to obtain such information. The foregoing conclusion should not be interpreted as a suggestion that police authorities are not at liberty to voluntarily release such information. Although not subject to mandatory disclosure, such records may be released by police agencies if such dissemination is in the public interest and does not interfere with a criminal investigation. Accordingly, I suggest that the citizen's group address a request to each police agency which may have such a list of unclaimed property, with a view toward obtaining a voluntary release of such information in an effort to locate the rightful owners.

VIRGINIA FREEDOM OF INFORMATION ACT. EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE. MAY NOT MEET AS A BODY WITH EMPLOYEES REGARDING SPECIFIC COMPLAINTS.

August 20, 1982

The Honorable Regina V. K. Williams, Director
Department of Personnel and Training

This is in reply to a letter from your office and subsequent discussions with a member of your staff inquiring whether the Virginia Equal Employment Opportunity Committee (the "Committee") may have confidential hearings with applicants and employees regarding discrimination in the Commonwealth's employment practices. You indicate that concerns have been expressed about employees who may have encountered discriminatory actions but who would feel threatened if they filed charges of discrimination.

Section 2.1-116.14 of the Code of Virginia charges the Committee with the broad responsibility of "monitoring the Commonwealth's equal employment opportunity practices so as to assure that such practices fulfill the Commonwealth's obligations of providing equal opportunity to all employees and applicants." This section also requires the Committee members to "refer employees who have work related discrimination complaints to the Director of Equal Opportunity and Employment Programs." (Emphasis added.) Thus, an employee may either file a complaint with the Director or may file a grievance pursuant to §§ 2.1-116.14 and 2.1-114.5:1. On the other hand, there is no provision for an applicant with discrimination complaints to be referred to the Director by the Committee, nor for an applicant to be
able to file a complaint under the grievance procedure.1 See § 2.1-114.5:1(C).

I am of the opinion that the Committee's meeting as a body with employees regarding specific complaints, is beyond the scope of its powers and duties as prescribed by the Code and would, therefore, constitute an impermissible act by the Committee. Your inquiry is therefore answered in the negative.

If the Committee finds it helpful in monitoring the equal employment opportunity practices of the Commonwealth there would be no objection to the Committee or any of its members meeting with an applicant or employee so long as it does not deal with a specific complaint. If the Committee meets as a body with applicants or employees, it must comply with the open meeting requirements of the Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1).

Such applicant may, of course, file a complaint with a federal or State Office of Equal Employment Opportunity.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETING TO FILL ONE DEPUTY SUPERINTENDENT'S POSITION AND ELIMINATING ANOTHER FALLS WITHIN AMBIT OF EXEMPTION IN § 2.1-344(A)(1).

November 12, 1982

The Honorable Vivian E. Watts
Member, House of Delegates

This is in reply to your letter which you delivered on November 8, 1982, requesting an opinion regarding the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

Your letter reads in part as follows:

"On September 9, 1982 the Fairfax County School Board reconvened their regularly scheduled public meeting after an hour and a half executive session. The first order of business of this public session was a motion to fill one deputy superintendent's position and to eliminate the other. Reference was made to the fact that this action would confirm the discussion which had taken place in executive session. No discussion took place on this motion, which passed with one abstention. No other motions were made nor was any other reference made to the extraordinarily long executive session."

You have asked whether an executive session discussion to reorganize the administrative structure of the school system by eliminating one deputy superintendent position is in violation of § 2.1-344.
The Act requires that all meetings of public bodies be public meetings except as otherwise specifically provided by law. Section 2.1-344(a)(1) of the Act allows public bodies to discuss certain personnel matters in executive meetings, including "[d]iscussion or consideration of employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body...." This exception to the open meeting requirement allows private discussion of personnel matters involving individual employees. If the executive session discussion dealt with the assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers or employees, then such discussion was the proper subject of an executive meeting. This is proper even when the personnel decision is implemented through action which results in a reorganization. If, however, the discussion was devoid of personnel considerations and dealt with the general policy of reorganization of the administrative structure of the school system, such discussion does not fall within the exemption of § 2.1-344(a)(1) or any other provision authorizing executive meetings.

Based solely on the motion which was passed in open session, I am of the opinion that a closed session would be appropriate to consider filling one deputy superintendent's position and eliminating another. Such action would fall within the ambit of employment, appointment, promotion, etc., as contemplated in § 2.1-344(a)(1).

1See § 2.1-343.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. HIRING, FIRING, RESIGNATION, RETENTION, SALARY AND MATTERS RELATING TO MONIES PAID TO STAUNTON CITY ATTORNEY MAY BE DISCUSSED IN EXECUTIVE SESSION.

April 19, 1983

The Honorable Raymond C. Robertson
Commonwealth's Attorney for the City of Staunton

This is in reply to your letter of April 7, 1983, regarding the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You have asked whether the subject of the hiring, firing, resignation, retention, salary and any matters relating to monies paid to the city attorney of Staunton may be discussed in executive or closed session under the Act.

Section 2.1-343 requires that all meetings of public bodies shall be public meetings except as provided in
§§ 2.1-344 and 2.1-345. Section 2.1-344(a)(1) provides in part:

"(a) Executive or closed meetings may be held only for the following purposes:

(1) Discussion or consideration of employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body...."

The Charter of the City of Staunton authorizes the council to elect a city attorney who shall serve for such term as may be provided by the council and who shall perform such duties and receive such compensation as shall be prescribed by the council. You state that the city attorney is appointed by the city council, and serves at its pleasure. He is paid a retainer and an hourly rate for services performed. Even though the practice appears to be more akin to a retention of a lawyer as an independent contractor than it does the appointment or election of a city official, I do not think it is the determinative fact in this instance. Whether he be considered to be a public officer, appointee or employee of the city council, I am of the opinion that discussion of matters regarding his employment, appointment, salary, etc., would be an appropriate subject for an executive session of the council, as authorized in § 2.1-344(a)(1). This Office has held that a city council may discuss the selection of a mayor in executive meeting and that a town council may meet in executive session for the purpose of discussing employment of a person for the position of town manager.

I am of the opinion that in the situation you have described the election of a city attorney as provided by the city charter is equivalent to the appointment or employment of a city attorney; therefore, the hiring, firing, resignation, retention, salary and any matters relating to monies paid him by the city are appropriate topics for discussion in executive session of the city council. It will, of course, be necessary to follow the procedure outlined in § 2.1-344(b) in order to consider the matter. Further, the action taken in the executive meeting does not become effective until the council reconvenes in open session and takes affirmative action as required by § 2.1-344(c).

1Section 10 of the City Charter of Staunton provides in part: "The council shall elect...a city attorney...[who] shall serve for such term as may be provided by the council, and until his successor has been elected and qualified. [He] shall perform such duties and receive such compensation as shall be prescribed by the council." Ch. 239, Acts of Assembly of 1934 at 344, 348.
July 7, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

This is in reply to your recent letter asking under what circumstances a public body may meet in executive session pursuant to the "potential litigation" and "legal matters" exemptions from the open meeting requirement of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

This Office has previously held that § 2.1-344(a)(6) is "designed to allow private discussions concerning...specific potential legal disputes..." and "specific legal questions..." (Emphasis added.) The Supreme Court of Virginia has held that "[i]t is neither necessary nor in the public interest to require as a prerequisite to closing a meeting pursuant to § 2.1-344(a)(6) that the governing body disclose in detail the legal matters or the legal issues to be considered...." Marsh, et al. v. Richmond Newspapers, Inc., et al., 223 Va., 228 S.E.2d 415 (1982). It is mandatory, however, that the language of the specific statutory exemption be used in the motion to go into executive session. See § 2.1-344(b). Consequently, although a public body need not state in its motion the specific case or other legal matter to be discussed, there must exist a specific potential legal dispute or a specific legal question which will be discussed in the executive meeting.

Although I would not attempt to detail each situation that would come within the § 2.1-344(a)(6) exemption, following are several examples taken from previous Opinions of this Office.

1) Pending or potential obscenity prosecution of theater operators may be discussed in executive session. 3

2) Consideration of terms of proposed contractual arrangements with specific auto repair firms may be discussed in executive session. 4

3) Consideration of whether a particular provision of a zoning ordinance is constitutionally valid. 5

I am of the opinion, therefore, that exemptions from the public meetings requirement for discussion of "potential litigation" or "other legal matters" under § 2.1-344(a)(6)
apply only when such discussions deal with specific potential legal disputes and specific legal questions confronting the public body.

Section 2.1-344(a)(6) allows executive or closed meetings for the purpose of "[c]onsultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to actual or potential litigation, or other legal matters within the jurisdiction of the public body, and discussions or consideration of such matters without the presence of counsel, staff, consultants, or attorneys."


For purposes of § 2.1-344(a)(6), it would make no difference whether the challenged ordinance has been actually adopted or is only proposed for adoption.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE SESSIONS. DESIRABILITY OF DEFERRED PAYMENT PLAN FOR SEWER SERVICE IS NOT PROPER TOPIC FOR EXECUTIVE SESSION.

July 19, 1982

The Honorable J. Samuel Glasscock
Member, House of Delegates

This is in response to your letter with enclosures inquiring whether a city council violated the Virginia Freedom of Information Act (the "Act"), §§ 2.1-340 through 2.1-346.1 of the Code of Virginia in holding executive or closed meetings to discuss whether and upon what terms the city would permit its residents to defer payment of the costs of connecting with the public sewer system. First, you ask whether such a deferred payment plan is a proper topic for an executive or closed meeting under § 2.1-344(a). Second, you ask whether a councilman's reading of a prepared statement that council was going into closed session to consider "personnel, legal matters, land acquisitions and other matters covered by the Freedom of Information Act" complies with the requirements for holding an executive or closed meeting under § 2.1-344(b).

With respect to your first question, the letter you enclosed indicated that council was justifying closing the meetings at which the deferred payment plan was discussed by stating that the discussion concerned a "legal contract." Section 2.1-344(a)(6) permits closing a meeting for the purpose of discussing "actual or potential litigation, or other legal matters within the jurisdiction of the public body...." Whether a city's plan for deferred payment of sewer connection costs constitutes a "legal matter" within the meaning of this exemption must be determined in light of
This is in reply to your recent letter asking under what circumstances a public body may meet in executive session pursuant to the "potential litigation" and "legal matters" exemptions from the open meeting requirement of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

This Office has previously held that § 2.1-344(a)(6) is "designed to allow private discussions concerning... specific potential legal disputes..." and "specific legal questions...." (Emphasis added.) The Supreme Court of Virginia has held that "[i]t is neither necessary nor in the public interest to require as a prerequisite to closing a meeting pursuant to § 2.1-344(a)(6) that the governing body disclose in detail the legal matters or the legal issues to be considered...." Marsh, et al. v. Richmond Newspapers, Inc., et al., 223 Va. ___, 228 S.E.2d 415 (1982). It is mandatory, however, that the language of the specific statutory exemption be used in the motion to go into executive session. See § 2.1-344(b). Consequently, although a public body need not state in its motion the specific case or other legal matter to be discussed, there must exist a specific potential legal dispute or a specific legal question which will be discussed in the executive meeting.

Although I would not attempt to detail each situation that would come within the § 2.1-344(a)(6) exemption, following are several examples taken from previous Opinions of this Office.

1) Pending or potential obscenity prosecution of theater operators may be discussed in executive session.

2) Consideration of terms of proposed contractual arrangements with specific auto repair firms may be discussed in executive session.

3) Consideration of whether a particular provision of a zoning ordinance is constitutionally valid.

I am of the opinion, therefore, that exemptions from the public meetings requirement for discussion of "potential litigation" or "other legal matters" under § 2.1-344(a)(6)
apply only when such discussions deal with specific potential legal disputes and specific legal questions confronting the public body.

1Section 2.1-344(a)(6) allows executive or closed meetings for the purpose of "[c]onsultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to actual or potential litigation, or other legal matters within the jurisdiction of the public body, and discussions or consideration of such matters without the presence of counsel, staff, consultants, or attorneys."

41d.
51980-1981 Report of the Attorney General at 389. For purposes of § 2.1-344(a)(6), it would make no difference whether the challenged ordinance has been actually adopted or is only proposed for adoption.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE SESSIONS. DESIRABILITY OF DEFERRED PAYMENT PLAN FOR SEWER SERVICE IS NOT PROPER TOPIC FOR EXECUTIVE SESSION.

July 19, 1982

The Honorable J. Samuel Glasscock
Member, House of Delegates

This is in response to your letter with enclosures inquiring whether a city council violated the Virginia Freedom of Information Act (the "Act"), §§ 2.1-340 through 2.1-346.1 of the Code of Virginia in holding executive or closed meetings to discuss whether and upon what terms the city would permit its residents to defer payment of the costs of connecting with the public sewer system. First, you ask whether such a deferred payment plan is a proper topic for an executive or closed meeting under § 2.1-344(a). Second, you ask whether a councilman's reading of a prepared statement that council was going into closed session to consider "personnel, legal matters, land acquisitions and other matters covered by the Freedom of Information Act" complies with the requirements for holding an executive or closed meeting under § 2.1-344(b).

With respect to your first question, the letter you enclosed indicated that council was justifying closing the meetings at which the deferred payment plan was discussed by stating that the discussion concerned a "legal contract." Section 2.1-344(a)(6) permits closing a meeting for the purpose of discussing "actual or potential litigation, or other legal matters within the jurisdiction of the public body...." Whether a city's plan for deferred payment of sewer connection costs constitutes a "legal matter" within the meaning of this exemption must be determined in light of
the policy of the Act and the specific issues relating to the plan which the council wished to discuss. Section 2.1-340.1 expressly declares the policy that the Act's requirements are to be liberally construed to enable citizens to observe the operation of government and that the exemptions from the Act's requirements are to be narrowly construed "in order that nothing which should be public may be hidden from any person." The exemption for legal matters "may not be relied upon as a catch-all exemption from the open meeting requirements of the Act."1 This Office has opined that § 2.1-344(a)(6) requires the existence of a specific legal question which will be discussed in the executive or closed meeting.2 This Office has also opined that neither discussions of solutions to a city's drainage problems, nor possible reductions of city garbage collections are exempt from the Act.3

On the facts presented with your inquiry, discussion of the city's proposed plan for deferred payment for sewer connection costs apparently focused on the desirability of the proposed policy rather than any actual or potential legal question concerning the policy. Based solely upon this understanding and in view of the requirement of a narrow construction of the Act's exemptions, I am of the opinion that discussion of the policy of the city's proposed plan for deferred payment of sewer connection costs at closed meetings does not fall within the exemption for "legal matters" and is not, therefore, a proper topic for an executive meeting under § 2.1-344(a)(6). See Marsh v. Richmond Newspapers, Inc., 223 Va. 415, 228 S.E.2d 415 (1982).

Turning to your second question, § 2.1-344(b) provides that:

"No meeting shall become an executive or closed meeting unless there shall have been recorded in open meeting an affirmative vote to that effect by the public body holding such meeting, which motion shall state specifically the purpose or purposes hereinabove set forth in this section which are to be the subject of such meeting and a statement included in the minutes of such meeting which shall make specific reference to the applicable exemption or exemptions as provided in subsection (a) or § 2.1-345...."

The language of this section clearly requires the public body to adopt a motion during the open portion of a meeting that makes specific reference to the applicable statutory exemption(s) relied upon to go into executive session.4 The practice of merely reading a prepared statement prior to closing a meeting is not the same as the council's adopting such a motion. Accordingly, I am of the opinion that the practice you describe does not satisfy the requirement that a motion be adopted prior to closing a meeting.

As for the requisite specificity of a motion to close a meeting pursuant to § 2.1-344(a)(6), the Virginia Supreme
Court has found motions defective where there was no "identifiable connection between the motions to go into executive session and the business then under consideration..." by the public body. Additionally, this Office has opined that the motion must use the language of the specific statutory exemption.

In summary, I am of the opinion that discussion by the city council of a plan for deferred payment of sewer connection costs at closed meetings as described in the material submitted with your letter did not fall within § 2.1-344(a)(6) and that the mere reading of a statement did not comply with the Act's requirements for a motion stating a proper purpose with sufficient specificity.

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2Opinion to the Honorable Glenn B. McClanan, Member, House of Delegates, dated July 7, 1982.
4See Nageotte, et al. v. Board of Supervisors of King George County, et al., 223 Va., 228 S.E.2d (1982).
5Nageotte, supra. The motion need not, however, disclose the details of the legal matters to be considered. Marsh, supra.
6See McClanan Opinion, supra.

VIRGINIA FREEDOM OF INFORMATION ACT. HOSPITAL ASSOCIATION SUPPORTED WHOLLY OR PRINCIPALLY BY PUBLIC FUNDS SUBJECT TO ACT.

January 28, 1983

The Honorable David T. Stitt
County Attorney for Fairfax County

This is in reply to your letter of January 11, 1983, requesting an Opinion whether the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), applies to the Fairfax Hospital Association (the "Association").

You have advised that the Association is a non-profit, non-stock corporation organized under Ch. 2, Title 13.1, of the Code, and that it operates the Fairfax Hospital and other facilities under a lease with the county. The construction of Fairfax Hospital was financed by county bonds. You do not indicate whether the county contributes to the Association's operating budget. You have advised, however, that the Board of Supervisors of Fairfax County has appointed three of its members to the board of trustees of the Association as provided in the lease. In light of this arrangement, you have specifically asked:
1. Whether meetings of the Board of Trustees of the FHA [Fairfax Hospital Association] are subject to the open meeting requirements of Va. Code § 2.1-343 (Supp.) due to the presence and participation of three of the nine members of the Fairfax County Board of Supervisors as trustees.

