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

From July 1, 1983 to June 30, 1984
Commonwealth of Virginia
Office of the Attorney General
Richmond
1984
1983-1984 REPORT OF THE ATTORNEY GENERAL

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*In order to conserve space the complete listing of cases is not reprinted herein but is an Addendum to this Report. Interested members of the public may obtain copies by contacting the Librarian, Office of the Attorney General.*
The Honorable Charles S. Robb  
Governor of Virginia  
State Capitol  
Richmond, Virginia 23219  

My dear Governor Robb:

The Office of the Attorney General is charged by the Constitution and the Code of Virginia with providing legal representation to the hundreds of agencies and institutions of the Commonwealth, and with providing formal, advisory opinions interpreting State law.

This year the Office of the Attorney General provided representation in more than 5,000 court cases and administrative proceedings involving practically every aspect of State Government. This year I also rendered over 350 formal Opinions in response to requests of State and local government officers and officials.

Significantly, attorneys in the Claims and Collections Section, the Medicaid Fraud and Abuse Control Unit, the Department of Social Services, the Department of Taxation and the Antitrust Unit, working with others, have recovered or established for recovery for the General Fund of the Commonwealth, units of local government, and citizens of Virginia more than $27,000,000 for FY 1983-84.

No single document can accurately summarize all the activities of the Office of the Attorney General. Therefore, I have prepared separately an Annual Report providing an overview of the activities of the Office during 1983-1984. In addition, as contemplated by § 2.1-128, I have also had prepared the customary volume containing the Opinions of the Attorney General whose publication will be helpful in promoting uniformity of construction of the laws of the Commonwealth.

I trust these two publications will provide you with an understanding of the efforts of this Office to meet the constitutional and statutory mandates of the Attorney General.

With kindest regards, I am

Sincerely,  

Gerald L. Baliles  
Attorney General
### PERSONNEL OF THE OFFICE

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<td>Jack Richardson</td>
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ATTORNEYS GENERAL OF VIRGINIA
FROM 1776 TO 1984

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

1Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.
Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. John R. Saunders and served until October 6, 1947.

Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abram P. Staples and served until his death on January 31, 1948.

Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson. Resigned September 16, 1957.

Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.

Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.

1983-1984 REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Adult Center, Inc. v. Commonwealth. Circuit Court, County of Prince William. Appeal from obscenity conviction. Challenge to use of average person standard as to prurient appeal of materials for clearly defined deviant sexual groups. Appeal withdrawn.


Augustine v. Commonwealth. Circuit Court, City of Suffolk. Sufficiency to prove arson beyond a reasonable doubt. Reversed and dismissed.


Buckley v. The College of William and Mary. Circuit Court, City of Richmond. Breach of contract action filed by visiting professor alleging failure of college to timely notify him of non-renewal of contract. Dismissed in favor of Plaintiff.

Buffalo v. Director of Central State Hospital. Petition for writ of habeas corpus alleging improper conditions of confinement. Dismissed in favor of defendant.


Campbell, George v. Commonwealth. Circuit Court, County of Rockingham. Admissibility of evidence as to reputation and prior acts of third party who was intended victim. Affirmed.


Cates v. Virginia Polytechnic Institute and State University. Circuit Court, City of Richmond, Division I. Action under Freedom of Information Act to compel production of tenure evaluations. Appeal from Circuit Court awarding access. Dismissed.

Commonwealth v. B. J. McAdams, Inc. Circuit Court, City of Richmond, Division II. Whether an interstate trucking company is required to file and pay Virginia income taxes. Reversed and remanded.

Commonwealth v. Seafood Harvesters, Inc. Circuit Court, City of Hampton. Appeal from decision that § 28.1-128.01 cannot be applied to shellfish leases issued prior to effective date of the statute. Reversed and injunction vacated.

Cox v. Commonwealth. Circuit Court, County of Fairfax. Right of defendant to call for favorable evidence. Ruling that financial records of city were records of a party to proceedings. Reversed and remanded.


Dukes v. Commonwealth. Circuit Court, City of Chesapeake. Sufficiency to establish possession of marijuana with intent to distribute. Reversed and remanded.

Edenton v. Commonwealth. Circuit Court, County of Henrico. Petition for appeal to determine whether the operation of a motor vehicle without a valid operator's license is a lesser included offense to the charge of operating a motor vehicle after having been adjudged a habitual offender. Conviction reversed.


Fariss, Jr., v. Commonwealth of Virginia, Department of Highways and Transportation. Circuit Court, County of Campbell. Whether personnel issue grievable. Writ of Appeal denied; Commonwealth did not prevail.

Fitzgerald v. Commonwealth. Circuit Court, City of Richmond. Sufficiency as to forgery where defendant/payee endorsed fraudulent checks with his own name. Affirmed.

Fulcher v. Commonwealth. Circuit Court, County of Botetourt. Whether key prosecution witness should have been cross-examined as to pending juvenile charges notwithstanding confidentiality of juvenile proceedings. Affirmed.


Gilchrist v. Commonwealth. Circuit Court, County of Accomack. Failure to disclose exculpatory evidence and failure to allow adequate time to prepare defense. Reversed and remanded.