2. Whether the FHA is an 'other organization, corporation, or agency in the State, supported wholly or principally by public funds' such that it is a 'public body' within the meaning of Va. Code § 2.1-341(e) (Supp.), subject to the VFOIA."

I will address your questions in inverse order.

Section 2.1-341(e) defines "public body" to mean "any of the groups, agencies or organizations enumerated in subsection (a) of this section."

Subsection (a) of 2.1-341 provides:

"'Meeting' or 'meetings' means the meetings, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of State institutions of higher education; and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds.

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Nothing in this chapter shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity." (Emphasis added.)

The question of whether the Association is supported principally by public funds, which would bring it within the scope of the Act, is a factual one. Webster's New Collegiate Dictionary (1979) defines "principal" as "most important, consequential, or influential." Black's Law Dictionary 1073 (5th ed. 1979) defines "principal" as "chief; leading; most important or considerable; primary; original." As you will note, no objective standard is set forth.
Although the Association clearly receives public support by use of facilities owned or financed by government, I cannot conclude from the information available to me that it is "principally" supported by public funds. If it is determined that the principal support of the Association is from public funds, it would be a public body subject to the Act.

The question remains that, even if the Association is not deemed to be supported principally by public funds, would it still be subject to the open meeting requirements of the Act (§ 2.1-344) because three members of the board of trustees of the Association are also members of the Board of Supervisors of Fairfax County. The question here is actually whether the assemblage of three members of the board of supervisors constitutes a meeting of the board of supervisors which would be subject to the Act. I fully recognize the sound purpose of the Act and the liberal construction to which its provisions are entitled. Nevertheless, I do not believe that the mere presence of three members of a board of supervisors on an entirely different and otherwise private board transforms the second board into a public body subject to the Act. While the three members will undoubtedly promote the public interest, they are gathered to conduct the business of the Association, not the board of supervisors. Accordingly, I conclude that the Association does not become a "public body" subject to the Act simply because three of its members are also members of the board of supervisors.

To summarize, I am of the opinion that if a determination is made that the Association is supported wholly or principally by public funds, it is deemed to be a public body which is subject to the Act. Otherwise, based on the facts presented, the Association would not be subject to the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. MEETINGS. WHEN SOCIAL FUNCTIONS NOT CONSIDERED MEETINGS.

August 20, 1982

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

This is in reply to your letter received on August 13, 1982, in which you asked my opinion on the applicability of the Virginia Freedom of Information Act to social functions, such as cocktail parties, attended by members of a city council. A typical invitation was enclosed with your letter. The invitation to attend the cocktail party indicated that it was being sponsored by the Chamber of Commerce in recognition of outstanding service performed by the present and retiring members of the city council.

Section 2.1-343 of the Code of Virginia requires that all "meetings" of public bodies, including local governing
bodies, shall be public meetings, except as otherwise provided by law. Section 2.1-341, which defines what constitutes a meeting, contains a proviso which reads in pertinent part as follows:

"Nothing in this chapter shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity."

It is clear from the foregoing quoted provision that social functions attended by members of public bodies do not fall within the purview of the Virginia Freedom of Information Act, in absence of evidence that such occasion was prearranged with the purpose of discussing or transacting any business of that public body.

Section 2.1-341(a) provides in part that "meetings" means the "meetings, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership, wherever held...."

VIRGINIA FREEDOM OF INFORMATION ACT. "OFFICIAL RECORDS" DO NOT INCLUDE TAPE RECORDINGS MADE AS BACK-UP FOR SHORTHAND NOTES TAKEN TO PREPARE MINUTES OF MEETING.

September 10, 1982

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

This is in reply to your letter of August 27, 1982, inquiring whether any provision of Virginia law prohibits the erasure of tape recordings of school board meetings after the minutes of the meeting have been prepared. You have advised that shorthand notes are taken during the meeting and later transcribed as minutes of the meeting and that the tape recording is used for reference in case there is a question in the transcription of the shorthand notes. The tape is then reused at the next meeting.

The Virginia Freedom of Information Act and the Virginia Public Records Act (the "Acts") provide for disclosure and retention of public records. In this case, however, it appears from the practices you describe that the tape recording is not intended to be the record of the school board meeting, but rather it is intended to serve as an aid in preparing the minutes which are required by the Freedom of Information Act.
Although the Association clearly receives public support by use of facilities owned or financed by government, I cannot conclude from the information available to me that it is "principally" supported by public funds. If it is determined that the principal support of the Association is from public funds, it would be a public body subject to the Act.

The question remains that, even if the Association is not deemed to be supported principally by public funds, would it still be subject to the open meeting requirements of the Act (§ 2.1-344) because three members of the board of trustees of the Association are also members of the Board of Supervisors of Fairfax County. The question here is actually whether the assemblage of three members of the board of supervisors constitutes a meeting of the board of supervisors which would be subject to the Act. I fully recognize the sound purpose of the Act and the liberal construction to which its provisions are entitled. Nevertheless, I do not believe that the mere presence of three members of a board of supervisors on an entirely different and otherwise private board transforms the second board into a public body subject to the Act. While the three members will undoubtedly promote the public interest, they are gathered to conduct the business of the Association, not the board of supervisors. Accordingly, I conclude that the Association does not become a "public body" subject to the Act simply because three of its members are also members of the board of supervisors.

To summarize, I am of the opinion that if a determination is made that the Association is supported wholly or principally by public funds, it is deemed to be a public body which is subject to the Act. Otherwise, based on the facts presented, the Association would not be subject to the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. MEETINGS. WHEN SOCIAL FUNCTIONS NOT CONSIDERED MEETINGS.

August 20, 1982

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

This is in reply to your letter received on August 13, 1982, in which you asked my opinion on the applicability of the Virginia Freedom of Information Act to social functions, such as cocktail parties, attended by members of a city council. A typical invitation was enclosed with your letter. The invitation to attend the cocktail party indicated that it was being sponsored by the Chamber of Commerce in recognition of outstanding service performed by the present and retiring members of the city council.

Section 2.1-343 of the Code of Virginia requires that all "meetings" of public bodies, including local governing
bodies, shall be public meetings, except as otherwise provided by law. Section 2.1-341, which defines what constitutes a meeting, contains a proviso which reads in pertinent part as follows:

"Nothing in this chapter shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity."

It is clear from the foregoing quoted provision that social functions attended by members of public bodies do not fall within the purview of the Virginia Freedom of Information Act, in absence of evidence that such occasion was prearranged with the purpose of discussing or transacting any business of that public body.

Section 2.1-341(a) provides in part that "meetings" means the "meetings, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership, wherever held." 1

VIRGINIA FREEDOM OF INFORMATION ACT. "OFFICIAL RECORDS" DO NOT INCLUDE TAPE RECORDINGS MADE AS BACK-UP FOR SHORTHAND NOTES TAKEN TO PREPARE MINUTES OF MEETING.

September 10, 1982

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

This is in reply to your letter of August 27, 1982, inquiring whether any provision of Virginia law prohibits the erasure of tape recordings of school board meetings after the minutes of the meeting have been prepared. You have advised that shorthand notes are taken during the meeting and later transcribed as minutes of the meeting and that the tape recording is used for reference in case there is a question in the transcription of the shorthand notes. The tape is then reused at the next meeting.

The Virginia Freedom of Information Act and the Virginia Public Records Act (the "Acts") provide for disclosure and retention of public records. In this case, however, it appears from the practices you describe that the tape recording is not intended to be the record of the school board meeting, but rather it is intended to serve as an aid in preparing the minutes which are required by the Freedom of Information Act.
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It is, therefore, my opinion that the minutes of the meeting would be the records that are governed by each of the Acts and that the tape recordings are simply aids in producing such records.1 I am unaware of any other provision of law which would prohibit the erasure of the tapes under the circumstances you describe. Accordingly, I conclude that Virginia law does not prohibit the erasure of tape recordings of a school board meeting which are made for reference purposes in preparing the minutes of the meeting.

If, however, the tape recordings were intended to be the records of the meeting, they would fall within the purview of the Acts.

VIRGINIA FREEDOM OF INFORMATION ACT. PLANNING COMMISSION MAY NOT RENDER OPINIONS IN OPEN MEETING BY SECRET BALLOT.

September 3, 1982

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

This is in reply to your letter dated August 25, 1982, requesting an Opinion whether a town planning commission may render opinions by secret ballot procedure at an open meeting.

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia, (the "Act") provides that all meetings shall be public meetings unless otherwise specifically provided by law.1 Meetings of a planning commission expressly come within the purview of the Act.2 This Office has opined that secret ballot voting by members of a public body constitutes a violation of the open meeting requirements of the Act3 and I concur with that conclusion.

Accordingly, I am of the opinion that a town planning commission may not render opinions by secret ballot in an open meeting without violating the open meeting requirements of the Act.

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1See § 2.1-343.
2See § 2.1-341(a).

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS. APPLICATION FOR PERMIT TO CARRY CONCEALED WEAPON SUBJECT TO MANDATORY DISCLOSURE UNLESS COURT ORDERS OTHERWISE.
The Honorable Lester E. Schlitz, Chief Judge
Circuit Court of the City of Portsmouth

This is in reply to your recent letter requesting an opinion whether applications for a permit to carry a concealed weapon, which are filed with the circuit court pursuant to § 18.2-308 of the Code of Virginia, must be made available for public inspection under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act").

Section 2.1-342(a) provides:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records."

Neither the Act itself, nor any other statute exempts these applications from mandatory disclosure. As an independent branch of government, however, courts have inherent powers, aside from statutory authority. Button v. Day, 204 Va. 547, 132 S.E.2d 292 (1963). There is authority for the view that the court, in its discretion, may order that its own records be kept confidential. The United States Supreme Court has held:

"It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Nixon v. Warner Communications Inc., 435 U.S. 589, 98 S.Ct. 1306, 1312 (1978).

Applying these two propositions together, I am of the opinion that a court's records, including applications for a permit to carry a concealed weapon, are subject to review under the Act unless the court enters an order prohibiting the records from disclosure. Accordingly, in the absence of a court order sealing the file, the applications would be available for public inspection under the Act.

The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates

This is in reply to your letter of February 15, 1983, requesting an Opinion regarding the Virginia Freedom of
Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You have asked the following:

"Whether or not a County can deny access to a draft management letter related to an audit of the County."

Section 2.1-342(a) provides in pertinent part:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records."

This Office has previously held that draft architectural reports and analyses were deemed to be "official records" for the purposes of the Act. I Likewise, I am of the opinion that the draft management letter to which you refer is also an "official record" for the purposes of the Act.

Because the Act requires that all official records shall be open to public inspection except as otherwise specifically provided by law, a determination must be made if there are any specific exemptions either under the Act or elsewhere in the Code which apply to the record in question. Section 2.1-342(b)(4) provides:

"(b) The following records are excluded from the provisions of this chapter:

***

(4) Memoranda, working papers and correspondence held or requested by...[the] chief executive officer of any political subdivision of the Commonwealth...."

If the draft management letter is held by the chief executive officer of the county, it would be exempt from mandatory disclosure under the Act. This exemption, however, does not apply to similar records held by others, and once the chief executive officer of the county disseminates any records held by him, those records lose the exemption accorded by § 2.1-342(b)(4).

I am unaware of any other provision of law which would exempt the draft management letter from the mandatory disclosure provisions of the Act.

I am, accordingly, of the opinion that if the draft management letter is held by the chief executive officer of the county, it would be exempt from mandatory disclosure pursuant to § 2.1-342(b)(4). If, however, the letter has been disseminated, it would lose the exemption and would be subject to mandatory disclosure under the Act.

1 See Opinion to the Honorable Douglas K. Baumgardner, Commonwealth's Attorney for the County of Rappahannock, dated October 21, 1982.

I have not seen the management letter and am not advised as to the scope or content. I assume it does not relate solely to one employee, nor to criminal charges, so as to be considered a personnel record, or a criminal investigation. If so, the letter would not be subject to mandatory disclosure.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS OF VOLUNTEER FIRE DEPARTMENT SUPPORTED WHOLLY OR PRINCIPALLY BY PUBLIC FUNDS ARE "OFFICIAL RECORDS."

September 15, 1982

The Honorable W. Ward Teel
Member, House of Delegates

This is in reply to your letter of September 2, 1982, inquiring whether the board of directors of a volunteer fire department is required to make public the reasons for the one-month suspension of its fire chief. You advise that the fire department is funded by State and local tax dollars.

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1, (the "Act") applies to the official records and meetings of "public bodies." For the purposes of the Act, if the volunteer fire department is, in fact, supported wholly or principally by public funds, its board would be considered a public body. Section 2.1-342 provides that "[e]xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth...." (Emphasis added.) Likewise, § 2.1-343 provides in pertinent part that "[e]xcept as otherwise specifically provided by law...all meetings shall be public meetings." (Emphasis added.)

The Act itself provides that records regarding certain matters are excluded from the Act. Section 2.1-342(b)(3) excludes personnel records from mandatory disclosure. Section 2.1-344(a)(1) excludes "[d]iscussion or consideration of...performance, demotion...disciplining or resignation of public officers, appointees or employees of any public body..." from the public meeting requirement.

I am of the opinion, therefore, that under the Act personnel records that contain the reasons for the fire chief's suspension are not required to be disclosed. Additionally, I conclude that, if the decision to suspend the fire chief was made in a properly convened executive meeting, a report of any discussion of this matter held in executive session need not be made public.
Section 2.1-341(e) defines "public body" as any groups, agencies or organizations enumerated in subsection (a), i.e., "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of State institutions of higher education; and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds...." (Emphasis added.)

This assumes for purposes of my response that the volunteer fire department is wholly or principally funded by State or local funds. Except for that fact, the department would not constitute a "public body" in the usual sense; hence, not subject to the Act. In making this assumption, I note that the Act is to be liberally construed so that the public will receive the benefits of its purpose, and that exemptions from the Act are to be narrowly construed.

See § 2.1-344(b).

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS WHICH CONTAIN INFORMATION WHICH MAY NOT BE MADE PUBLIC UNDER PROVISIONS OF § 58-46 NOT REQUIRED TO BE MADE PUBLIC BY ACT.

December 15, 1982

The Honorable William P. Robinson, Jr.
Member, House of Delegates

This is in reply to your recent letter inquiring whether the officials and agents of a municipality, county or other governmental entity within the Commonwealth of Virginia may refuse to provide information over the telephone concerning the names, addresses and/or telephone numbers of applicants for business licenses within those entities on the grounds that such transmittal of information would violate applicable State or federal laws or regulations concerning dissemination of information. For the purposes of this Opinion, we shall assume that the records in question are governed by the Virginia Freedom of Information Act.

Section 2.1-342 of the Code of Virginia, a part of the Virginia Freedom of Information Act (the "Act"), provides that "[e]xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth...." Although some types of records are excluded from the provisions of the Act in subparagraph (b) of § 2.1-342, the records about which you ask do not fall within such exclusions.

Section 58-46, however, does prohibit the dissemination of certain information by the commissioner of revenue. The pertinent language of § 58-46 reads as follows:
"[I]t shall be unlawful for the...commissioner of the revenue...to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties."

The statute furnishes interpretative guidelines by further stating that:

"This section shall not be construed to prohibit a local tax official from disclosing whether a person, firm or corporation is licensed to do business in that locality."

This Office has held that § 58-46 prohibits neither the disclosure of the address of a business licensee nor the disclosure of the type of business for which a taxpayer is licensed.1 I concur in this conclusion and would extend it to permit the disclosure of a licensee's published telephone number. There is no requirement that a local tax official prepare a list of business licensees with addresses and telephone numbers upon a request for such a list. It is within the discretion of such official whether a request for such a list should be granted. However, once the list is prepared, it would be subject to further disclosure in accordance with the Act.2

I further conclude that the Privacy Protection Act, §§ 2.1-377 through 2.1-386, does not prohibit public disclosure of the addresses and telephone numbers of business licensees. Such records are not records which contain "personal information" as defined in § 2.1-379(2). Moreover, the Privacy Protection Act does not prohibit the dissemination of records containing personal information where dissemination of such records is otherwise required or permitted by law.3 If the records contain information which may not be made public under the provisions of § 58-46, the Freedom of Information Act would not require their disclosure. However, if records containing addresses and telephone numbers of business licensees do not also contain such confidential information, the provisions of the Freedom of Information Act would require their disclosure and, thus, the Privacy Protection Act would not prohibit the disclosure.4

I am unaware of any federal law that would prohibit the disclosure of addresses and telephone numbers of business licensees.

I, therefore, am of the opinion that neither State nor federal law prohibits the dissemination of the information about which you inquire. I would reiterate, however, that the commissioner of revenue or other official need not compile a list containing such information if it does not already exist. Additionally, I am of the opinion that the Act does not prohibit a policy of providing such information only when requested in person or by written request in order
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VIRGINIA FREEDOM OF INFORMATION ACT. REPORTS COMPILED EXCLUSIVELY FOR EXECUTIVE SESSION LOSE THEIR EXEMPT STATUS IF ESSENCE OF SUBSTANCE AND CONTENTS WERE SUBJECT OF DISCUSSION IN OPEN MEETING.

October 21, 1982

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

This is in reply to your recent letter in which you request my opinion regarding the application of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act") to certain architectural reports.1 Your letter, with enclosures, indicated that the reports in question were discussed in open session although they had been prepared to be used in executive session.

Your inquiry presents the following questions:

1. Is the superintendent of schools for a local school division considered the "chief executive officer" of a political subdivision of the Commonwealth under the Act?

2. Are draft architectural reports and analyses regarding a proposed new administrative facility considered working papers and/or records recorded in or compiled exclusively for executive or closed meetings lawfully held pursuant to § 2.1-344 and therefore excluded from the mandatory disclosure requirements of the Act?

Section 2.1-342(b)(4) provides:

"(b) The following records are excluded from the provisions of this chapter:

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(4) Memoranda, working papers and correspondence held or requested by...[the] chief executive officer of any political subdivision of the Commonwealth...."

This Office has consistently held that for purposes of the Act school boards are political subdivisions and the superintendents are their chief executive officers.2 Therefore, if the reports were held by the superintendent of schools, they would be exempt from mandatory disclosure under the Act. This exemption, however, does not apply to similar

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2See § 2.1-380(1).
records held by the school board\(^3\) and once the superintendent 
disseminates records held by him to the school board those 
records lose the exemption accorded by § 2.1-342(b)(4).

Section 2.1-342(b)(11) excludes from mandatory 
disclosure, among other records,

"Memoranda, legal opinions, working papers and records 
recorded in or compiled exclusively for executive or 
closed meetings lawfully held pursuant to § 2.1-344."

You state that the records in question are draft 
architectural reports and analyses. If the documents were 
prepared exclusively for an executive meeting which was 
lawfully held pursuant to § 2.1-344, then they would be 
exempt unless subsequent actions were taken which caused the 
documents to lose their exemption.\(^4\)

Although the documents in question may have been 
prepared exclusively for executive session, you indicate that 
the public body discussed the reports in open session in 
addition to the discussion in executive session. If the 
essence of the report was disclosed by the public body in 
open session, I am of the opinion that the reports lost the 
privileged protection provided in the exemption of 
§ 2.1-342(b)(11). To hold otherwise would allow any report 
prepared for a public body to be exempt from mandatory 
disclosure even if it were disclosed in open session as long 
as it was purportedly prepared for executive session. Such a 
result would be contrary to the purpose of the Act.

The mere fact that reference is made in public session 
to a report lawfully received in executive session will not, 
however, cause the report to lose its exemption. It 
necessarily becomes a factual determination whether the 
board's public discussion has so revealed the essence of the 
report's content that the report has, by reason of the public 
discussion, become a part of the public domain.\(^5\)

In summary, I am of the opinion that the superintendent 
of schools is considered to be the chief executive officer of 
a political subdivision of the Commonwealth for the purposes 
of the Act. Additionally, I conclude that the draft 
architectural reports and analyses would not be exempt from 
the mandatory disclosure requirements of the Act under 
§ 2.1-342(b)(11) if the essence of their substance and 
contents were the subject of discussion in open meeting, even 
though they may have been initially prepared exclusively for 
use in executive session.

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\(^1\)Based upon the definition of "official records" contained 
in § 2.1-341(b) it is apparent that the reports are official 
records for purposes of the Act.

Section § 2.1-344 permits a public body to meet lawfully in executive session to discuss the condition, acquisition or use of real property for public purposes and to receive briefings by staff members on legal matters within the jurisdiction of the body. See §§ 2.1-344(a)(2) and 2.1-344(a)(6). Of course, the public body may not take final action in such a meeting. See § 2.1-344(b).

In reaching this conclusion, I believe it is necessary to focus on the action of the public body, as such, in revealing the content of an otherwise exempt report, and not on the unilateral statements of a board member who, whether in public session or not, comments on such a report.

VIRGINIA FREEDOM OF INFORMATION ACT. SALARIES. ONE PERSON WHO HOLDS TWO POSITIONS. DISCLOSURE REQUIRED IF SALARY IS OVER $10,000 PER YEAR.

April 5, 1983

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

This is in reply to your letter which we received on March 28, 1983, requesting an Opinion regarding the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You have advised that the county administrator is paid a salary for serving as county administrator in excess of $10,000. The same person also serves as the local Coordinator of Emergency Services (the "Coordinator"). His salary for serving as the Coordinator is less than $10,000 per year and is based on a pro rata percentage of his salary as a county employee.

You have asked whether two salaries are being paid to one person, one for performing the duties of county administrator and one for performing the duties of the Coordinator. If the answer is in the affirmative, you have asked if the salary for serving as Coordinator is subject to disclosure under the Act, or if the two salaries are to be added together, thereby making both subject to disclosure if the total exceeds $10,000 even though one may be less than $10,000.

Section 2.1-342(a) provides that all "official records" shall be open to inspection and copying, except as otherwise specifically provided by law. Although § 2.1-342(b)(3) specifically exempts personnel records from the mandatory disclosure provisions of the Act, § 2.1-342(c) requires disclosure of the salaries and positions of certain public officials. Prior to the enactment of this subsection in 1978, this Office had interpreted § 2.1-342(b)(3) as exempting all salaries from mandatory disclosure, as being a part of the personnel record. See 1975-1976 Report of the Attorney General at 416. Section 2.1-342(c) provides:
to further the proper and efficient administration of the office.

2Id.
3See § 2.1-380(1).

VIRGINIA FREEDOM OF INFORMATION ACT. REPORTS COMPILED EXCLUSIVELY FOR EXECUTIVE SESSION LOSE THEIR EXEMPT STATUS IF ESSENCE OF SUBSTANCE AND CONTENTS WERE SUBJECT OF DISCUSSION IN OPEN MEETING.

October 21, 1982

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

This is in reply to your recent letter in which you request my opinion regarding the application of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act") to certain architectural reports.1 Your letter, with enclosures, indicated that the reports in question were discussed in open session although they had been prepared to be used in executive session.

Your inquiry presents the following questions:

1. Is the superintendent of schools for a local school division considered the "chief executive officer" of a political subdivision of the Commonwealth under the Act?  

2. Are draft architectural reports and analyses regarding a proposed new administrative facility considered working papers and/or records recorded in or compiled exclusively for executive or closed meetings lawfully held pursuant to § 2.1-344 and therefore excluded from the mandatory disclosure requirements of the Act?

Section 2.1-342(b)(4) provides:

"(b) The following records are excluded from the provisions of this chapter:

***

(4) Memoranda, working papers and correspondence held or requested by...[the] chief executive officer of any political subdivision of the Commonwealth...."

This Office has consistently held that for purposes of the Act school boards are political subdivisions and the superintendents are their chief executive officers.2 Therefore, if the reports were held by the superintendent of schools, they would be exempt from mandatory disclosure under the Act. This exemption, however, does not apply to similar
to further the proper and efficient administration of the office.

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2 Id.
3 See § 2.1-380(1).

VIRGINIA FREEDOM OF INFORMATION ACT. REPORTS COMPILED EXCLUSIVELY FOR EXECUTIVE SESSION LOSE THEIR EXEMPT STATUS IF ESSENCE OF SUBSTANCE AND CONTENTS WERE SUBJECT OF DISCUSSION IN OPEN MEETING.

October 21, 1982

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

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This Office has consistently held that for purposes of the Act school boards are political subdivisions and the superintendents are their chief executive officers. Therefore, if the reports were held by the superintendent of schools, they would be exempt from mandatory disclosure under the Act. This exemption, however, does not apply to similar
records held by the school board and once the superintendent disseminates records held by him to the school board those records lose the exemption accorded by § 2.1-342(b)(4).

Section 2.1-342(b)(11) excludes from mandatory disclosure, among other records,

"Memoranda, legal opinions, working papers and records recorded in or compiled exclusively for executive or closed meetings lawfully held pursuant to § 2.1-344."

You state that the records in question are draft architectural reports and analyses. If the documents were prepared exclusively for an executive meeting which was lawfully held pursuant to § 2.1-344, then they would be exempt unless subsequent actions were taken which caused the documents to lose their exemption.

Although the documents in question may have been prepared exclusively for executive session, you indicate that the public body discussed the reports in open session in addition to the discussion in executive session. If the essence of the report was disclosed by the public body in open session, I am of the opinion that the reports lost the privileged protection provided in the exemption of § 2.1-342(b)(11). To hold otherwise would allow any report prepared for a public body to be exempt from mandatory disclosure even if it were disclosed in open session as long as it was purportedly prepared for executive session. Such a result would be contrary to the purpose of the Act.

The mere fact that reference is made in public session to a report lawfully received in executive session will not, however, cause the report to lose its exemption. It necessarily becomes a factual determination whether the board's public discussion has so revealed the essence of the report's content that the report has, by reason of the public discussion, become a part of the public domain.

In summary, I am of the opinion that the superintendent of schools is considered to be the chief executive officer of a political subdivision of the Commonwealth for the purposes of the Act. Additionally, I conclude that the draft architectural reports and analyses would not be exempt from the mandatory disclosure requirements of the Act under § 2.1-342(b)(11) if the essence of their substance and contents were the subject of discussion in open meeting, even though they may have been initially prepared exclusively for use in executive session.

1Based upon the definition of "official records" contained in § 2.1-341(b) it is apparent that the reports are official records for purposes of the Act.
Section § 2.1-344 permits a public body to meet lawfully in executive session to discuss the condition, acquisition or use of real property for public purposes and to receive briefings by staff members on legal matters within the jurisdiction of the body. See §§ 2.1-344(a)(2) and 2.1-344(a)(6). Of course, the public body may not take final action in such a meeting. See § 2.1-344(b).

In reaching this conclusion, I believe it is necessary to focus on the action of the public body, as such, in revealing the content of an otherwise exempt report, and not on the unilateral statements of a board member who, whether in public session or not, comments on such a report.

VIRGINIA FREEDOM OF INFORMATION ACT. SALARIES. ONE PERSON WHO HOLDS TWO POSITIONS. DISCLOSURE REQUIRED IF SALARY IS OVER $10,000 PER YEAR.

April 5, 1983

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

This is in reply to your letter which we received on March 28, 1983, requesting an Opinion regarding the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You have advised that the county administrator is paid a salary for serving as county administrator in excess of $10,000. The same person also serves as the local Coordinator of Emergency Services (the "Coordinator"). His salary for serving as the Coordinator is less than $10,000 per year and is based on a pro rata percentage of his salary as a county employee.

You have asked whether two salaries are being paid to one person, one for performing the duties of county administrator and one for performing the duties of the Coordinator. If the answer is in the affirmative, you have asked if the salary for serving as Coordinator is subject to disclosure under the Act, or if the two salaries are to be added together, thereby making both subject to disclosure if the total exceeds $10,000 even though one may be less than $10,000.

Section 2.1-342(a) provides that all "official records" shall be open to inspection and copying, except as otherwise specifically provided by law. Although § 2.1-342(b)(3) specifically exempts personnel records from the mandatory disclosure provisions of the Act, § 2.1-342(c) requires disclosure of the salaries and positions of certain public officials. Prior to the enactment of this subsection in 1978, this Office had interpreted § 2.1-342(b)(3) as exempting all salaries from mandatory disclosure, as being a part of the personnel record. See 1975-1976 Report of the Attorney General at 416. Section 2.1-342(c) provides:
"Neither any provision of this chapter nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this title shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of state, local or regional government in this Commonwealth whatsoever. The provisions of this subsection, however shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less."

Section 2.1-342(c) requires, inter alia, the disclosure of records of the position, job classification, official salary or rate of pay of public officials or employees whose annual rate of pay is over $10,000. It is my opinion that the salary which must be disclosed is that which corresponds to the position or job classification of the public official or employee in question.

Accordingly, I am of the opinion, based on the above facts, that two salaries are being paid to one person. The two salaries would be considered separately for purposes of the Act. The salary for performing the duties of the county administrator, if over $10,000 per year, would be subject to the mandatory disclosure provisions of the Act and the salary for serving as Coordinator, if less than $10,000 per year, would not be subject to such mandatory disclosure requirements.

1See Opinion to the Honorable Shirley F. Cooper, Member, House of Delegates, dated March 7, 1983.
2The fact that the salary for being the Coordinator is based on a pro rata percentage of his salary from the county does not alter this conclusion.
3The Act does not prohibit discretionary disclosure of either salary. See 1980-1981 Report of the Attorney General at 394. Consequently, the salary of the position of Coordinator could likely be obtained through the budget papers or other records, excepting personnel records.

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT. FRANCHISE AGREEMENTS. NOTICE FROM REFINER OF PETROLEUM PRODUCTS TO RETAIL DEALERS ADVISING DEALERS OF DEDUCTION OF COSTS INCURRED IN EXTENDING RETAIL CREDIT FROM TANKWAGON PRICES AND INCORPORATING PROVISIONS OF PERTINENT STATUTE COMPLIES WITH VIRGINIA LAW.

July 26, 1982

The Honorable Warren G. Stambaugh
Member, House of Delegates
You have asked whether a written notice from the Texaco Corporation ("Texaco") to its Virginia dealers engaged in the retail sale of petroleum products, under franchise agreements with Texaco, is in compliance with § 59.1-21.11(g) of the Code of Virginia, a part of the Virginia Petroleum Products Franchise Act (the "Act"), §§ 59.1-21.8 through 59.1-21.18:1.

Section 59.1-21.11 enumerates certain provisions that are implied by law into franchise agreements between producers or refiners of petroleum products and retail dealers. Subsection (g) of the section, which was added as a 1982 amendment to the Act provides as follows:

"A producer or refiner may require a dealer to pay a fee or charge for the privilege of honoring a credit card issued by the producer or refiner and used by customers of the dealer in purchasing at retail products and services at retail outlets which bear the brand name or trademark of the producer or refiner only if such producer or refiner has deducted the cost of extending retail credit from the tankwagon price charged dealers, has notified the dealer in writing of such deduction and such fee is a part of a program designed (i) to induce retail purchases for cash or (ii) to separate the cost of extending retail credit from the tankwagon price paid by the dealer. The amount of any such fee or charge shall be directly related to the actual cost incurred by the producer or refiner in the extension of retail credit." (Emphasis added.)

The notice to which you refer, dated June 28, 1982, states:

"Under provisions of § 59.1-21.11 of the Code of Virginia, as amended, Texaco Inc. makes the following disclosures relative to the three per cent (3%) processing charge which Texaco imposes for the redemption of credit card invoices:

I. You are notified that Texaco has deducted the cost of extending retail credit from the tankwagon price of motor fuels sold at retail.

II. You are further notified that Texaco's 3% processing charge is part of a program designed to separate the cost of extending retail credit from the tankwagon prices paid by the retailer.

III. You are finally notified that the 3% processing charge is directly related to Texaco's annual cost incurred in the extension of retail credit."

The requirements of subsection (g) provide that only the notice of the deduction of the cost of extending retail credit from the tankwagon price be communicated in writing to the dealer. No other limitations or directions regarding the
language to be used are included in the statute. The language in the notice sent by Texaco notifies its dealers of the deduction. Accordingly, I am of the opinion that Texaco's notice to its retail dealers is in compliance with the notice provision of § 59.1-21.11.

VIRGINIA PUBLIC PROCUREMENT ACT. CHANGE ORDERS INCREASING ORIGINAL CONTRACT AMOUNT. WHEN ADVANCE WRITTEN APPROVAL REQUIRED.

May 19, 1983

The Honorable G. C. Jennings
Member, House of Delegates

This is in reply to your letter which we received on May 9, 1983, requesting an Opinion regarding the application of § 11-55 of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"), to the following situation.

In 1982 the Carroll County School Board let a contract in the amount of $596,128. Subsequent change orders increased the value of the contract to $629,705.80. The school board is now contemplating changes that would increase the contract amount by more than another $10,000. You have asked whether § 11-55 requires the advance written approval of the governing body.2

Section 11-55 provides in part:

"A. A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25 percent of the amount of the contract or $10,000, whichever is greater, without the advance written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions." (Emphasis added.)

Advance written approval of the governing body is required if modifications to the contract result in an increase of the greater of $10,000 or twenty-five percent of the amount of the contract. Although the increase in this instance, as you have indicated, is more than $10,000, apparently it will not exceed $149,032 (which would be twenty-five percent of the original contract price). I am, therefore, of the opinion that advance written approval is not required.

1For the purposes of this Opinion, I assume that the provisions of § 11-55 (not a "mandatory section" of the Act) are effective in Carroll County.
You did not inquire whether the previous change orders violated § 11-55. The view expressed in this Opinion addresses only the proposed change order, but I am of the opinion that the limitation in § 11-55 applies to the aggregate change orders in a contract.

VIRGINIA PUBLIC PROCUREMENT ACT. COOPERATIVE AGREEMENT ALLOWED BETWEEN SCHOOL BOARD AND BOARD OF SUPERVISORS THAT HAS ADOPTED ALTERNATIVE POLICIES AND PROCEDURES PURSUANT TO § 11-35.

June 6, 1983

The Honorable Floyd C. Bagley
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion whether a school board proposal for renewal of Blue Cross-Blue Shield hospital and dental insurance for employees complies with the requirements of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"). The proposal is for the school board to enter into a cooperative agreement with the county board of supervisors for the purposes of negotiating a renewal of the insurance contract and that such renewal be done without bids.