Godfrey v. Commonwealth. Circuit Court, City of Clifton Forge. Whether continuances requested by defendant to obtain witnesses resulted in denial of speedy trial. Reversed and dismissed.


Gray v. Commonwealth. Circuit Court, City of Williamsburg and County of James City. Whether error not to strike two jurors who were third cousins of the victims. Reversed and remanded.


Heyward, et al. v. Robb, Governor of Virginia and the Rector and Visitors of the University of Virginia. Circuit Court, City of Richmond. Appeal of Order dismissing suit to enjoin construction of the Sprigg Lane Dormitory at the University of Virginia. Appeal denied.


In re Arundel Communications. Circuit Court, County of Rappahannock. Petition for writ of mandamus and prohibition to compel disclosure of sealed transcripts. Petition dismissed as moot.

In re Edythe M. Rogers v. Virginia Board of Bar Examiners. Petition for review of adverse action by Virginia Board of Bar Examiners. Denied.

In re Harrison Freeman Clark, Jr. Petition for writ of mandamus. Denied.

In re Harry Hundell Ware, III. Circuit Court, City of Richmond. Prohibition case to block spousal support proceeding. Dismissed.

Jones v. Commonwealth. Circuit Court, City of Richmond. Whether failure to take defendant to view crime scene denied his right to be present at all stages of trial. Affirmed.


Lansdown v. Commonwealth. Circuit Court, County of Loudoun. Whether error to deny motion to suppress larceny as lesser-included offense of robbery. Instruction as to inference in possession of stolen goods. Affirmed.
Lawhorne, et al. v. King. Circuit Court, City of Richmond, Division I. Whether collateral estoppel was properly ruled present to bar this action. Appeal not granted; Commonwealth prevailed.


Michaels v. Virginia Employment Commission and Southeastern Marketing, Inc. Circuit Court, County of Giles. Section 60.1-58(b) - misconduct. Writ denied.


Rease v. Commonwealth. Circuit Court, County of Fairfax. Whether State court had jurisdiction to impose suspended sentence for probation violation. Affirmed.


Riddick v. Commonwealth. Circuit Court, City of Portsmouth. Whether reversible error not to set aside verdicts as contrary to law and evidence and to grant certain jury instructions. Affirmed.


Short v. Commonwealth. Circuit Court, City of Richmond, Division I. Interlocutory appeal. Dismissed.


State Highway and Transportation Commissioner v. Nannie Clore White (Worsham) and Texaco Inc. Circuit Court, City of Richmond. Whether landowner could retain a condemnation award in excess of her testimony. Writ of Appeal granted, reversed and entry of final judgment ordered. Commonwealth prevailed.

Stone v. Virginia State Bar, ex rel, the Tenth District Committee. Appeal from decision of Virginia State Bar to suspend attorney's license for three years. Dismissed.

Swersky v. Barrow. Circuit Court, City of Virginia Beach. Mandamus/prohibition for alleged refusal of circuit court judge to remove committee. Dismissed.


Turner v. Commonwealth. Circuit Court, City of Lynchburg. Whether error to find defendant "operator". Instruction on illegal gambling. Reversed and remanded.

Vance v. Tri-City Transport Company and Virginia Employment Commission. Circuit Court, City of Bristol. Section 60.1-58(a) - voluntary quit. Writ applied for. Writ denied.


Virginia Department of Corrections v. Clark. Circuit Court, County of Fairfax. Appeal from award of habeas writ by Circuit Court of Fairfax County in capital case. Reversed and remanded.

Virginia Department of Corrections, et al. v. Crowley. Circuit Court, County of Cumberland. Appeal of denial of motion to vacate judgment of Circuit Court releasing three inmates after jurisdictional period had lapsed. Reversed and final judgment.

Virginia Department of Corrections, et al. v. Sherman. Circuit Court, County of Cumberland. Appeal of denial of motion to vacate judgment of Circuit Court releasing three inmates after jurisdictional period had lapsed. Reversed and final judgment.

Virginia Department of Corrections, et al. v. Taylor. Circuit Court, County of Cumberland. Appeal of denial of motion to vacate judgment of Circuit Court releasing three inmates after jurisdictional period had lapsed. Reversed and final judgment.

Virginia Real Estate Commission v. Bias. Circuit Court, County of Albemarle. APA action for discipline of a licensee; license suspended, $1000 fine; decision in favor of Real Estate Commission. Reversed and final judgment.
Virginia Real Estate Commission v. Chewning. Circuit Court, City of Richmond, Division II. APA action for discipline of a license. Decision in favor of Virginia Real Estate Commission.


Wellford v. Commonwealth. Circuit Court, County of Richmond. Whether error to overrule motion to suppress marijuana plants seized without a warrant. Affirmed.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Baliles v. Miller. Circuit Court, County of Rappahannock. Suit to construe a will. Appeal granted.

Ballard v. Commonwealth. Circuit Court, City of Richmond. Whether error not to allow trial jury to sentence defendant.


Bowles v. Director of Central State Hospital. Petition for writ of habeas corpus alleging improper conditions of confinement.


Brown, et al v. Lukhard, et al. Circuit Court, City of Richmond, Division I. Whether Department of Social Services correctly implemented Aid to Dependent Children cutbacks.

Carbaugh v. Hartford Accident & Indemnity Company. Circuit Court, City of Richmond, Division I. Distribution of Michael's Packers and Stockyard Bond. Commonwealth dismissed as appellee.

Clozza v. Commonwealth. Circuit Court, City of Virginia Beach. Capital murder case.


Commonwealth v. Millsaps. Circuit Court, County of Fairfax. Appeal from denial of rescue and grant of assumption of risk instructions in property damage case involving apprehension of reckless driver on a public highway.


Easterling v. Commonwealth. Circuit Court, County of Pulaski. Wiretap evidence, search warrant and elements of offense in conviction under § 54-524.93, selling misbranded drugs.

Educational Books, Inc. v. Commonwealth. Circuit Court, County of Fairfax. Whether error to conclude that same evidence test of double jeopardy clause did not prevent convictions for seven of nine counts.


Gunter v. Virginia Employment Commission and Danville School Board. Circuit Court, City of Danville. Section 60.1-52.3(A) - payment of benefits to substitute teachers.

HCMF Corp. v. Kenley. Circuit Court, County of Montgomery. Reimbursement dispute over medicaid disallowance for accelerated deprivation.

Harris v. Commonwealth. Circuit Court, City of Richmond. Appeal of suspension of driver's license for failure to pay fines.


In Re William Allen Marcontell, Petitioner. Circuit Court, County of Alleghany. Petition for writ of mandamus seeks to compel circuit court judge to order attorney to release client's files.


Jackson v. Commonwealth. Circuit Court, City of Richmond. Admissibility, relevance and prejudice as to evidence on cross-examination and rebuttal.


Lomax v. Commonwealth. Circuit Court, City of Richmond. Whether error to deny defendant's request for continuance.


McCary v. Commonwealth. Circuit Court, County of Gloucester. Admissibility of evidence from search of automobile and whether error to permit jury to consider in-court identification of defendant by two witnesses.


Morris v. Commonwealth. Circuit Court, County of Greene. Whether error to sentence to two life terms on one capital murder indictment and to convict of two charges of use of firearm in commission of murder.

National Freight, Inc. v. Virginia Employment Commission. Circuit Court, City of Richmond. Section 60.1-70 - tax liability - employer or independent contractor.

O'Brien v. George Mason University, et al. Circuit Court, County of Fairfax. Motion for declaratory judgment and injunction arising out of University's decision to terminate electrical contractor and call in surety to complete project.


Ramey v. Virginia Employment Commission and Golden Chip Coal Company. Circuit Court, County of Dickison. Section 60.1-58(c) - failure to accept suitable work.


Robinson v. Commonwealth. Circuit Court, City of Richmond. Admissibility of evidence in rebuttal as to deceased victim's scheduled testimony in upcoming drug trial.

Shinault v. Commonwealth. Circuit Court, City of Chesapeake. Appeal of a third offense drunk driving conviction.


St. Mary's Hospital of Norton v. Baliles, et al. Circuit Court, County of Wise. Appeal from ruling that hospital must obtain certificate of public need.

State Highway Commissioner v. Brabham Petroleum Co. Inc. Circuit Court, County of Roanoke. Arbitrary and capricious award by commissioners bearing no reasonable relationship to testimony; impeachment of Highway Department employee called by landowner; income approach of valuation. Petition for appeal filed.

State Highway Commissioner v. Lanier Farms Inc. Circuit Court, City of Martinsville. Admissibility of evidence pertaining to speeding on improved roadway; denial of instruction on damages for denial of reasonable access. Petition for appeal filed.


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

State Highway and Transportation Commissioner v. McDonald's Corporation. Circuit Court, City of Richmond, Division II. Eminent domain matter. Whether commissioners followed the instructions given. Writ sought.

Stockton v. Commonwealth. Circuit Court, County of Patrick. Capital murder case. Petition for writ of certiorari to United States Supreme Court.

Stokes v. Virginia Employment Commission and Richmond Cedar Works. Circuit Court, City of Danville. Section 60.1-58(b) - misconduct - insubordination.


Virginia Dept. of Labor and Industry v. Westmoreland Coal Co. Circuit Court, County of Wise. Declaratory judgment action seeking interpretation of statute.


Virginia State Bar, ex rel., Third District Committee v. Gibbs. Appeal from disciplinary action of State Bar.

Virginia State Bar, ex rel., Third District Committee v. Pickus. Appeal from order by State Bar suspending license.

Virginia State Board of Medicine v. Tan. Circuit Court, City of Williamsburg. Appeal of issuance of ex parte injunction restraining Board from revoking Tan's license.


Whitehurst v. Virginia State Bar, ex rel., Third District Committee. Circuit Court, City of Richmond, Division I. Appeal of suspension of license.


CASES IN THE SUPREME COURT OF THE UNITED STATES


Palmer v. Hudson. Appeal concerning (1) applicability of Fourth Amendment to search of prison inmate's cell and (2) applicability of Fourteenth Amendment to inmate's claim of loss of property. Court ruled for Commonwealth.