Section 11-41(A) provides in part:

"All public contracts with nongovernmental contractors...for the purchase of...insurance...shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law." (Emphasis added.)

Therefore, unless the law specifically provides otherwise, contracts for insurance, including the renewal of such contracts, must be awarded through competitive sealed bidding or competitive negotiation.

Section 11-41(C) provides:

"Upon a determination in writing that competitive sealed bidding is either not practicable or not advantageous to the public, goods, services, insurance or construction may be procured by competitive negotiation. The writing shall document the basis for this determination."

Thus, if a determination is made in writing that competitive sealed bidding is either not practicable or not advantageous to the public, the contract may be procured by competitive negotiation as defined in § 11-37. Section 11-37 specifies that proposals be submitted after a request for proposals has been issued and timely notice of such request for proposals has been given. Negotiations may then be conducted with each offeror who is deemed to be fully qualified and best suited
among those submitting proposals. The public body may, after a determination in writing that only one offeror is fully qualified or that one offeror is clearly more highly qualified than the others under consideration, decide that the contract may be negotiated and awarded to that offeror.

The foregoing procedure is based upon a request for proposals being made and a subsequent narrowing of the field of offerors. It does not contemplate requesting only one offeror to make a proposal for the contract as indicated in the instant case if other sources are practicably available.\(^2\)

On the other hand, the procedures set out in § 11-37 do not apply in every situation.\(^3\) While not here germane, any town with a population of less than 3,500 is exempt from the foregoing requirements. Also, the procedures do not apply to a county, city or town if it has adopted its own alternative policies and procedures for the procurement of goods and services. Section 11-35(D) allows a governing body to adopt by ordinance or resolution alternative policies and procedures which are based on competitive principles. Although the Act does not define "competitive principles," I believe the intent of the legislature, as expressed in § 11-35(G), contemplates a procedure which gives all qualified vendors an opportunity to submit a proposal. Paragraph G reads as follows:

"To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered."

In summary, the proposal by the school board to enter into a cooperative agreement with the county is a valid procedure, provided the contract to be thereafter negotiated is awarded after competitive sealed bidding or competitive negotiation, or pursuant to an adopted procedure based on competitive principles.\(^4\) Based on the facts before me, it does not appear that the proposal for renewal of the group insurance complies with the foregoing requirements. Accordingly, I am of the opinion that the selection of only one insurance company to submit a proposal would be in
violation of the purpose of the Act as expressed in § 11-35 and would not be in compliance with the procedures of competitive negotiation as set forth in § 11-37. This conclusion is based on the assumption that more than one source is practicably available in this case. Section 11-41(D) does permit a negotiated contract without competitive sealed bidding or competitive negotiation upon a determination in writing that there is only one source practicably available.

1Section 11-40 permits cooperative agreements between any public body with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to § 11-35(C) or 11-35(D).

2See § 11-35(C).

3Section 11-41(F) permits a public body to establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed $10,000; however, the procedure must provide for competition whenever practicable.

4Although not essential in replying to your inquiry, it should be noted that by passage of Ch. 593 (S.B. 226) in the 1983 session, the General Assembly has provided authority for school boards to adopt alternative procurement policies and procedures if the board is not covered by a centralized purchasing ordinance applicable in the locality. Any such alternative procedures must be based on competitive principles.

VIRGINIA PUBLIC PROCUREMENT ACT. COOPERATIVE PROCUREMENT AGREEMENT MAY REQUIRE PROCUREMENT PURSUANT TO POLICIES AND PROCEDURES OF ONE PARTICIPATING PUBLIC BODY.

December 14, 1982

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

You have asked whether a cooperative procurement agreement between the City of Chesapeake and other public bodies pursuant to the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"), would enable the city's purchasing agent to procure goods and services for participating public bodies, regardless of whether the city participates in each procurement. You indicate that the city proposes to extend the services of its centralized procurement program to the local mosquito control commission and other entities, and you advise that the city desires to procure all goods and services in compliance with the city's procurement ordinance.
Section 11-40 provides as follows:

"Any public body may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more public bodies, or agencies of the United States, for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to § 11-35C or § 11-35D of this chapter shall comply with said alternative policies and procedures so adopted by said governing body of such county, city or town."

Section 11-35(C) exempts from the Act towns having populations of less than 3500, subject to certain mandatory provisions enumerated in § 11-35(E). Section 11-35(D) affords the same exemption to counties, cities and towns which adopt alternative competitive procurement policies and procedures.

The Opinion to the Honorable L. Ray Garland, dated December 7, 1982, which holds that any "public body", as defined by § 11-37, which enters into a cooperative procurement agreement with a county, city or town which has adopted alternative policies and procedures pursuant to § 11-40 must follow such alternative policies and procedures. This is the only mandatory provision of § 11-40, and the remaining language of that section indicates that the General Assembly intended that participating public bodies should have the discretion to agree upon the procedures by which they combine their procurement functions. Given that discretion, it would be appropriate for them to agree that the administrative policies and procedures of one public body shall apply to every procurement. If a partial exemption from the Act is desired, the centralized procedures would have to be those of a county, city or town qualifying for an exemption under § 11-35.

Accordingly, I am of the opinion that should the City of Chesapeake and other public bodies, including the mosquito control commission, enter into a cooperative procurement agreement pursuant to § 11-40, such an agreement may provide that the city purchasing agent may procure goods and services for all participating public bodies in accordance with the city's procurement ordinance. There is no requirement in the Act that the purchases for the participating public bodies, such as the mosquito control commission, be made only in conjunction with similar purchases for the city. In this regard, I believe that the Act is sufficiently broad to permit the city purchasing agent to make such purchases on behalf of the other public bodies at such times as those bodies request, provided the requests are in accordance with the terms of the cooperative procurement agreement and with the terms of the city's alternative policies and procedures.
August 4, 1982

The Honorable John M. Lohr  
Commonwealth's Attorney for Highland County

This is in reply to your letter of July 21, 1982, requesting an Opinion whether § 11-43(B) of the Code of Virginia would prohibit an agreement between the Highland County School Board and an oil supply company to supply gasoline to the school system.

Section 11-43(B) provides in pertinent part:

"Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost...."

A cost-plus contract is one which fixes the amount to be paid the contractor (i.e., the gasoline supplier) on a basis, generally, of the cost of the material and labor, plus an agreed percentage thereof as profits. Black's Law Dictionary 312 (5th ed. 1979). The agreement you describe in your accompanying letter is for the purchase of gasoline at consumer tank wagon price, which is the going bulk rate, less a set discount and less Virginia and other fuel taxes. Such agreement does not fall in the category of a "cost plus percentage of cost" contract and, therefore, would not be prohibited by § 11-43(B).

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1This is part of the Virginia Public Procurement Act which will go into effect on January 1, 1983.

April 1, 1983

The Honorable Johnny S. Joannou  
Member, House of Delegates

You have requested my opinion on the applicability of the Virginia Public Procurement Act (the "Act") in the following situation:

The City of Portsmouth collects and forwards premiums for group life insurance to an insurance company on behalf of certain firefighters and police employed by the city who belong to associations. It deducts the premiums from their
paychecks as a convenience to these police officers and firefighters pursuant to an agreement made with the associations some time ago. These group life insurance policies are not part of the city benefit package for its police and firefighters, but are rather contracts which they have procured through their own associations. The financial responsibility for making premium payments rests on the policemen and firefighters themselves. Were this money not deducted from individual paychecks, it would be paid to the employees. The only involvement of the city is the gratuitous service which it renders to these employees by deducting and forwarding the premium payments.

You asked whether, under these circumstances, the Act (Title 11, Ch. 7 of the Code of Virginia) requires the City of Portsmouth to competitively purchase such insurance on behalf of these firefighters and police officers.

Section 11-41(A) (part of the Act) states as follows:

"All public contracts with nongovernmental contractors for the purchase...of...insurance...shall be awarded after competitive sealed bidding, or competitive negotiations as provided in this section, unless otherwise authorized by law."

The subsection just quoted is the basic provision of the Act requiring competitive purchasing procedures for the procurement of insurance by public contract. A public contract is one procured by a "public body." The term "public body" is defined in § 11-37 to mean:

"[A]ny legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter."

The associations do not fall within this definition of a "public body," because they are not created by law to exercise sovereign power or to perform governmental duties. They are private organizations created to further private rather than public, governmental ends. The contracts of insurance are between the insurance company and these two private organizations. I am of the opinion, therefore, that the policies of insurance are not public contracts and need not be procured pursuant to the provisions of the Act. The gratuitous service provided by the City of Portsmouth in making the premium deduction from the payroll of the individuals concerned is a courtesy extended to them which does not change the status of their private insurance policies to that of public contracts.
VIRGINIA PUBLIC PROCUREMENT ACT. SEWER AUTHORITY IS PUBLIC BODY WHOSE CONTRACTS WITH NONGOVERNMENTAL CONTRACTORS ARE GOVERNED BY ACT.

June 8, 1983

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your letter regarding the application of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"). Specifically, you have asked:

1. Is a sewer authority, formed under the Water and Sewer Authorities Act, subject to the provisions of the Virginia Public Procurement Act?

2. If an attorney, under letter contract with the Sewer Authority, requested a change in the rates set forth in the March 31, 1976 letter, would the change in fees represent a new contract which would require a solicitation of proposals under the revised Virginia Public Procurement Act?

Section 11-37 defines a "public body" as "any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in [the Act]." A sewer authority created pursuant to the Virginia Water and Sewer Authorities Act is "a public body politic and corporate" and is empowered to exercise "public and essential governmental functions to provide for the public health and welfare...." Accordingly, I am of the opinion that such a sewer authority would be a public body whose contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, are governed by the Act.

The answer to your second question depends upon a determination of whether the contract with the attorney is an exception to the Act. A change in the consideration to be paid, with no corresponding change in his duties is not sufficient to support a conclusion that it is a modifying agreement and, consequently, such a change in the fee arrangement would be the basis of an entirely new agreement which, unless exempt, would be subject to the provisions of the Act if entered into after January 1, 1983.

This particular contract may be excluded from the competitive sealed bidding or competitive negotiation requirements of the Act if: (1) this is a single or term contract which is not expected to exceed ten thousand dollars and there is a written purchase procedure providing for competition wherever practicable or (2) the contract is for...
legal services associated with litigation or regulatory proceedings.  

Accordingly, I am of the opinion that although sewer authority contracts are generally governed by the Act, this contract may be exempt from the requirements of competitive negotiation as described in § 11-37, depending upon the circumstances in the case.

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1See § 15.1-1241.
2See § 15.1-1250.
3See § 11-41.
5Section 11-41(A) provides: "All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law."
6See § 11-41(6).
7Section 11-45(B) provides: "Any public body may enter into contracts for legal services, expert witnesses, and other services associated with litigation or regulatory proceedings without competitive sealed bidding or competitive negotiation, provided that the pertinent provisions of Chapter 11 (§ 2.1-117 et seq.) of Title 2.1 of the Code remain applicable."

VIRGINIA REAL ESTATE TRANSACTION RECOVERY ACT. EXPENDITURES OF INTEREST EARNED ON FUND CREATED BY ACT SHOULD BE SPENT IN ACCORDANCE WITH STATE PURCHASING REGULATIONS.

June 8, 1983

The Honorable Bernard L. Henderson, Jr., Director Virginia Department of Commerce

You have asked whether interest earned on the Virginia Real Estate Transaction Recovery Fund (the "Fund") must be spent in accordance with Regulations of the Department of General Services or the Department of Management Analysis and Systems Development.

The Virginia Real Estate Transaction Recovery Act, §§ 54-765.1 through 54-765.9 of the Code of Virginia (the "Act"), was enacted by the General Assembly in 1977 to provide a source of money which the Commonwealth's courts could use to help citizens recover losses incurred as a result of improper conduct by persons or entities licensed by the Virginia Real Estate Commission. The source of the Fund is assessments on members of the licensed real estate profession. The Act establishes, among other things, that
the money is to be deposited in one or more federally insured
banks or savings and loan associations in the Commonwealth. See § 54-765.3(B). Payments of claims are made only upon a 
court order. See § 54-765.4(B). The interest earned on the 
deposits in the Fund is used first to pay the costs of 
administration, and the remainder may be spent "at the 
discretion of the Commission...for the purpose of providing 
research and education on subjects of benefit to real estate 
licensees or may accrue to the fund." Section 54-765.3(F).

The Division of Purchases and Supply ("DPS") is the 
procuring agency of the Department of General Services. DPS 
possesses authority for regulating any purchasing pursuant to 
§ 2.1-440, which states:

"Except as the Division shall direct and authorize 
otherwise, every department, division, institution, 
officer and agency of the State, hereinafter called the 
using agency, shall purchase through the Division of 
Purchases and Supply all materials, equipment, supplies, 
and printing of every description, the whole or a part 
of costs whereof is to be paid out of the State 
treasury; the Division shall make purchases in 
conformity with this article." (Emphasis added.)

I am informed by your staff that the Fund is not 
maintained as a part of the State treasury, and that neither 
the State Treasurer nor the Comptroller is in any way 
involved in its accrual or disbursement. Furthermore, the 
Fund does not contain monies appropriated by the General 
Assembly. Therefore the Fund is not in whole or in part 
"paid out of the State treasury."

Section 2.1-440 must, however, be read together with 
§ 2.1-442 which states:

"All purchases made by any department, division, officer 
or agency of the Commonwealth shall be made in 
accordance with Chapter 7 of Title 11 [Virginia Public 
Procurement Act] and such rules and regulations as the 
Division may prescribe. Such rules and regulations 
shall include a purchasing plan which shall be on file 
at the Division and shall be available to the public 
upon request. The Division shall have authority to 
make, alter, amend or repeal regulations relating to 
purchase of materials, supplies, equipment, 
nonprofessional services, and printing, and may 
specifically exempt purchases below a stated amount or 
particular agencies or specified materials, equipment, 
nonprofessional services, supplies and printing." 
(Emphasis added.)

This section is clearly not limited to expenditures from the 
State treasury. It is, therefore, my opinion that the 
interest earned by the Fund should be spent in accordance 
with DPS's regulations. I note that § 2.1-442 does not apply 
to professional services, permits DPS to exempt agencies,
nonprofessional services, etc., from the requirements of that section; however, I am not aware of any exemption applicable to the Fund.

You also ask whether interest earned on the Fund must be spent in accordance with the Regulations of the Department of Management Analysis and Systems Development ("MASD"). MASD is the agency designed to coordinate all aspects of the State's computer and management systems. Most of the duties of MASD, delineated at § 2.1-410, extend to all State agencies. Those duties are not limited in any way by the source of the funds to be spent. Accordingly, if the Virginia Real Estate Commission intends to spend interest from the Fund for any purpose for which MASD formulates policies or standards, that expenditure must be consistent with the policies and standards established by MASD.

1

1Article X, § 7 of the Constitution of Virginia (1971) requires payment of all "revenues" of the Commonwealth into the State treasury. Section 2.1-180 requires any "public funds" or "monies" from any source be paid into the State treasury.

VIRGINIA STATE BAR. JUDGES. COMPETENT TO TESTIFY IN DISCIPLINARY PROCEEDING BEFORE BAR DISTRICT COMMITTEES.

January 26, 1983

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

This is in response to an inquiry whether § 19.2-271 of the Code of Virginia prevents a circuit court judge from testifying in a disciplinary proceeding against an attorney pursuant to Part 6:IV:§13(5) of the Rules of the Supreme Court of Virginia. The testimony of the judge is material to the question before the district committee investigating a charge of fraud committed on the court.

Section 19.2-271 provides in pertinent part:

"No judge shall be competent to testify in any criminal or civil proceeding as to any matter which shall have come before him in the course of his official duties."

In speaking of the statutory forerunner to § 19.2-271, the Supreme Court of Virginia stated that the purpose was to protect an accused against the testimony of judicial officers before whom he has appeared as to admissions or confessions made by him. Baylor v. Commonwealth, 190 Va. 116, 56 S.E.2d 77 (1949).

A proceeding to discipline an attorney is not a criminal proceeding. It is a special proceeding, civil and
nonprofessional services, etc., from the requirements of that section; however, I am not aware of any exemption applicable to the Fund.

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A proceeding to discipline an attorney is not a criminal proceeding. It is a special proceeding, civil and
disciplinary in nature, and of a summary character. Seventh District Committee v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971). Such a proceeding may very well involve a judge as a complaining party against an attorney.

Section 19.2-271 is not an absolute bar to a judge testifying as a witness. See, for example, § 20-61.1 and 1976-1977 Report of the Attorney General at 114. In the case of Maddy v. First District Committee, 205 Va. 652, 139 S.E.2d 56 (1964), the Supreme Court affirmed the action of the lower court in admitting testimony by another judge as to conversations he had with the attorney, which confirmed in part the testimony of other witnesses.

It could not be reasonably said that the General Assembly intended to declare a judge incompetent to testify in a disciplinary proceeding involving lawyers, who are officers of the court. A judge may well be the only witness to the alleged unprofessional conduct. I am, accordingly, of the opinion that a judge is competent to testify in a disciplinary hearing before the Virginia State Bar’s district committees.

VIRGINIA SUPPLEMENTAL RETIREMENT ACT. ART. VI, § 9 OF CONSTITUTION PROHIBITS REDUCTION OF JUDGE’S SALARY.