The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
ADMINISTRATIVE PROCEDURE. ATTORNEYS. PARTY ENTITLED TO REASONABLE COSTS AND FEES IF THREE CONDITIONS MET: PARTY PREVAILS SUBSTANTIALLY ON MERITS; COURT FINDS AGENCY TO HAVE ACTED UNREASONABLY; AND AGENCY UNABLE TO DEMONSTRATE SPECIAL CIRCUMSTANCES THAT WOULD MAKE AWARD OF COSTS AND FEES UNJUST.

October 21, 1983

The Honorable Vivian E. Watts
Member, House of Delegates

You have asked for my opinion on several questions concerning the award of costs and of attorneys' fees as authorized by the Administrative Process Act (the "Act"), §§ 9-6.14:1 to 9-6.14:21 of the Code of Virginia.

You first ask whether a party, who contests an agency action in court and prevails, is entitled to reasonable costs and attorneys' fees if the agency is found to have acted unreasonably. A party is entitled to reasonable costs and fees if three conditions are met. First, the party must prevail substantially on the merits. See § 9-6.14:21(A). The Supreme Court of Virginia has construed the word "substantially" or the word "substantial" to mean "important; essential; material." Bank of Chatham v. Arendall, 178 Va. 183, 190, 16 S.E.2d 352, 355 (1941). Consequently, I conclude that, if a party prevails only on a collateral issue not essential to his appeal and he does not prevail upon the principal bases of his appeal, he is not entitled to an award of costs and of fees.

The second condition specified in § 9-6.14:21 is that the agency must be found to have acted unreasonably. At a minimum, this means that the court must first find that the agency acted arbitrarily or capriciously because the Supreme Court has so defined the word "unreasonable." See Pump and Well Company v. Taylor, 201 Va. 311, 317, 110 S.E.2d 525, 530 (1959). In my judgment, though, I believe the General Assembly meant more than a mere finding of an instance of arbitrary and capricious action. This is because § 9-6.14:17 specifies the issues which a court may address upon appeal. A court might rule in favor of a party on any one of those issues and against an agency, holding, for example, there was not substantial evidence to support the agency's findings. The prevailing party might then assert that the court's holding necessarily indicates that the agency acted arbitrarily or capriciously, i.e., "unreasonably." See State Bd. of Health v. Godfrey, 223 Va. 423, 435, 290 S.E.2d 875, 881 (1982) (wherein the Supreme Court of Virginia commented that there may be no significant distinction between the substantial evidence test and the arbitrary and capricious standard). Thus, if all a prevailing party must do to prove arbitrary or capricious conduct is to prevail upon one of the issues specified in § 9-6.14:17 in order to obtain an award of costs or of fees, then the General Assembly's specific requirement that the agency must be found to have acted unreasonably is meaningless.

The presumption is that the General Assembly does not enact meaningless legislation. Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949). Consequently, the General Assembly must have intended the requirement of unreasonableness to mean something more than a simple finding by the court that a party prevails upon one of the issues specified in § 9-6.14:17 and that, as a consequence, the agency's action was necessarily arbitrary and capricious. I believe, therefore, that a judicial finding of unreasonableness must also be predicated upon some more stringent standard, such as, for example, evidence that responsible, supervisory personnel of the agency knew or should have known that the agency's action was arbitrary and capricious or was in bad faith and took no corrective action.

This conclusion is supported by the actions of the 1931 General Assembly when it considered House Bill 1735, which was ultimately enacted as § 9-6.14:21. As originally
submitted, House Bill 1735 did not contain the "unreasonableness" requirement. That language was added by a legislative committee considering the bill. This fact suggests that the General Assembly did not intend to imitate the approach taken by Congress in enacting 42 U.S.C. § 1988, which is the federal statute authorizing an award of fees to prevailing parties in federal civil rights cases, without statutorily being required to consider the "reasonableness" of the agency's actions. Had the General Assembly wished to imitate the federal approach to permit an award of costs and of fees whenever a party prevailed, it would not have been necessary to add the unreasonableness language to House Bill 1735. Compare Fire Assurance Corp. v. Cohen, 203 Va. 810, 813, 127 S.E.2d 399, 401 (1962) (where the legislature is presumed to have adopted the construction of a federal statute that is identical to a state statute) with Williams v. Commonwealth, supra.

The third condition which must be satisfied before a party is entitled to an award of costs and of fees is that there must be no special circumstances that exist which would make an award unjust. In this regard, I note that the burden of proving special circumstances is that of the agency, whereas the complaining party must carry the burden in establishing that the agency's action was in error and that the agency acted unreasonably. Section 9-6.14:21(A) does not define the term "special circumstances," and I am unaware of any decision of the Supreme Court of Virginia which would explain it. This language, however, is the same language used by the Supreme Court of the United States in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), when it construed a federal statute that authorized payment of attorneys' fees. The federal courts have also used the same language in deciding whether an award of fees is appropriate under 42 U.S.C. § 1988. Unfortunately, none of the federal cases explicitly construes the language in an affirmative fashion. One commentator, however, has observed that the only time the federal courts have denied fees to a prevailing party has been when that party has acted reprehensibly in instituting or in conducting the lawsuit. Awards of Attorneys' Fees in the Federal Courts, 56 St. John's Law Rev. 277, 326 (1982); see also, Arnold v. Burger King Corporation, No. 81-1697 (4th Cir. October 5, 1983) (a court did not abuse its discretion under title VII of the Civil Rights Act of 1964 in awarding fees to successful defendants after finding the plaintiff's case to be frivolous).

While I believe that reprehensible conduct by a complaining party may be special circumstances which would make an award unjust and thus a basis for denying costs and fees under § 9-6.14:21, I am not persuaded that that is the only circumstance under which an award can be denied, especially in view of the fact that the federal courts have had difficulty with this language. See, e.g., Concerned Democrats v. Reno, 458 F.Supp. 60 (S.D. Fla. 1978), vacated and remanded 601 F.2d 891 (5th Cir. 1979), on remand 493 F.Supp. 660 (S.D. Fla. 1980), rev'd, 634 F.2d 629 (5th Cir. 1980), reh'g en banc denied, 638 F.2d 1234 (5th Cir. 1981), cert. denied, 102 S.Ct. 1426 (1982); see also, Young v. Kenley, 465 F.Supp. 1260 (E.D. Va. 1979), vacated and remanded 614 F.2d 373 (4th Cir. 1979), on remand 485 F.Supp. 365 (E.D. Va. 1980), rev'd, 641 F.2d 192 (4th Cir. 1981), reh'g denied (4th Cir. March 24, 1981), cert. denied 455 U.S. 961, 102 S.Ct. 1476 (1982) (Justices Rehnquist and O'Connor dissenting). Given the "special circumstances" language and the fact that the appeal of a case decision is maintained in equity, see Rule 2A:5; Commonwealth v. County Utilities, 223 Va. 534, 547, 290 S.E.2d 867, 874 (1982), I conclude that a determination of special circumstances rests in the sound discretion of the court and the court may consider circumstances other than "reprehensible conduct" alone. Your second question is whether a prevailing party may request the court to award costs and fees regardless of the requirement of § 2.1-223.1 that a person having a pecuniary claim against the Commonwealth present it to the appropriate agency head. In my opinion, § 2.1-223.1 is inapplicable and has no effect upon the award of costs and of fees authorized by § 9-6.14:21. As a more specific statute that was enacted later in time than § 2.1-223.1, § 9-6.14:21 controls in the event of a conflict between the two. Additionally, § 9-6.14:21 clearly contemplates that the court, which hears the appeal,
will be the proper forum for determining whether an award should be made at that time. Therefore, a timely and appropriate motion from the prevailing party would be a proper mechanism for requesting the court to exercise the authority vested in it by § 9-6.14:21, without regard to the provisions of § 2.1-223.1.

In your third question, you have asked whether the prevailing party must request an award of costs and fees within a specified time frame. Although § 9-6.14:21 does not explicitly set forth a time within which such a request must be made, "the initial words of the statute are "in any civil case.... This language indicates that § 9-6.14:21 was intended to apply to matters before a court. Rule 1:1 of the Rules of the Supreme Court of Virginia specifies that twenty-one days after the entry of a final order the court loses jurisdiction of the case. Accordingly, a motion for an award of costs and fees, made pursuant to § 9-6.14:21, must be made and acted upon prior to the expiration of twenty-one days following entry of the court's final order.

Your fourth question relative to § 9-6.14:21 is whether a prevailing party or the agency may introduce new evidence on the issue of unreasonableness once the court has ruled upon the merits of the appeal. Nothing in § 9-6.14:21 would prohibit the introduction of new evidence. Moreover, the Supreme Court has held that a court does not abuse its discretion to receive evidence concerning the arbitrary nature of an agency's action or evidence of the agency's bad faith even though those issues were not before the agency in the administrative stage of the proceedings. State Board of Health v. Godfrey, 223 Va. at 433, 290 S.E.2d at 880. In view of this, I believe that it would not be improper for a court to receive new evidence on the issue of unreasonableness after ruling on the merits of the appeal. The decision to receive such evidence would be a matter within the sound discretion of the court. I would point out, however, that in most situations the prevailing party may well have already submitted its evidence on this point in an attempt to prevail on the merits of the judicial appeal, and the agency, in turn, may have already introduced its evidence in rebuttal. Thus, the court may determine not to permit the taking of any further evidence.

In your fifth question, you have asked whether new evidence may be introduced if an appeal is taken from the court's decision on the merits. The answer to this question depends, in my opinion, upon whether twenty-one days has passed since the court entered its final order on the merits of the agency action. If it has, the court is without jurisdiction. If it has not, then, as indicated previously, the court may receive such evidence and rule on the issue of costs and fees.