February 1, 1983

The Honorable Wayne F. Anderson
Secretary of Administration and Finance

You have asked whether the salaries of the justices of the Virginia Supreme Court and other State judges may be reduced pursuant to proposed H.B. 519 and S.B. 250.

Section 51-160 of the Code of Virginia creates the Judicial Retirement System for the judiciary of the Commonwealth. Section 51-164 further provides that each member of the Judicial Retirement System shall contribute a percentage of his creditable compensation to the retirement plan. House Bill 519 and S.B. 250 would permit the Commonwealth to assume this responsibility for justices and judges. These Bills amend § 51-164 as follows:

"The Commonwealth, from time to time, to the extent of any reduction in the salary otherwise payable to members, shall pick up, assume and pay the contributions required of such members by subsection (a) of this section. All member contributions picked up by the Commonwealth shall be credited to the members' contribution account, shall constitute member contributions, creditable compensation and annual compensation for the purposes of this chapter, and shall not constitute wages for the purposes of Chapter 3.1 (§ 51-111.1 et seq.) of this title. All such amounts shall be calculated and paid as provided by this
chapter, and shall be in addition to the other obligations imposed on the Commonwealth hereunder."
(Emphasis added.)

Based on this proposed amendment, the Commonwealth would be required to pay member contributions to the extent of any reduction in the justice's (or judge's) salary. Thus, a judge's salary must be reduced in order for the Commonwealth to assume its obligations under this proposed provision.

Article VI, § 9 of the Constitution of Virginia (1971) specifically provides, in part:

"All justices of the Supreme Court and all judges of other courts of record shall be commissioned by the Governor. They shall receive such salaries and allowances as shall be prescribed by the General Assembly, which shall be apportioned between the Commonwealth and its cities and counties in the manner provided by law...The salary of any justice or judge shall not be diminished during his term of office." (Emphasis added.)

This provision clearly prohibits the diminution or reduction of the salary of any justice or judge. Since the reference to "judge" is not modified, this prohibition applies to justices, judges of courts of record, judges of courts not of record and "others who perform judicial duties with such frequency that it is appropriate to call them 'judges.'" II Howard's Commentaries on the Constitution of Virginia 756 (1974).

You have stated in your letter that the economic effect of the proposed legislation is to increase each member's take-home pay without increasing the amount of State monies required for the retirement system. Even though the tax benefits of this arrangement may result in an increase in a judge's take-home pay, the proposed Bill specifically refers to a reduction in salary.

Since Art. VI, § 9 is a general prohibition without any modifying language, it appears to be directed at all diminution of salary regardless of the purpose or effect. In the present case, the purpose and effect of the diminution is to shelter retirement contributions from federal taxes. Even though this proposition may benefit the judges, the constitutional prohibition does not provide for such an exception. To hold otherwise would permit the General Assembly to diminish the salary of judges whenever, in the General Assembly's opinion, there is a reasonable basis to conclude that such diminution is in the "best interest" of the judge.

As stated above, there is an unequivocal constitutional mandate against any reduction or diminution in salary of a judge or justice. Accordingly, I am of the opinion that the plain meaning of Art. VI, § 9 prohibits the reduction of a
judge's salary, even though such a diminution may result in favorable tax consequences.

1The prohibition against the diminution of a judges' salary creates an atmosphere of judicial independence. See II Howard's Commentaries on the Constitution of Virginia, supra. In reviewing a comparable diminution prohibition in Art. III, § 1 of the United States Constitution, the Supreme Court stated that this prohibition promotes judicial independence and ensures a prospective judge that the compensation of the new post will not be diminished. U.S. v. Will, 449 U.S. 200 (1980) citing Evans v. Gore, 253 U.S. 245 (1920).

In Commonwealth v. Clopton, 36 Va. (9 Leigh.) 109, 115 (1837), the Virginia Supreme Court commented: "If [the General Assembly] could [reduce judges' salaries], then that which the constitution says shall be fixed, might easily be unfixed at the pleasure of the legislature; and judges, instead of that feeling of independence which results from the consciousness of a certain support that cannot be taken from them, would be liable to the continual apprehension of a state of dependance." [Emphasis in the original.]

2It should be noted that the Supreme Court has ruled that an income tax imposed on a judge does not violate the Compensation Clause of Art. III, § 1 of the United States Constitution. See O'Malley v. Woodrough, 307 U.S. 277 (1939). Although this Clause is comparable to the prohibition in question, the Virginia provision relates specifically to "salary," a more specific term, and the Bill in question specifically contemplates a reduction in salary.

VIRGINIA SUPPLEMENTAL RETIREMENT ACT. H.B. 30, ITEM 665.3 DOES NOT APPLY TO EMPLOYEES WHO BELONG TO LOCAL PLAN THAT DOES NOT REQUIRE MEMBER CONTRIBUTIONS.

May 26, 1983

The Honorable E. L. Turlington, Jr., Judge General District Court for the City of Richmond

You have asked whether general district court personnel, who are members of a local retirement system but pay nothing into that system, will be included in the retirement "contribution pick-up" set forth in Ch. 622, Item 665.3, Acts of Assembly of 1983.

Item 665.3 provides, in part:

"Effective October 1, 1983 the Commonwealth shall (i) pay equivalent amounts in lieu of, and (ii) assume and pay the employee contributions required of all members of the Virginia Supplemental Retirement System, the State Police Officers Retirement System, the Judicial Retirement System or any local retirement system in lieu of the Virginia Supplemental Retirement System, the
judge's salary, even though such a diminution may result in favorable tax consequences.

1 The prohibition against the diminution of a judge's salary creates an atmosphere of judicial independence. See II Howard's Commentaries on the Constitution of Virginia, supra. In reviewing a comparable diminution prohibition in Art. III, § 1 of the United States Constitution, the Supreme Court stated that this prohibition promotes judicial independence and ensures a prospective judge that the compensation of the new post will not be diminished. U.S. v. Will, 449 U.S. 200 (1980) citing Evans v. Gore, 253 U.S. 245 (1920).

In Commonwealth v. Clifton, 36 Va. (9 Leigh.) 109, 115 (1837), the Virginia Supreme Court commented: "If [the General Assembly] could [reduce judges' salaries], then that which the constitution says shall be fixed, might easily be unfixed at the pleasure of the legislature; and judges, instead of that feeling of independence which results from the consciousness of a certain support that cannot be taken from them, would be liable to the continual apprehension of a state of dependance." [Emphasis in the original.]

2 It should be noted that the Supreme Court has ruled that an income tax imposed on a judge does not violate the Compensation Clause of Art. III, § 1 of the United States Constitution. See O'Malley v. Woodrough, 307 U.S. 277 (1939). Although this Clause is comparable to the prohibition in question, the Virginia provision relates specifically to "salary," a more specific term, and the Bill in question specifically contemplates a reduction in salary.

VIRGINIA SUPPLEMENTAL RETIREMENT ACT. H.B. 30, ITEM 665.3 DOES NOT APPLY TO EMPLOYEES WHO BELONG TO LOCAL PLAN THAT DOES NOT REQUIRE MEMBER CONTRIBUTIONS.

May 26, 1983

The Honorable E. L. Turlington, Jr., Judge General District Court for the City of Richmond

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State Police Officer's Retirement, and the Judicial Retirement System, for whom the Commonwealth is the employer. All such amounts shall be paid to the applicable retirement system as required by the applicable retirement act." (Emphasis added.)

You stated in your letter that the employees in question do not pay anything into the local retirement system. In this type of plan, the locality assumes the responsibility for making contributions for these employees. For this reason, the members of such a system are not required to make contributions from their salaries.

Item 665.3 specifically states that the Commonwealth shall assume and pay the employee contributions "required of all members" of a local retirement system in lieu of the Virginia Supplemental Retirement System. In the factual situation you describe, the local retirement plan does not require a contribution by the member; consequently, it is my opinion that these individuals would not be included in the pick-up provisions set forth above.

**VIRGINIA SUPPLEMENTAL RETIREMENT ACT. RETIREMENT CONTRIBUTION PICK-UP SET FORTH IN H.B. 30 DOES NOT INCLUDE LOCAL CONSTITUTIONAL OFFICERS AND THEIR EMPLOYEES.**

April 8, 1983

The Honorable Charles R. Hawkins
Member, House of Delegates

You have asked whether the employees of constitutional officers in local county governments will be included in the retirement pick-up provisions set forth in H.B. 30, Item 665.3 that was passed by both houses of the General Assembly and sent to the Governor during the 1983 regular session.

The reference to constitutional officers was deleted from H.B. 30, Item 665.3 at the reconvened session on April 6, 1983. Amended H.B. 30, Item 665.3 provides, in part:

"Effective October 1, 1983 the Commonwealth shall (i) pay equivalent amounts in lieu of, and (ii) assume and pay the employee contributions required of all members of the Virginia Supplemental Retirement System, the State Police Officers Retirement System, the Judicial Retirement System or any local retirement system in lieu of the Virginia Supplemental Retirement System, the State Police Officer's Retirement System, and the Judicial Retirement System, for whom the Commonwealth is the employer. All such amounts shall be paid to the applicable retirement system as required by the applicable retirement act."
Sections 51-111.10(5) and 51-111.10:01(5) of the Code of Virginia, part of the Virginia Supplemental Retirement Act, specifically state that the term "State employee" shall not include "any local officer as defined in paragraph (21)..." of §§ 51-111.10 and 51-111.10:01. Paragraph 21 defines "local officer" as "the treasurer, commissioner of the revenue, Commonwealth's attorney, clerk of a circuit court, sheriff, or constable, of any county or city, or his deputy or employee..." Based on these definitions, local constitutional officers and their employees are considered officers and employees of the locality for the purposes of the Virginia Supplemental Retirement Act.

In view of the foregoing Virginia Supplemental Retirement System provisions and the deletion of local constitutional officers from the enacted Bill, it is my opinion that local constitutional officers and their employees are not included in the retirement contribution pick-up set forth in H.B. 30, Item 665.3.¹

¹At the time of the amendment to Item 665.3, the following provision was added to Item 665: "Notwithstanding any further provisions of law or any provision herein, effective October 1, 1983, all salaries for constitutional officers...are hereby increased by 4 1/2%." Additionally, the Compensation Board was authorized to provide merit increases for qualified employees of constitutional officers.

VIRGINIA SUPPLEMENTAL RETIREMENT ACT. § 51-111.10:1(A)(2) DOES NOT MANDATE THAT EMPLOYEES TRANSFER CREDITABLE SERVICE WHEN THEY ELECT TO PARTICIPATE IN STATE SYSTEM.

July 14, 1982

The Honorable Clifton A. Woodrum
Member, House of Delegates

You advise that the Roanoke City Council has requested, pursuant to § 16.1-235(A) of the Code of Virginia that the State Department of Corrections operate the Court Services Units of the Juvenile and Domestic Relations District Court and effect a transfer of the personnel of that unit from local service to State service. You have asked whether eligible employees of the Court Services Unit may elect to participate in the Virginia Supplemental Retirement System (hereinafter "State Retirement System") and also retain their previously earned creditable service¹ and benefits under the Roanoke Retirement System.

Paragraphs (a)(2) and (d) of § 51-111.10:1 provide that transferred personnel of such a unit may elect, within three months of the date of State employment, to participate in the State Retirement System. Section 51-111.10:1(a)(2) further
provides that any employee "who so elects may transfer from such local system as prior service his creditable service in such local system...." (Emphasis added.) Accordingly, there is no mandate that the employee transfer his creditable service when he elects to become a member of the State Retirement System.

In view of the foregoing, I conclude that the applicable provisions of the Code of Virginia permit eligible court services personnel to retain their creditable service and benefits under the local program when they enroll in the State system; however, if they make such an election they will not be credited with any prior service under the State Retirement System.

1Section 51-111.10:01(12) defines "creditable service" as prior service plus membership service for which credit is allowed under the Virginia Supplemental Retirement Act.

2The employee should consult with a representative of the local retirement program to ensure that there are no provisions governing eligibility in the local program which would be affected by the employee's becoming a member of another retirement program.

WARRANTS. DISTRESS. ARTICLES EXEMPT FROM DISTRAIN'T. LEVY UPON EXEMPT PROPERTY.

September 24, 1982

The Honorable Edgar F. Smith
Sheriff of the City of Staunton

This is in reply to your recent letter in which you inquire whether articles exempted from levy or distress by §§ 34-26 and 34-27 of the Code of Virginia may nevertheless be subject to distress for payment of rent pursuant to § 55-230.1 You further ask whether you are responsible for denominating any exempt items at the time of levy.

Section 55-231 provides generally that the distress may be levied on "any goods" of the lessee on the premises. Section 55-230 provides, however, that officers "shall restrain except as may otherwise be provided by statute, the property found on the premises of the tenant as provided by § 55-231." (Emphasis added.) Section 34-26 lists diverse personal and household items and tools of trade which are exempt from levy or distress "in addition to" the "homestead exemption" as provided in Ch. 2 of Title 34. Section 34-27 provides additional exemptions for agricultural tools. I am of the opinion that the language of § 55-230 thus recognizes that items enumerated in §§ 34-26 and 34-27 are exempt from distress for rent.
You next inquire whether the levying officer is responsible for exempting from the levy those items which are exempt from levy under §§ 34-26 and 34-27.

The express language of §§ 34-26 and 34-27 places upon a householder the responsibility for selecting those articles which he wishes to exempt from levy or distress. Section 34-26 provides, in pertinent part, that a householder "shall also be entitled to hold exempt from levy or distress the following articles or so much or so many thereof as he may have, to be selected by him or his agents...." (Emphasis added.) In examining the homestead exemption, which sets forth entitlement and selection synonymous with the language of § 34-26, the Supreme Court of Virginia has held that "[t]he homestead exemption is a mere privilege extended in the benignity of the law to the debtor; and he may claim the shield and protection of this privilege or not at his election." Scott v. Cheatham, 78 Va. 82, 86 (1883). Also, the character of numerous articles made specifically exempt by §§ 34-26 and 34-27 depends upon the nature of their use by the debtor. Hence, the debtor must at least inform the officer of the nature of the use, a fact known only to the debtor, before he is entitled to exemption therein. See Hanson v. Edwards, 32 N.C. 43 (1949). I am, therefore, of the opinion that the burden is on the householder to select the articles which are exempt and take affirmative action in pointing out such items to the levying officer.

1Section 55-230 reads in pertinent part as follows: "The officer into whose hands the warrant is delivered for pretrial levy shall distrain except as may be otherwise provided by statute, the property found on the premises of the tenant as provided by § 55-231. The officer shall return the warrant of distress to the general district court to which the warrant of distress is returnable by the return date unless otherwise notified by the court to make return by an earlier date."

2In White v. Owen, 71 Va. 43, 47 (1878), the Court stated that "[t]he homestead exemption] does not declare that his [the debtor's] property shall be exempt absolutely as by the laws known as the 'poor laws.' But he shall be entitled, not required, to hold it exempt." Section 34-26 is the successor to the poor debtors' law. But at the time of White, § 33 of Ch. 49 of the Code of 1873 provided that the goods listed therein "shall be exempt" from distress or levy. Section 3650 of the Code of 1887 changed the mandatory language to the language of entitlement and selection which parallels the exemptions in today's statutes.

WATER AND SEWER AUTHORITIES. EXPANSION MAY BE UNDERTAKEN IF PROPOSED BY GOVERNING BODY OF ONE OF POLITICAL SUBDIVISION MEMBERS AND APPROVED BY MAJORITY OF AUTHORITY'S BOARD.
You have asked whether the Appomattox River Water Authority's (the "Authority") proposed treatment plant expansion can take place without the unanimous consent of all its members. I assume that by reference to "member" you refer to the various counties and cities which joined originally to form the Authority. It is my understanding that the Authority proposes to expand its water treatment plant from its present capacity of twenty-two million gallons a day to a capacity of forty-six million gallons a day.

The Authority is an authority created and existing pursuant to the provisions of the Virginia Water and Sewer Authorities Act (the "Act"), §§ 15.1-1239 through 15.1-1270 of the Code of Virginia. Its articles of incorporation were approved in a concurrent resolution adopted in October 1960, pursuant to § 15-764.4 (now § 15.1-1242) by the governing bodies of the five political subdivisions organizing the Authority. Pursuant to §§ 15-764.6 and 15-764.7 (now §§ 15.1-1245 and 15.1-1246), its articles of incorporation were filed with the State Corporation Commission and its certificate of incorporation was issued November 21, 1960.

Section 15.1-1247 provides as follows:

"Having specified the initial purpose or purposes and/or project to be undertaken by the authority, the governing bodies of any of the political subdivisions organizing such authority may, from time to time by subsequent ordinance or resolution, after public hearing, and with or without referendum specify further projects to be undertaken by the authority, and no other projects shall be undertaken by the authority than those so specified. If the governing bodies of the political subdivisions organizing the authority fail to specify any project or projects to be undertaken, then the authority shall be deemed to have all the powers granted by this chapter."

The members specified the initial purpose or purposes and/or project to be undertaken by the Authority as contemplated by § 15.1-1247. Paragraph (4) of the articles of incorporation provides:

"The purpose for which said Authority is to be created is the construction of a water reservoir or water reservoirs suitable to provide a supply of water, to be located on the Appomattox River, including water distribution systems, intakes, mains, laterals, pumping stations, stand pipes, filtration plants, purification plants and the equipment or appurtenances necessary or suitable therefor and including the acquisition of any properties, rights, easements or franchises relating thereto and deemed necessary or convenient by the
Authority for their operation. The preliminary estimate of the capital cost of said improvements, as certified by Wiley and Wilson, who are responsible Engineers, is $18,100,000.00."