Your last question is whether a prevailing party may avail himself of the procedures authorized in §§ 2.1-223.1 and in 8.01-192 to file a claim for costs and fees against the Commonwealth within five years after the claim arose if the party had not timely requested a court award of costs and fees when the court decided the party's appeal of the agency action. In my opinion, the answer to this question must be in the negative for two reasons. First, § 9-6.14:21 may be invoked only "[i]n any civil case brought under articles 4 and 5" of the Administrative Process Act. See § 9-6.14:21(A). That being the case, a new action brought under §§ 2.1-223.1 and 8.01-192 does not qualify for an award of costs and of fees after a court has already finally ruled upon the merits of an agency action. The second reason is that §§ 2.1-223.1 and 8.01-192 relate to contract claims against the Commonwealth and are not applicable to other types of disputes or agency actions. See Davis v. Marr, 200 Va. 479, 106 S.E.2d 722 (1959); Morris v. Tunnel District, 203 Va. 196, 123 S.E.2d 398 (1962). Thus, I conclude that a prevailing party may not, after he has prevailed in court on the merits of his case, avail himself of the five-year period of time authorized by § 8.01-255 to initiate an action under §§ 2.1-223.1 and 8.01-192 to obtain an award of costs and of fees authorized by § 9-6.14:21.
In your letter you made reference also to § 9-6.14:15 (iii), which lists the agency actions exempted from Article 4 of the Administrative Process Act. Any agency action that is exempted from Article 4 may not be a basis for an award of costs or of fees because § 9-6.14:21 applies only to civil matters brought under Articles 4 and 5 of the Act.

I also note that your first question was predicated upon a court finding a person "to be not guilty" as opposed to being a prevailing party. As § 9-6.14:21 applies only to civil cases, not criminal ones, I have rephrased your question in terms of a prevailing party in a civil action.

I do note that an agency action that falls within Article 5 of the Administrative Process Act is not judicially reviewed under the Act. Instead, those agency actions are either non-reviewable or they must be reviewed pursuant to other statutes, such as §§ 2.1-223.1 and 8.01-192, which are available when contract disputes arise. In cases involving agency actions concerning the subjects set forth in Article 5 of the Act, a prevailing party may invoke § 9-6.14:21 in whatever court action, if any, is authorized by these other statutes. But, if a case is judicially reviewable under Article 4 of the Act, the party must invoke § 9-6.14:21 during that judicial review. He may not rely, at a later time, upon § 9-6.14:21, using other statutes to invoke a court's jurisdiction.

ADMINISTRATIVE PROCEDURE. IMPACT OF 1984 AMENDMENTS TO ADMINISTRATIVE PROCESS ACT UPON STATE REGULATIONS IN VARIOUS STAGES OF PROMULGATION.

May 29, 1984

The Honorable Wayne F. Anderson
Secretary of Administration and Finance

Chapter 5, Acts of Assembly of 1984, has made important amendments to the Administrative Process Act, § 9-5.14:1 et seq. of the Code of Virginia ("APA"), effective October 1, 1984. As a result, you have asked a number of questions regarding the appropriate procedures to be followed by State agencies in the promulgation of regulations prior to and after October one.

I will answer your questions in the order asked.

1. May existing agencies begin now to promulgate the public participation guidelines which will be required under the amended APA for use after October 1, 1984?

There is currently no statutory requirement for promulgation of such guidelines. There is no prohibition against an existing agency promulgating such guidelines under existing law, however, if the agency now has the power to promulgate regulations. Of course, newly created agencies are not yet in existence and, thus, can do nothing in advance of their establishment dates. Existing agencies which choose to wait until after October one to adopt guidelines will also be unable to promulgate other regulations after October one until their public participation guidelines are effective. Section 9-6.14:7.1 expressly provides that, after October 1, 1984, such guidelines must be used during the entire regulatory process. Accordingly, the answer to your question is in the affirmative.

2. If the answer to question number one is yes, do the existing agencies comply in that promulgation of guidelines with the existing APA or with the amended APA?
Your second question is also answered by (1) above. All regulations promulgated before October 1, 1984, that is, all regulations in which final agency actions have occurred, must be accomplished under existing law.

3. If a regulation, which is currently being promulgated, will be finally promulgated prior to October 1, 1984, are there any requirements to repromulgate it under the amended APA?

The new statute is entirely prospective. It would, therefore, have no impact on valid regulations promulgated prior to October one. See Forbes v. Kenley, 227 Va. __, 314 S.E.2d 49 (1984).

4. If a regulation, which is currently being promulgated, will be finally promulgated before October 1, 1984, that is, all agency action will have occurred but the regulation is not effective until some time after October 1, 1984, because of the thirty-day delay period, is there any requirement to repromulgate it under the amended APA or to comply with any aspect of the amended APA?

By reason of existing § 9-6.14:9, a regulation cannot be operative until the final regulation has been filed with the Virginia Registrar for a period of thirty days. During that period, nothing remains to be done; hence, for practical purposes, the regulation is final. This is analogous to the legislative process, following the approval of legislation by the Governor. Except for emergencies, the legislative measure does not take effect until the first day of July following the adjournment of the session of the General Assembly. As a result, it is my opinion that a regulation which has been adopted under existing law, but has an effective date after October one would not be subject to the provisions of the new amended APA.