The purpose of the Authority was thus to construct a water supply system to supply the needs of the members. While there is reference to a preliminary cost estimate in the purpose paragraph of the articles, I do not construe that as a cost limit which cannot be exceeded. As indicated, the purpose is to supply water to meet the needs of the members of the Authority. Those needs are elastic and may expand as the population grows in the constituent members. Indeed, the official statement issued with the initial bond offering in 1964 described the plant as being "so arranged that it may be indefinitely increased in capacity" and the dam and reservoir were described as having "an estimated safe yield of approximately 100 million gallons per day from stream flow and storage."

From your letter, I assume that the proposed plant expansion will serve to permit the Authority to continue fulfilling its original purpose of providing water to its members whose needs have grown since 1960. While this would admittedly be an expansion of a facility, it would not be an expansion of purpose. Thus, I am of the opinion that § 15.1-1247 does not prevent the Authority from undertaking the expansion of its treatment plant.

In any event, even if one were to conclude that the expansion constitutes a new project and modification of purpose, I remain of the opinion that the expansion may be undertaken if the expansion is proposed by the governing body of one of the political subdivisions and then approved by a majority of the members of the board of the Authority.1 The requirement of § 15.1-1247 relating to action on new projects refers to "the governing bodies of any of the political subdivisions organizing such authority...." (Emphasis added.) Had the General Assembly intended to require action by the governing bodies of all of the member political subdivisions, it undoubtedly would have so specified. To reach a contrary conclusion would not only ignore the clear language of the statute, it would permit one member to veto the desire of all other members that the Authority proceed with new projects to serve the Commonwealth of the area served by the Authority.

1Section 15.1-1249 provides in pertinent part that "[a] majority of members of the authority shall constitute a quorum and the vote of a majority of members shall be necessary for any action taken by the authority...."

WEAPONS. DISPOSITION FORFEITED TO STATE.
June 15, 1983

The Honorable William H. Fuller, III
Commonwealth's Attorney for the City of Danville

You have asked several questions concerning the proper disposition of confiscated and/or forfeited weapons, as follows:

1. Does giving guns which have been confiscated by the police department or used in the commission of a crime to police officers and/or civilians for their personal use and without a court order entered of record violate the intent and purpose of §§ 18.2-308, 18.2-308.2 and 18.2-310 of the Code of Virginia?

2. Does issuing (loaning for the duration of employment) a gun which has been confiscated by the police department to a civilian police department employee for non-police purposes violate §§ 18.2-308, 18.2-308.2 and 18.2-310?

3. If guns are disposed of contrary to the provisions of these sections does it constitute a criminal offense?

The disposition of such weapons is governed by §§ 18.2-308, 18.2-308.2 and 18.2-310. Under § 18.2-308, if any person is convicted of carrying a concealed weapon, the weapon is automatically forfeited to the Commonwealth. No separate court order is necessary, as the conviction itself operates to forfeit the weapon. Such a weapon may then be seized by an officer as forfeited, and those weapons which "may be needed for police officers...shall be devoted to that purpose, and the remainder shall be destroyed...." The clear meaning of this statute is that forfeited weapons may be used by police officers if they are so needed in the performance of their official duties. Although the statute is silent on this matter, the officer to whom the weapon is assigned for use should be designated by departmental policy rather than the unilateral decision of the police officer who seized the weapon. Section 18.2-308 does not authorize personal use of forfeited weapons by police officers, nor does it permit such weapons to be given to civilian employees or private citizens.

Section 18.2-308.2 governs the possession or transportation of handguns by convicted felons and the carrying of concealed weapons by such persons. Inasmuch as this section refers specifically to "any weapon described in § 18.2-308A," the same restrictions as to disposition which apply to § 18.2-308 also apply to weapons forfeited pursuant to § 18.2-308.2.

Under § 18.2-310, if any person is convicted of using certain weapons in the commission of a crime, the court may forfeit the weapon to the Commonwealth. To do so, the court
must enter an order of record. The court "shall make such disposition of such weapons as it deems proper..." but because the weapon may only be forfeited "to the Commonwealth..." the statute obviously intends that the weapons will be used only for official purposes and not for personal use.

In answer to your first question, a court order, other than the order of conviction, is not necessary for the disposition of weapons confiscated and/or forfeited pursuant to §§ 18.2-308 or 18.2-308.2. Such an order is required by § 18.2-310. A weapon confiscated and/or forfeited pursuant to §§ 18.2-308, 18.2-308.2 or 18.2-310 can be used by a police officer but only in the performance of his official duties. Such weapons cannot be given to civilians for personal use under any circumstances.

In answer to your second question, a weapon confiscated and/or forfeited pursuant to §§ 18.2-308, 18.2-308.2, or 18.2-310 cannot be issued (or loaned for the duration of employment) to a civilian police department employee for non-police purposes. In answer to your third question, although the statutes in question do not specifically state that improper disposition of such weapons shall constitute a statutory criminal offense, such improper disposition could constitute the common-law offense of malfeasance (a wrongful act which a public official has no legal right to do). You have correctly stated that there is a two-year statute of limitations applicable to malfeasance. See § 19.2-8.

WEAPONS. ORDINANCES. WITHOUT SPECIFIC STATUTORY AUTHORITY, CITY MAY NOT, BY ORDINANCE, REQUIRE PERMITS TO SELL OR PURCHASE WEAPONS.

June 27, 1983

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

This is in reply to your letter concerning the authority of cities to require permits to sell or purchase pistols, and in that regard you request my opinion of the validity of § 38-6 of the Code of the City of Virginia Beach, which reads as follows:

"(a) No person shall sell, lease, rent, give or otherwise furnish to any person within the city any pistol, dirk, bowie knife, slungshot or any weapon of like kind, unless a permit granted by the chief of police, or such other officer of the police department as may be designated, in writing, by the chief of police, is presented authorizing the holder of such permit to acquire such weapon. Such permit shall be surrendered to the person furnishing such weapon, who shall preserve it for inspection, upon request, by the police of the city."
Authority for their operation. The preliminary estimate of the capital cost of said improvements, as certified by Wiley and Wilson, who are responsible Engineers, is $18,100,000.00."

The purpose of the Authority was thus to construct a water supply system to supply the needs of the members. While there is reference to a preliminary cost estimate in the purpose paragraph of the articles, I do not construe that as a cost limit which cannot be exceeded. As indicated, the purpose is to supply water to meet the needs of the members of the Authority. Those needs are elastic and may expand as the population grows in the constituent members. Indeed, the official statement issued with the initial bond offering in 1964 described the plant as being "so arranged that it may be indefinitely increased in capacity" and the dam and reservoir were described as having "an estimated safe yield of approximately 100 million gallons per day from stream flow and storage."

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WEAPONS. DISPOSITION FORFEITED TO STATE.
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WEAPONS. ORDINANCES. WITHOUT SPECIFIC STATUTORY AUTHORITY, CITY MAY NOT, BY ORDINANCE, REQUIRE PERMITS TO SELL OR PURCHASE WEAPONS.

June 27, 1983

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

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"(a) No person shall sell, lease, rent, give or otherwise furnish to any person within the city any pistol, dirk, bowie knife, slungshot or any weapon of like kind, unless a permit granted by the chief of police, or such other officer of the police department as may be designated, in writing, by the chief of police, is presented authorizing the holder of such permit to acquire such weapon. Such permit shall be surrendered to the person furnishing such weapon, who shall preserve it for inspection, upon request, by the police of the city."
(b) Every applicant for a permit required by this section shall pay to the city treasurer an application fee of five dollars ($5.00). This fee shall not be charged to sworn police officers of the city.

(c) A violation of this section shall constitute a Class 1 misdemeanor."

There are several State statutes which deal with or regulate sales and purchases of weapons. For example, § 15.1-523 provides that "[t]he governing body of any county may impose a license tax of not more than twenty-five dollars on persons engaged in the business of selling pistols and revolvers to the public," and § 15.1-524 authorizes county governing bodies to require sellers of pistols and revolvers to furnish information about such sales to the clerk of the circuit court. Section 18.2-309 prohibits any sale to a minor of a "pistol, dirk, switchblade knife or bowie knife..." and § 18.2-311 prohibits the sale to anyone of a "blackjack, brass or metal knucks, switchblade knife or like weapons...." Section 58-394 imposes a special license tax on retail dealers engaged in the business of selling pistols.

The only provision of law which speaks of permits as related to purchases or sales of weapons is § 15.1-525, which continues in effect the provisions of Ch. 297, Acts of Assembly of 1944, requiring permits to sell or purchase pistols or revolvers in any county having a density of population of more than one thousand per square mile. Prior Opinions of this Office, issued over a period of many years, hold the effect of this pattern of legislation regulating weapons to be that the State has preempted the field and that localities may not therefore enact regulatory measures without specific statutory authorization. See Opinion to the Honorable J. Paul Councill, Jr., Member, House of Delegates, dated August 26, 1982, and Opinions therein cited; 1981-1982 Report of the Attorney General at 112.

As noted above, there are statutes which specifically authorize any county to impose a license tax on sellers of pistols and revolvers; authorize any county to require such sellers to furnish information about their sales to the clerk of court; prohibit the sale of certain weapons to minors and prohibit the sale of certain other weapons to anyone; impose a license tax on retail dealers in pistols; and require permits for sales and purchases of pistols and revolvers in Arlington County and in Fairfax County. There is no statute, however, which specifically authorizes local governing bodies to require by ordinance that permits be obtained in relation to sales or purchases of weapons, nor is there any provision in Virginia Beach's charter which specifically authorizes such an ordinance in that city. In light of the foregoing, and in accordance with the holdings of past Attorneys General in Opinions concerning weapons legislation, I am constrained to conclude that the General Assembly has not given the City of Virginia Beach the power
to enact § 38-6, and, in answer to your question, that section of the city code is invalid.

1Note, also, that there are a number of statutes which authorize local regulation of the carrying and discharge of firearms in certain instances. See, e.g., §§ 15.1-518, 15.1-518.1, 18.2-287, 18.2-287.1 of the Code of Virginia. See, also, § 15.1-865, which is applicable to Virginia Beach by virtue of § 2.01 of its charter (see Ch. 147, Acts of Assembly of 1962, as amended by Ch. 14, Acts of Assembly of 1977), and which authorizes the city to "regulate or prohibit the...discharge of firearms." (Emphasis added.)

2Note that § 18.2-308(D) requires a person to apply for and obtain a permit from a circuit court in order to be able to legally carry a concealed weapon.

3Chapter 297 provides that, in the affected counties, anyone engaged in the business of selling pistols or revolvers at retail must first obtain a permit to do so from the chief of police; that any person desiring to acquire a pistol or revolver also must first obtain a permit from the chief; and, in language similar to that contained in § 38-6 of the Virginia Beach Code, quoted supra, that no dealer shall sell or otherwise furnish a pistol or revolver to any person unless the person delivers to the dealer the required permit.

4Chapter 297 was continued in effect pursuant to § 59-144 until 1968 and thereafter pursuant to § 15.1-525. See former § 59-144, and Ch. 439, Acts of Assembly of 1968.

4Chapter 297, Acts of Assembly of 1944, discussed, supra, in fn. 3, originally applied only to Arlington County, but, due to subsequent population growth, Fairfax County now meets the Act's criterion of one thousand persons per square mile population density.

5Note, by way of comparison, H.B. 70, 1983 session of the General Assembly, which in its original version proposed to add subsection (dd) to § 2.04 of the charter for the City of Alexandria, empowering that city "[t]o require permits to sell pistols or revolvers within the city limits." This provision of H.B. 70 was deleted in the House, and the amendments to Alexandria's charter in the Acts of Assembly of 1983, contained in Ch. 314, do not include any mention of weapons permits.

WELFARE. WIC PROGRAM. RELEVANT FEDERAL REGULATIONS FOR WIC PROGRAM NEITHER CREATE RIGHT TO FEDERAL COURT REVIEW OF FAIR HEARING DECISION NOR REQUIRE COMMONWEALTH TO CREATE RIGHT TO STATE COURT REVIEW.

July 27, 1982

The Honorable James F. Almand
Member, House of Delegates
You have asked for my opinion concerning the availability of judicial review of certain decisions made by the State Department of Health in its administration of the Special Supplemental Food Program for Women, Infants and Children (the "WIC Program"). Specifically, you desire to know what judicial review, if any, is available to applicants or recipients following completion of the "fair hearing process." The fair hearing process is an administrative appeals procedure that is available to a person who is denied participation in the program, or is suspended from participation, or has his participation terminated. See 7 C.F.R. § 246.23 (1982).

The WIC Program is a federal nutritional program for indigent women and children who meet certain criteria. The Commonwealth of Virginia has agreed to administer that program through the State Department of Health. Federal legislation, 42 U.S.C. § 1786 (Supp. IV 1980), and the implementing federal regulations, 7 C.F.R. §§ 246.1-246.25 (1982), specify the nature of the Commonwealth's agreement. Accordingly, federal law must first be examined to determine whether Virginia has agreed to afford judicial review to persons aggrieved by the results of a fair hearing decision.

42 U.S.C. § 1786(f)(9) (Supp. IV 1982) requires the State Health Department to "grant a fair hearing, and a prompt determination thereafter, in accordance with regulations issued by the Secretary [of Agriculture]...." Those regulations of the United States Secretary of Agriculture reiterate this requirement and generally describe how the appeals process is to work. See 7 C.F.R. § 246.23 (1982). With regard to judicial review, the regulation specifies:

"(1) Judicial review. If a State level decision upholds the agency action and the appellant expresses an interest in pursuing a higher review of the decision, the State agency shall explain any available State level review of the decision and any State level rehearing process. If neither are available or have been exhausted, the State agency shall explain the right to pursue judicial review of the decision." 7 C.F.R. § 246.23(1) (1982).

Nothing in this regulation either creates a right to federal court review of a fair hearing decision or requires the Commonwealth to create a right to State court review.

Accordingly, in the absence of any federal court review or of any federal requirement for State court review of a fair hearing decision, the inquiry becomes whether Virginia has created a means of State court review. I am unaware of any statute of the Commonwealth that explicitly provides a right of judicial review of fair hearing decisions in the WIC Program. That being the case, the only other possibilities would be the court review article of the Virginia Administrative Process Act, §§ 9-6.14:1 to 9-6.14:21 of the
Code of Virginia, or the declaratory judgment statute, § 8.01-184.

While a fair hearing decision would satisfy the definition of a "case decision," see § 9-6.14:4(D), such decisions are exempted from the Administrative Process Act by § 9-6.14:20(ii) because they involve "grants of State or federal funds or property." See Harris v. Lukhard, No. 80-0163(L) (W.D. Va. June 28, 1982) (and the Virginia circuit court cases cited therein); see, also, White v. Madison County Department of Social Services, No. 76-1710 (Circuit Court of Madison County) (Plaintiff, who appealed a Medicaid eligibility determination pursuant to the declaratory judgment statute was, in effect, appealing a "case decision," and § 9-6.14:20(ii) precludes judicial review.) The conclusion that § 9-6.14:20(ii) excludes judicial review of fair hearing decisions is bolstered by the fact that the Administrative Process Act's purpose is to supplement basic laws and to standardize court review of case decisions where the basic law is silent or inadequate in terms of procedures, including those for obtaining judicial review. Compare § 9-6.14:3(A) with § 9-6.14:16(ii). In view of these stated purposes, it is significant that the General Assembly chose, nonetheless, to exempt case decisions involving grants of State or federal funds from the Administrative Process Act. This exclusion indicates that the General Assembly intended to preclude any judicial review of such case decisions, and that is what the decisions of the various Virginia circuit courts signify.

That, therefore, leaves the question of whether § 8.01-184 provides a means of judicial review. I conclude it does not because the Supreme Court has repeatedly held that the declaratory judgment statute is not available to resolve disputed facts that are determinative of a case's issues. E.g., Williams v. Bank of Norfolk, 203 Va. 657, 663, 125 S.E.2d 803, 807 (1962). Moreover, the declaratory judgment statute does not give parties greater rights than those they previously possessed. Liberty Mutual Insurance Co. v. Bishop, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). In other words, if a person were challenging the State Department of Health's evaluation of the evidence presented at a fair hearing and the decision based upon that evidence, the declaratory judgment statute does not afford a means of judicial review. See Williams, supra. The declaratory judgment statute would be available only if a person were to challenge the legality of some program requirement, but such a challenge would not involve a factual dispute. See Art Commission v. Silvette, 215 Va. 596, 212 S.E.2d 261 (1975). More importantly, such a challenge would not constitute an appeal of a fair hearing decision because the person would be challenging only the legality of the program requirement, not the findings of fact made by the State Department of Health concerning the person's eligibility.
Consequently, I am of the opinion that Virginia law does not confer any right to judicial review upon persons aggrieved by WIC Program fair hearing decisions, and, therefore, such persons have no judicial recourse following a fair hearing decision.

**WETLANDS ACT.** MARINE RESOURCES COMMISSION AND LOCAL WETLANDS BOARDS HAVE NO AUTHORITY TO REGULATE FEDERAL ACTIVITIES AFFECTING FEDERALLY OWNED WETLANDS.