5. If an agency initiates a rulemaking process but does not finally adopt a regulation prior to October 1, 1984, what effect will the amended APA have upon the proposed regulation's future promulgation? In this regard, should agencies cease the promulgation of regulations until the amended APA takes effect?

Because an entirely new procedure for promulgation of regulations becomes effective October one, it is my opinion that any regulation not finally adopted before that date must be repromulgated under the new procedure. This may work a hardship upon some agencies, as well upon the participating public, but it appears to be the only practical means by which the legislative intent, expressed in the new requirements for public participation and for executive and legislative review can be implemented. I suggest that any agency which has initiated the process prior to October 1, 1984, may wish to suspend the process if the agency cannot complete all agency action prior to that date.

6. If any agency has finally adopted a regulation under existing law and has satisfied all requirements of existing law, but for compliance with the legislative oversight provisions of the current APA and if the legislative oversight cannot be accomplished prior to October 1, 1984, what aspect, if any, of the amended APA must be followed in order to complete the promulgation process?

As noted above, prior to October one agencies must adopt all regulations under present law. At present, there is no statutory provision for executive review, and I have ruled that the existing legislative review procedures are unconstitutional. See 1981-1982 Report of the Attorney General at 93. Moreover, since that opinion, the United States Supreme Court has ruled that such legislative oversight offends several constitutional concepts, such as the separation of powers doctrine. See INS v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983). While that opinion is not directly related to the legislative oversight in Virginia, it is highly persuasive because it deals precisely with analogous issues.
discussed in my prior Opinion. As a result, it is my opinion that an agency may promulgate a regulation under existing law without regard to the current ninety-day waiting period for legislative review. All regulations completely promulgated under the current law but for the legislative oversight provisions are, in reality, final, effective regulations. Such regulations will become effective before October one in accordance with (3) and (4) above.

ADMINISTRATIVE PROCESS ACT. HEARING OFFICER HAS NO AUTHORITY TO RECOMMEND SANCTION, UNLESS REQUESTED TO DO SO BY AGENCY.

March 12, 1984

The Honorable Bernard L. Henderson, Jr., Director
Virginia Department of Commerce

You have asked for my opinion concerning the use and role of hearing officers in formal evidentiary hearings conducted under the Administrative Process Act, § 9-6.14:1 et seq. of the Code of Virginia. Specifically, you have asked whether a subordinate, who presides as a hearing officer, may recommend a sanction when the agency either has requested, or has not requested, such a recommendation. Secondly, you have asked whether an agency may specifically direct a hearing officer not to recommend an appropriate sanction.

Section 9-6.14:12(C), which specifies the authority of a subordinate hearing officer, provides, in pertinent part:

"Where subordinates preside, they shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by such presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion." (Emphasis added.)

The foregoing statute does not refer to "sanctions." It refers only to "findings" and "decisions." Unlike the Federal Administrative Procedure Act, the Virginia Administrative Process Act does not contain a definition of "sanction." Black's Law Dictionary defines "sanction" as a penalty or punishment provided as a means of enforcing obedience to a law. The same source defines "finding" as the result of deliberations. With this in mind, a sanction would not, in my opinion, qualify as a "finding." Therefore, the question is whether a recommended sanction could be a "decision." In that regard, the Supreme Court has indicated that it is improper to interpret a statute by focusing on only one provision. See VEPCO v. Citizens, 222 Va. 886, 284 S.E.2d 613 (1981). Instead, the Court has held that a statute can be properly interpreted only by reading all parts of the statute. See Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953).

Section 9-6.14:4(D), therefore, must be considered because it defines "case decision" in the following manner:

"[A]ny agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit."

Nothing in this definition refers to a sanction. Accordingly, the use of the word "decision" in § 9-6.14:12(C) does not necessarily include a sanction. Consequently, if the
agency has not indicated to its hearing officer that it desires such a recommended sanction, the hearing officer has no legal authority to provide such a recommendation.

In the event, however, that the agency has requested a recommended sanction, I note that nothing in § 9-6.14:12(C) prohibits either the agency from making such a request or the hearing officer from complying with such a request. In this regard, I am persuaded that the agency has sufficient inherent authority to request a recommended sanction from the hearing officer who has had an opportunity to observe the witnesses and to consider the evidence in the first instance. It should be clearly understood, however, that the agency is responsible for making the decision to impose a sanction. Moreover, it should be evident that the hearing officer is to recommend the sanction only in those cases in which he has decided that the evidence justifies the imposition of a sanction.

With respect to your second question concerning whether an agency may specifically request a hearing officer not to recommend a sanction, I conclude that the agency may so instruct its hearing officer. In that event, the hearing officer has no authority to recommend a sanction. To do so, would be an ultra vires action on the part of the hearing officer, because, as noted above in response to your previous question, a hearing officer has no authority to recommend a sanction unless authorized by the agency.

1The word "sanction" includes the "whole or part of any agency...(C) imposition of penalty or fine...." 5 U.S.C.S. § 551.