September 1, 1982

The Honorable James E. Douglas, Jr., Commissioner

Marine Resources Commission

You have asked for my opinion as to whether, under the Wetlands Act and the Coastal Primary Sand Dune Protection Act, §§ 62.1-13.1, et seq., and 62.1-13.21, et seq., of the Code of Virginia, respectively, local wetlands boards or the Marine Resources Commission can exercise jurisdiction over vegetated and non-vegetated wetlands and coastal primary sand dunes on lands owned by the federal government.

Article VI of the United States Constitution provides that federal law is the supreme law of the land. Thus, states cannot regulate or control the functioning of the federal government within their boundaries in any manner to impede the execution of constitutionally granted federal power, except where the federal government has voluntarily subjected itself to state regulatory processes. 1978-1979 Report of the Attorney General at 174. As pointed out in that Opinion, the 1977 Clean Water Act amended § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344(t), to expressly require that federal agencies comply with all substantive and procedural state requirements concerning the discharge of dredged or fill material. Therefore, to the extent that any project involves the discharge of dredged or fill material in any portion of the navigable waters within Virginia's jurisdiction, that activity is subject to regulation by State law.

The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451, et seq., does not waive federal immunity from state requirements, but § 1456(c)(2) directs federal agencies to ensure that any development project in the coastal zone is consistent, to the maximum extent practicable, with approved state coastal zone management programs. The requirements for approval are found in 16 U.S.C. § 1455(c). Because Virginia elected not to have an approved coastal zone management program, this provision is not applicable.

I am unaware of any federal laws which specifically waive federal immunity from state regulations for wetlands and primary sand dunes, as was done in the Clean Water Act of 1977. I am, therefore, of the opinion that the Marine Resources Commission and the local wetlands boards have no
Consequently, I am of the opinion that Virginia law does not confer any right to judicial review upon persons aggrieved by WIC Program fair hearing decisions, and, therefore, such persons have no judicial recourse following a fair hearing decision.

WETLANDS ACT. MARINE RESOURCES COMMISSION AND LOCAL WETLANDS BOARDS HAVE NO AUTHORITY TO REGULATE FEDERAL ACTIVITIES AFFECTING FEDERALLY OWNED WETLANDS.

September 1, 1982

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I am unaware of any federal laws which specifically waive federal immunity from state regulations for wetlands and primary sand dunes, as was done in the Clean Water Act of 1977. I am, therefore, of the opinion that the Marine Resources Commission and the local wetlands boards have no
jurisdiction to regulate federal activities on federally owned wetlands and primary sand dunes unless (1) such activities involve the discharge of dredged or fill materials in any portion of the navigable waters within Virginia's jurisdiction or (2) federal immunity from state environmental requirements has been specifically waived in the legislation authorizing the project in question.

1 Both acts require permits for use or development of "wetlands" and "coastal primary sand dunes" from either the Virginia Marine Resources Commission, or a wetlands board created pursuant to § 62.1-13.6. See §§ 62.1-13.5§4(a) and 62.1-13.26.

WETLANDS ACT. MEMBERS OF LOCAL WETLANDS BOARD MAY APPEAR AND TESTIFY BEFORE MARINE RESOURCES COMMISSION WHERE SUCH COMMISSION, IN ITS DISCRETION, DECIDES TO HEAR SUCH EVIDENCE.

December 16, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked whether it is appropriate for members of a local wetlands board to (1) appear and (2) testify before the Marine Resources Commission (the "Commission") in connection with a hearing of an appeal from a denial of an application by such local board where the local board members appearing and testifying previously participated in the vote to deny the application.

Decisions of a local wetlands board are subject to review by the Commission under the circumstances enumerated in § 62.1-13.11 of the Code of Virginia. The Commission is empowered by § 62.1-13.13 to modify, remand or reverse the decision of the wetlands board.1

If the review by the Commission could be equated with appeals from lower courts, or limited to the record prepared by the board, I would be inclined to view as improper an appearance by a board member before the Commission. However, appeals from the board are not so limited. The procedure for review by the Commission is provided in § 62.1-13.12, which provides in pertinent part as follows:

"The Commission shall hear the appeal or conduct the review on the record transmitted by the board...and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. And the Commission, in its discretion, may receive such other evidence as the ends of justice require."

This section gives the Commission full discretion to receive any evidence which the ends of justice require. If
the Commission decides that testimony of members of the local wetlands board which adopted the position being challenged on appeal would be helpful, the Commission has the discretion to receive it. As long as the appellant has an opportunity to be present to hear and to rebut any adverse evidence presented, he will not be improperly prejudiced by such testimony.

I am, therefore, of the opinion that it is not inappropriate for members of a local wetlands board who participated in a vote denying an application to appear and testify in the appeal of such application before the Commission, provided the Commission, in its discretion, determines that such evidence is appropriate to permit it to render a proper decision.

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1Section 62.1-13.13 provides: "The Commission shall modify, remand or reverse the decision of the wetlands board:

(1) If the decision of the wetlands board will not adequately achieve the policy and standards of this chapter or will not reasonably accommodate any guidelines which may have been promulgated by the Commission hereunder; or

(2) If the substantial rights of the appellant or the applicant have been prejudiced because the findings, conclusions or decisions are

(a) In violation of constitutional provisions; or

(b) In excess of statutory authority or jurisdiction of the wetlands board; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by the evidence on the record considered as a whole; or

(f) Arbitrary, capricious, or an abuse of discretion."

WETLANDS ACT. POLITICAL SUBDIVISION'S OWNERSHIP OF EASEMENT OR RIGHT-OF-WAY OVER WETLANDS EXEMPTS ITS GOVERNMENTAL ACTIVITY THEREIN FROM REQUIREMENT TO GET WETLANDS PERMIT.

January 18, 1983

The Honorable William T. Parker
Member, Senate of Virginia

You have asked if a political subdivision undertaking governmental activities in wetlands through which it has an easement or right-of-way is exempt from the permit requirements of the Wetlands Act, § 62.1-13.1, et seq., of the Code of Virginia.

Section 3(i) of the local wetlands zoning ordinance contained in § 62.1-13.5 reads as follows:

"§ 3. The following uses of and activities on wetlands are permitted, if otherwise permitted by law:
(i) Governmental activity on wetlands owned or leased by the Commonwealth of Virginia, or a political subdivision thereof.

The question is whether wetlands subject to a political subdivision's easement or right-of-way are wetlands "owned or leased" by a political subdivision for the purpose of being permitted by this section. While your letter did not describe the easement or right-of-way, I will assume that such easement or right-of-way has been obtained by properly recorded deed or condemnation proceedings. I further assume that the proposed activity falls within the permissible limits of the terms of the deed.

An easement or right-of-way is a different estate from that which an "owner" is normally thought to have. Possession of an easement or right-of-way is, however, ownership of some of the rights to the land. The owner of an easement or right-of-way is the "dominant" tenant and has a right to use the land, thus making the record owner a servient tenant. In tax cases, the word "owner" has covered various types of ownership.

"The word 'owner' includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee," Stark v. City of Norfolk, 183 Va. 282, 289, 32 S.E.2d 59 (1944), quoting from Powers v. Richmond, 122 Va. 328, 335, 94 S.E.803 (1918).

Interpreting "owned or leased by...a political subdivision" to include the ownership of an easement or right-of-way will not subvert the legislative purpose expressed in § 62.1-13.1, because the Commonwealth's political subdivisions will necessarily be guided by the wetlands policy established by the General Assembly.

For the foregoing reasons, I am of the opinion that local governmental activity on wetlands over which the local government has an easement or right-of-way is authorized by § 3(i) of the local wetlands zoning ordinance contained in § 62.1-13.5.1

1As previously stated, this conclusion is based upon an assumption that the activity falls within the permissible limits and terms of a properly recorded deed or condemnation proceeding.
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"The word 'owner' includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee," Stark v. City of Norfolk, 183 Va. 282, 289, 32 S.E.2d 59 (1944), quoting from Powers v. Richmond, 122 Va. 328, 335, 94 S.E.803 (1918).

Interpreting "owned or leased by...a political subdivision" to include the ownership of an easement or right-of-way will not subvert the legislative purpose expressed in § 62.1-13.1, because the Commonwealth's political subdivisions will necessarily be guided by the wetlands policy established by the General Assembly.

For the foregoing reasons, I am of the opinion that local governmental activity on wetlands over which the local government has an easement or right-of-way is authorized by § 3(i) of the local wetlands zoning ordinance contained in § 62.1-13.5.¹

¹As previously stated, this conclusion is based upon an assumption that the activity falls within the permissible limits and terms of a properly recorded deed or condemnation proceeding.

WETLANDS ACT. SUBDIVISION PLAT IS NOT A PLAN AS CONTEMPLATED BY EXEMPTION PROVISION OF WETLANDS ACT UNLESS IT IS A MONUMENT TO DEVELOPER'S INTENTION DILIGENTLY PURSUED AND IT REPRESENTS SUBSTANTIAL EXPENDITURE.
September 1, 1982

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You have asked that I reconsider a previous Opinion of this Office, found in the 1972-1973 Report of the Attorney General at 513, which discussed the meaning of the term "plan or plan of development" as used in the Wetlands Act. Section 62.1-13.20 of the Code of Virginia provides, in pertinent part, that

"[n]othing in this chapter shall affect...(2) any project or development...for which, prior to July 1, 1972...a plan or plan of development thereof has been filed pursuant to ordinance or other lawful enactment...."

The 1973 Opinion stated that "a subdivision plat which clearly indicates lot lines and streets, the confines of which are identifiable, would constitute a plan or plan of development..." required for the exemption. You point out that a recent decision of the Circuit Court of Virginia Beach, in a case styled City of Virginia Beach v. Virginia Marine Resources Commission, et al. (C81-2366-A), found a subdivision plat not to be a plan or plan of development for purposes of the above-quoted exemption from the provisions of the Wetlands Act.

The circuit court, in its Memorandum Opinion issued May 19, 1982, interpreted "plan or plan of development" to mean either a "plan of development" submitted under a zoning ordinance adopted pursuant to § 15.1-491, or a plan which would be equivalent to a plan of development, such as a site plan which had been filed and diligently pursued. See Fairfax County v. Medical Structures, Inc., 213 Va. 355, 357-358, 192 S.E.2d 799, 801 (1972). The court reserved decision on whether a subdivision plat meeting the necessary criteria would be regarded as a "plan" for purposes of § 62.1-13.20.

The court's test for equivalency to a plan of development was a document filed pursuant to law, diligently pursued, which represented (1) a monument to the developer's intention (that is, his intended use of the property), and (2) a substantial good faith expense. The court determined the plat in the Virginia Beach case was only a schematic representation of land divided and had no purposes other than to facilitate the transfer of ownership of land within the plat. The developer was free to vacate the plat, resubdivide the property, or convey all or part of the parcels identified on it. The court further noted that the plat in that case did not dedicate property or serve to meet any of the other commitments required of developers recording subdivision plats under modern subdivision ordinances. Hence, it did not satisfy either the requirement of showing what the developer intended to build, or the requirement of a substantial
expense. Accordingly, it was not exempt from the provisions of the wetlands ordinance.

The court's opinion limits the exemption from regulation to those projects for which developers have filed plans which represent a monument to the developer's intention diligently pursued and for which the developer has expended a substantial sum. This construction is sufficiently restrictive to accomplish the protection of undisturbed wetlands intended by the Wetlands Act. It also provides the protection intended by § 62.1-13.20(2) for those who have not yet begun construction but have so altered their position that in fairness they should be permitted to construct their project.

I am, therefore, of the opinion that a subdivision plat, standing alone, is not a plan or plan of development for purposes of the exemption provided in § 62.1-13.20(2), unless it is a monument to the developer's intention which has been diligently pursued and it represents a substantial good faith expense. This Opinion supersedes the Opinion found in the 1972-1973 Report of the Attorney General at 513 to the extent that the two Opinions are inconsistent.

1The Wetlands Act, § 62.1-13.1, et seq., provides generally that all development of wetlands shall require prior permit from either a local wetlands board or the Marine Resources Commission.

2When the plat which was the subject of that case was recorded, State law did not require localities to enact subdivision ordinances, and Princess Anne County, which is now a part of the City of Virginia Beach, did not enact such an ordinance until December 22, 1952.

WETLANDS ACT. WETLANDS PERMIT REQUIRED FOR SETTING OF PILINGS, FOR CONSTRUCTION OF RESIDENCE ON PILINGS, FOR CONSTRUCTION ON PILINGS OF ADJOINING OPEN WOODEN DECK.

January 10, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You have inquired whether the Wetlands Act (§ 62.1-13.1, et seq., of the Code of Virginia) requires that a permit be obtained from the local wetlands board under the following fact situation: An owner of a parcel of wetlands proposes to improve his parcel by constructing a two-story frame residence on pilings with an adjoining open wooden deck on pilings. No fill dirt will be placed in the wetlands, and the pilings will permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands. The Army Corps of Engineers has advised that no Department of Army permit will be required.
You ask the following three questions. (1) Is a permit required for setting the pilings? (2) Is a permit required for construction of the dwelling on pilings? (3) Is a permit required for construction on pilings of the open wooden deck adjoining the dwelling?

Section 62.1-13.9 of the Wetlands Act requires a permit for any activity in wetlands if the local wetlands zoning ordinance contained in § 62.1-13.5 requires a permit for such activity. Section 4(a) of the local wetlands zoning ordinance requires a permit for "[a]ny person who desires to use or develop any wetland...other than for those activities specified in § 3 above...." (Emphasis added.) Section 3 sets forth the uses and activities on wetlands which are permitted without a permit. The pertinent portion of § 3 is subsection (a) which exempts:

"The construction and maintenance of non-commercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures; provided that such structures are so constructed on pilings as to permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands[.]

I will address your first and second questions together, inasmuch as the pilings are to be set as part of the construction of a residence. The setting of pilings for a residence, and the construction of the house built on pilings, would clearly be a use or development of wetlands. Because no exemption is provided for such use or development, I am of the opinion that setting pilings and building a house on pilings over wetlands would require a permit from the local wetlands board.

The last question is whether the construction on pilings of an open wooden deck adjoining the dwelling would be exempted. Section 3(a) permits the construction of observation decks and similar structures as long as they are built on pilings so as to permit the flow of the tide and preserve the contour of the wetlands. The exemptions listed describe small, isolated structures which are used intermittently and which would have minimal effect on the wetlands. The exemptions are not applicable to decks constructed in conjunction with residential development, where the effects of the pilings and the covering of wetlands by the deck would have to be added to the effects resulting from the construction of the dwelling house. I am, therefore, of the opinion that a permit must be obtained for the construction of an open wooden deck adjoining a residence.
February 25, 1983

The Honorable Mitchell Van Yahres
Member, House of Delegates

This is in reply to your request for an opinion whether:

"(a) A will is self-proved as required under § 64.1-87-1 of the Code of Virginia, 1950, as amended, if the notarial acknowledgement is 'State of Virginia, At Large' rather than 'State of Virginia, At Large, County/City ______________';

(b) A Clerk of the Circuit Court in determining whether to admit a will to probate, may in his/her discretion refuse to admit a will to probate on the basis that a testator/testatrix has made a holographic change in the dispositive provisions of a typed will unless the subscribing witnesses sign an affidavit that such change was made in their presence and whether such a change would affect the self-proving provisions, if the self-proving provisions are in compliance with § 64.1-87-1 of the Code of Virginia, 1950, as amended; and

(c) A Clerk of a Circuit Court is required to admit a document to probate under § 64.1-77 of the Code of Virginia, 1950, as amended, that is testamentary in character and otherwise complies with the statutory requirements for wills set forth in the Code of Virginia, 1950, as amended, or may in his/her discretion refuse to admit such a document to probate."

I will answer your questions in the order in which you have asked them.

Section 64.1-87.1 of the Code of Virginia provides in part:

"A will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof of the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, attached or annexed to the will in form and content substantially as follows:

STATE OF VIRGINIA
COUNTY/CITY OF ________________ " (Emphasis added.)

Prior to 1980, notaries public were commissioned either for a particular county or city or for the State at large. Chapter 580, Acts of Assembly of 1980, amended and recodified the laws pertaining to notaries public and broadened the jurisdiction of notaries commissioned pursuant to Ch. 2 and 3
of Title 47.1 with the result that, currently, all notaries are commissioned for the State at large.

Current § 47.1-16 (as well as its forerunner, § 47-2.1) provides that every notarization shall include the county or city and state in which the notarial act was performed. Unlike omitting the expiration date, which goes to the validity of the notarial act itself, no harm would result if the name of the city or county were omitted from the notarization in view of the fact that a notary is not limited, as in the past, within the State as to where notarial acts may be performed. Additionally,

"it has been the policy of this State to look with great leniency on certificates of acknowledgment, and to uphold them if possible.***A substantial compliance with the material requirements of the law is all that is necessary. If it is reasonably certain that the grantor made the acknowledgment of the instrument in question that is sufficient."4

Regarding your second inquiry, the clerk of any circuit court is authorized by § 64.1-77 to admit wills to probate. The object of the probate proceeding is "to ascertain in the manner prescribed by law whether or not the paper or papers produced before [the clerk of the court] is or are the last will and testament of the deceased."5 The clerk decides whether or not the paper offered is the last will and testament of the decedent and either accepts or rejects the paper and enters the appropriate order in his order book.6 The Supreme Court of Virginia has held:

"[T]he clerk's order admitting the paper to probate as the true last will and testament of the testatrix was an adjudication not only that the will was duly executed, but of all other questions necessary to the validity of the testamentary act."7

The clerk must admit the will to probate unless it appears that the writing has not been duly executed8 or is not the last will and testament of the decedent.

The requirements of § 64.1-87.1 are that the testator acknowledge that the instrument is his last will and testament, that the testator freely and voluntarily executed the instrument, that the witnesses attest to such facts and that the testator is over the age of eighteen years and is of sound and disposing mind and memory. The witnesses' subscription to a will is "to establish and prove the genuineness of the testator's signature."9 Similarly, the witnesses' signing of the self-proving affidavit is for the purpose of proving that the writing was signed, executed and acknowledged by the testator.

Except for the pages to which they affix their signatures, it is unnecessary for witnesses to see the provisions of the will. Consequently, in the factual
situation suggested in your letter, the witnesses would not necessarily know if any changes had been made in the dispositive provisions. Admitting the will to probate does not purport to be a final adjudication of dispositive provisions thereof. Nor does it bar further court determination regarding construction of the will. Smith v. Mustian, 217 Va. 980, 234 S.E.2d 292 (1977). Hence, the impact, if any, of the change in the typed will, may be determined in a subsequent proceeding if the change has no relevancy to whether the paper was the will of the decedent. Smith, supra.

I am, accordingly, of the opinion that, if the will were otherwise properly signed, witnessed and acknowledged, a holographic change of a dispositive provision in a typed will would not adversely affect its due execution, the self-proving provisions or its testamentary character. Further, the clerk would not be justified in requiring affidavits that such change was made in the presence of the witnesses.

The same reasoning will also apply to your third question. The order of probate establishes the fact that the instrument is testamentary in character or not. Therefore, if the clerk determines that a writing is not testamentary in character and does not represent the last will and testament of the decedent, the clerk must enter an order reflecting such determination. Otherwise, the clerk must admit the will to probate.

In summary, I am of the opinion that the omission on the notarial acknowledgment of the county or city in which the acknowledgment was taken does not affect the validity of the acknowledgment. Further, a clerk of a circuit court has the discretion to reject a will only if he determines that the paper offered is not duly executed or is not the last will and testament of the decedent.

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1See former § 47-1.
2See former § 47-2.
3The expiration date of the notary's commission is required to appear on the notarization pursuant to § 47.1-16(B).
4Blair v. Rorer's Adm'r., 135 Va. 1, 24, 116 S.E. 767, error denied, 262 U.S. 734, 43 S.Ct. 704 (1923)
8The requisites of proper execution of a will are that the will must be: (1) in writing, (2) signed by the testator in accordance with statute, (3) unless a holographic will,
witnessed, and (4) unless holographic, subscribed to by witnesses present at the same time and in the presence of the testator. Harrison on Wills, supra, Ch. 9.


10See First Church of Christ, supra.

WORKMEN'S COMPENSATION ACT. DEFENDANTS PARTICIPATING IN COMMUNITY SERVICE PROGRAM PURSUANT TO § 19.2-303 OR § 19.2-354(B) ARE NOT CONSIDERED "EMPLOYEES" UNLESS THEY RECEIVE WAGE OR OTHER REMUNERATION.

November 16, 1982

The Honorable John Alexander, Judge
General District Court of Fauquier County

You have asked whether a defendant in a criminal case who performs services for a non-profit or governmental entity pursuant to § 19.2-303 or § 19.2-354(B) of the Code of Virginia is entitled to workmen's compensation benefits from the entity in the event of a work-related injury.

With your inquiry you have submitted a copy of the Battlefield Diversionary Programs Manual (the "Manual") which outlines the community service project proposed to be utilized by the Culpeper, Fauquier, Madison, Orange and Rappahannock General District Courts. The Fine Option Program outlined in Directive 100-1 of the Manual provides that an individual may volunteer to perform community services in lieu of fine. No wage or other remuneration is received by persons participating in this project. According to the Manual, the defendant only receives a credit for each hour of service. This credit is then applied as earned credits against his fine and costs.

In some cases, the defendant will have received a sentence in addition to a fine. Section 19.2-303 provides that after conviction, the court may require the defendant to perform community services as a condition of a suspended sentence. For this reason, Directive 100-1 also establishes a Sentencing Alternative Program which allows the defendant to perform community services in lieu of his sentence. This program parallels the Fine Option Program in that the defendant receives earned credits which are applied against his sentence. In these cases, no wage or other remuneration is received.

In order to participate in the Community Service Program, the defendant must execute an agreement with the Division of Court Services. See Manual Forms 1-82 and 5-82. This agreement provides that the defendant shall remain under the jurisdiction of the court and his failure to comply with the project guidelines will result in his expulsion from the program and further action by the court. After executing this agreement, the Division of Court Services selects a work
site in the community for the defendant. Only governmental and non-profit entities are considered for work placement.

Section 65.1-4 of the Workmen's Compensation Act defines an employee as every person under "any contract of hire." In the community service program, it is the court that places the individual in his position. The court may also terminate the position for misconduct or failure to abide by the terms of the agreement. Accordingly, there is no "contract of hire" between the defendant and the non-profit or governmental entity to which he is assigned by the court to work.

In Charlottesville Music Center, Inc. v. McCray, 215 Va. 31, 35, 205 S.E.2d 674 (1974), the Virginia Supreme Court defined "contract of hire" as an agreement in which an employee "provides labor...to an employer for wages or remuneration or other thing of value supplied by the employer." In the present case, the defendant only receives service credits without any wage or remuneration from the entity. These credits are not supplied by the entity, but are granted by the court.

Directive 100-4B requires that work placement be "those activities usually performed by volunteers...." Charlottesville, supra, specifically states that one who volunteers his services without promise of remuneration is excluded from the definition of "employee" and, therefore, is not covered by the Virginia Workmen's Compensation Act.

Section 65.1-3 defines an "employer" as the "State...any individual...or corporation...using the service of another for pay." (Emphasis added.) As stated above, the entity to which the defendant is assigned does not pay the defendant for his services; consequently, such entity would not be an employer as defined in the Workmen's Compensation Act.

In view of the foregoing, it is my opinion that a defendant convicted in a criminal case who performs services pursuant to the diversionary program for a non-profit or governmental entity without remuneration or wage is not an employee as defined in the Workmen's Compensation Act and, therefore, is not entitled to benefits under the Workmen's Compensation Act in the event of a work-related injury.

---

1 Section 19.2-303 provides, inter alia, that the court shall have the power to suspend a sentence and require a defendant to perform community service.

2 Section 19.2-354(B) provides, in part: "The court may establish a program to provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment."
The Honorable Wiley F. Mitchell, Jr.
Member, Senate of Virginia

You have asked a number of questions concerning the applicability of certain remedial legislation to volunteer fire fighters.

You first ask whether volunteer fire fighters are entitled to benefits under the Virginia Workmen's Compensation Act (the "Act") from a city even though, as stated in your letter, the city has not adopted a resolution of the type described in § 65.1-4.1, a part of the Act. Section 65.1-4 of the Act defines an "employee" as any person in the service of another "under any contract of hire...." A "contract of hire" is usually defined as an agreement in which an employee provides labor to an employer for wages or other remuneration. Charlottesville Music Center, Inc. v. McCray, 215 Va. 31, 205 S.E.2d 674 (1974). Subject to the exception provided in § 65.1-4.1, when services are rendered voluntarily without compensation, the individual providing the service is not covered by the Act. Id., 215 Va. at 35.

As indicated, the Act provides a limited exception to permit coverage of certain volunteer programs. Section 65.1-4.1 allows the governing body of a political subdivision to adopt a resolution acknowledging volunteer fire fighters, volunteer lifesaving and rescue squad members and auxiliary or reserve police as employees of the political subdivision for purposes of the Act. Section 65.1-4.1 provides, in part:

"For the purpose of this Act, volunteer fire fighters... shall be deemed employees of the political subdivision in which the principal office of such volunteer fire company...is located; provided, that the governing body of such political subdivision has adopted a resolution acknowledging such volunteer fire fighters...as employees for the purposes of this Act."

Based on this statute, volunteer fire fighters cannot be recognized as employees of the city for purposes of coverage under the Act without adoption by city council of a specific resolution acknowledging the volunteers as employees for purposes of the Act. You advise in your letter that the city has not adopted such a resolution. For this reason, the volunteer fire fighters would not be eligible for worker's compensation benefits from the city.
You also ask if these volunteer fire fighters are entitled to the presumptions set forth in § 65.1-47.1 relating to hypertension, respiratory and heart disease. That section does not create an independent claim or entitlement to benefits under the Act. First, it is necessary for the volunteer to establish a customary basis for a claim. Thus, if the city council has not adopted the resolution prescribed in § 65.1-4.1, the volunteer does not have a basis for his claim and the presumptions never come into play. If the council has adopted the requisite resolution and the volunteer does have a valid basis for a claim, then the volunteer may avail himself of the presumptions in accordance with the terms of § 65.1-47.1.2

You next ask whether volunteer fire fighters covered by the Act may validly waive either their right to worker's compensation coverage or the presumption set forth in § 65.1-47.1. Section 65.1-23 provides:

"Every employer and employee, except as herein stated, shall be conclusively presumed to have accepted the provisions of this Act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, except in the case of an executive officer, who shall have given prior to any accident resulting in injury or death notice to the contrary in the manner herein provided. No notice by an employee shall be effective to exempt an employer from the provisions of this Act in respect to occupational diseases under chapter 4 (§ 65.1-46 et seq.) hereof."

(Emphasis added.)

By virtue of the foregoing, an employee is not permitted to make a general waiver with respect to all occupational diseases and presumptions relating to such diseases as set forth in Ch. 4 of the Act. Section 65.1-53, however, does provide for a limited waiver in certain circumstances. This statute provides, in part:

"When an employee or prospective employee, though not incapacitated for work, is found to be affected by, or susceptible to, a specific occupational disease he may, subject to the approval of the Industrial Commission, be permitted to waive in writing compensation for any aggravation of his condition that may result from his working or continuing to work in the same or similar occupation for the same employer."

Based on this statute, a volunteer fire fighter may waive a claim to compensation for aggravation to a specific occupational disease if he has been found to be affected by or susceptible to the disease. This waiver, however, is subject to the prior approval of the Industrial Commission.

You have also asked several questions concerning Ch. 4 of Title 27 pertaining to relief for fire fighters and
dependents. Specifically, you ask if volunteer firemen are covered by that chapter, and if so, are they entitled to the presumption created by § 27-40.1. You further ask whether volunteers who do not meet the requirements specified in § 27-42 are entitled to the presumptions provided by § 27-40.1.

Chapter 4 of Title 27 provides generally for relief of fire fighters and dependents. The chapter has two articles. Article 1 establishes general authorization for localities to provide (a) relief for "any fire fighter who is disabled by injury or illness as the direct or proximate result of the performance of his duty...in the service of the county, city or town..." and (b) relief for the survivors of any fire fighter who dies. See § 27-39. Article 2 establishes authorization for localities to provide for relief of volunteer fire fighters, as that term is defined in § 27-42, a part of Art. 2.

An examination of the provisions of §§ 27-39 and 27-40.1, also a part of Art. 1, makes it clear that the relief authorized by Art. 1 and the presumptions contained therein apply to qualifying volunteers. Significantly, however, in 1972, the General Assembly added to Art. 1 an additional section, § 27-40.3, which provides that, for purposes of Art. 1, the term "volunteer fire fighters" shall be defined as in § 27-42. Thus, I conclude that volunteer fire fighters are covered by both Articles in Ch. 4 of Title 27, provided that they meet the requirements specified in § 27-42. As indicated above, it follows that volunteers meeting the requirements of § 27-42 would be eligible for the presumptions specified in § 27-40.1.

You have also asked if the presumption created by § 27-40.1 may be waived. Generally, statutory rights, such as the presumption about which you inquire, can be waived by the person holding them. Coleman v. Nationwide Life Ins. Co., 211 Va. 579, 583, 179 S.E.2d 466, 469 (1971); Creteau v. Phoenix Assur. Co. of New York, 202 Va. 641, 644, 119 S.E.2d 336, 339 (1961). The only common exception to this rule is when a right has been given to an individual, not simply for his private benefit, but as a matter of public policy in the interest of the state. Benane v. International Harvester Co., 142 Cal. App. Supp. 2d 874, 299 P.2d 750 (1956); Harfet v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941); City of Glendale v. Coquat, 46 Ariz. 478, 52 P.2d 1178 (1935). These types of expressions of public policy are not waivable because they are deemed to benefit the public as a whole, and not just the individual.

I believe that the rights conferred upon qualifying fire fighters by § 27-40.1 are an expression of public policy by the General Assembly, designed to enhance the availability of effective community fire prevention personnel by simplifying the proof required for recovery in the event of disability or death. Thus, the rights, while conferred upon individuals, promote the common good. Therefore, I am of the opinion that
the exception to the general right of waiver is applicable. Accordingly, I conclude that the presumption contained in § 27-40.1 cannot be waived.

1Effective July 1, 1983, Title 65.1 of the Code of Virginia will be known as the Virginia Worker’s Compensation Act, Ch. 239, Acts of Assembly of 1983.

2I note, for example, that § 65.1-47.1 does require certain physical examinations and findings prior to the volunteer’s making a claim.

3Section 27-42 provides, in pertinent part, that the term volunteer fire fighter "shall include only members of any organized fire-fighting company which has in its possession and operates fire-fighting apparatus and equipment, whose members serve without pay and whose names have been duly certified by the secretary of such company as active members thereof to the clerk of the circuit court of the county or city as the case may be."

ZONING. ZONING ADMINISTRATOR. APPEALS. STAY OF PROCEEDINGS PRESCRIBED IN § 15.1-496.1 APPLIES ONLY TO ACTIONS IN FURTHERANCE OF ZONING ADMINISTRATOR’S DECISION AND DOES NOT EXTEND TO ISSUANCE OF PERMITS BY WATER CONTROL BOARD OR HEALTH DEPARTMENT. ZONING ADMINISTRATOR MAY PROCEED ON MATTER UNDER APPEAL ONLY AFTER CERTIFYING IT AS ONE OF IMMINENT PERIL PURSUANT TO § 15.1-496.1.

June 6, 1983

The Honorable Nathan H. Miller
Member, Senate of Virginia

This is in reply to your recent letter in which you request my opinion whether a zoning administrator may proceed on a matter, and under what conditions he may proceed, after an appeal has been made to the board of zoning appeals. You ask also whether the stay of proceedings prescribed in § 15.1-496.1 of the Code of Virginia applies to the issuance of permits by the State Water Control Board or the State Health Department.

Section 15.1-491(d) authorizes inclusion in a local zoning ordinance of a provision for appointment or designation of a zoning administrator who thereafter administers and enforces the ordinance on behalf of the governing body. See, also, §§ 15.1-491.3, 15.1-491.4 and 15.1-496. Section 15.1-494 requires creation of a board of zoning appeals in any county or municipality which has enacted a zoning ordinance, and § 15.1-495 sets out the board’s powers and duties, among which is included the following:

"(c) To hear and decide appeals from the decision of the zoning administrator."
Section 15.1-496.1, relating to appeals to the board, reads as follows:

"An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator. Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal shall stay all proceedings in furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown." (Emphasis added.)

The zoning administrator, charged with the duties of administering and enforcing the zoning ordinance, is an administrative agent of government, who must be governed by the literal provisions of the zoning ordinance and must strictly adhere to its terms in making his decisions. See 1974-1975 Report of the Attorney General at 600. A person aggrieved by any such decision of the zoning administrator has an appeal of right to the board of zoning appeals, pursuant to § 15.1-496.1. See, e.g., 1962-1963 Report of the Attorney General at 306. In accordance with the terms of § 15.1-496.1, if (a) the zoning administrator has made a decision under his authority to administer and enforce the local zoning ordinance, which (b) aggrieves a person, and (c) within thirty days after the decision (d) the aggrieved person files with the zoning administrator and with the board a notice of appeal specifying the grounds thereof, all proceedings in furtherance of the zoning administrator's decision shall be stayed. In answer to your first question, I am of the opinion that the zoning administrator may thereafter proceed on the matter only if he first certifies to the board that, by reason of the facts stated in his certificate, a stay would in his opinion cause imminent peril to life or property. See the emphasized portions of § 15.1-496.1, supra.

In answer to your second inquiry, in my opinion the stay of proceedings prescribed in § 15.1-496.1 does not apply to actions of State agencies in issuing permits. The appellate process set out in § 15.1-496.1, et seq., may be invoked only in response to a decision of the zoning administrator in administering and enforcing a zoning ordinance, and, once the appeal is filed, the stay applies to all proceedings in furtherance of only that decision. The statute is to be
strictly construed and may not be enlarged by implication to apply to the acts of other administrators in other agencies. Compare Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740, 232 S.E.2d 767 (1977); Lake George Corp. v. Standing, 211 Va. 733, 180 S.E.2d 522 (1971). I am unaware of any other provision of law which would extend the stay in § 15.1-496.1 to actions of either the State Water Control Board or the State Health Department.

1Note that an appeal may be taken also by "any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator." Section 15.1-496.1, supra.

2The zoning administrator may, of course, proceed after a decision of the board affirming his decision, unless the aggrieved person successfully seeks a restraining order from circuit court in appellate proceedings under § 15.1-497.
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