ADMINISTRATIVE PROCESS ACT. VIRGINIA REGISTER ACT. REGISTER OF REGULATIONS. FREE COPIES OF REGISTER OF REGULATIONS MUST BE GIVEN TO STATE LIBRARIAN FOR DEPOSITORIES.

June 26, 1984

The Honorable Donald Haynes
State Librarian

You have asked whether copies of the Register of Regulations1 must be furnished by the Registrar of Regulations, without charge, to the State Librarian for distribution to depository libraries.

As background for your question, you state that a depository library system has been established to locate all public documents at fixed and advertised locations, so that researchers and the public at large may conveniently locate the publications of the government. See § 42.1-19 of the Code of Virginia.

Depository libraries must be furnished copies of State publications without charge under § 2.1-467.2. That section requires every State agency to furnish two copies of each of its publications, at the time of their issuance, to the State Library for its collection, and, if required by the State Librarian, copies sufficient for the depository system, not exceeding one hundred copies. Any unrestricted publication, printed, published or issued at State expense2 by an agency must be provided to the State Librarian under § 2.1-467.1. See 1981-1982 Report of the Attorney General at 339.

Effective October 1, 1984, § 9-6.14:22 will require the Registrar of Regulations to issue biweekly a Register of Regulations. Section 9-6.14:24 specifically addresses the
free distribution of the Register of Regulations. It provides that "the Register shall be
distributed without charge for public access to each public library system in the
Commonwealth or to the local governing body of any county without a public library
system." It makes no mention of depository libraries or of § 2.1-467.2.

Sections 9-6.14:24 and 2.1-467.2 are not mutually exclusive, or even contradictory
in their terms. Section 9-6.14:24 contains no expression of legislative intent to limit or
repeal the requirements of § 2.1-467.2. Moreover, the two statutory provisions may be
satisfied by providing free copies of the Register of Regulations for public libraries and
depository libraries without doing violence to the legislative intent behind either statute.

It is my opinion, therefore, that copies of the Register of Regulations must be
furnished by the Registrar of Regulations without charge to the State Librarian for
distribution to depositories, in addition to those free copies required by § 9-6.14:24 to be
distributed to public libraries.

1Established by § 9-6.14:22 of the Code of Virginia, a portion of the Administrative
2For a discussion of publications which must be provided, see 1981-1982 Report of the
Attorney General at 339.

ADOPTION. BIOLOGICAL PARENTS OF CHILD GIVEN UP FOR ADOPTION CANNOT
ADOPT THAT CHILD WHEN SHE/HE IS OVER EIGHTEEN AND DID NOT RESIDE IN
THEIR HOME PRIOR TO BECOMING EIGHTEEN.

May 2, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

In your inquiry concerning the adoption statutes, § 63.1-220, et seq. of the Code of
Virginia, you state that the biological parents of a child born prior to their marriage
placed the child for adoption. Now, over eighteen years later, the biological parents
desire to adopt the child. The letter enclosed with your request indicates that the
adoptive parents have no objection and that the child is presently residing with the
biological parents but did not reside with the biological parents prior to attaining the age
of eighteen.

Legal adoption exists only by statute and not by common law. See Harmon v.
D'Adamo, 195 Va. 125, 129, 77 S.E.2d 318, 320 (1953). Section 63.1-222 is the
jurisdictional statute for adoption of a person eighteen years of age or over. It provides,
in part, as follows:

"A petition may be filed by any natural person, resident of this State, for the
adoption of a stepchild eighteen years of age or over to whom he has stood in loco
parentis for a period of at least one year, or for the adoption of a niece or nephew
over eighteen years of age who has no living parents and who has lived in the home
of the petitioner for at least one year, or for the adoption of any person eighteen
years of age or over who resided in the home of the petitioner for a period of at
least one year prior to becoming eighteen years of age. Proceedings in any such
case shall conform as near as may be to proceedings for the adoption of a minor
child under this chapter...."
From the facts presented in your request, it is clear that adoption is not authorized by the foregoing statute because the child did not live with the biological parents for one year prior to becoming eighteen years of age. See, also, 1974-1975 Report of the Attorney General at 3.

I am, therefore, of the opinion that the biological parents of a child born out of wedlock who was then placed for adoption cannot now adopt the child, when that child is over eighteen years of age and did not reside in the home of those persons prior to attaining the age of eighteen. Despite the fact that the child has been legitimized by the subsequent marriage of her biological parents (§ 20-31.1) she, nonetheless, became the lawful child of the adoptive parents. In the facts which you present, the current law does not contemplate restoration of the parties' positions which existed prior to the adoption.

ANNEXATION. ELECTIONS. CITIES AND TOWNS. CITY WITH COUNCIL ELECTED AT LARGE NOT REQUIRED TO HOLD COUNCIL ELECTION AFTER ANNEXATION WHICH INCREASES CITY POPULATION LESS THAN FIVE PERCENT.

January 24, 1984

The Honorable Shirley F. Cooper
Member, House of Delegates

This is in reply to your request for my opinion whether § 15.1-1054 of the Code of Virginia, relating to elections in a city or town after an annexation, requires that an election be held for all members of the Council of the City of Williamsburg on the first Tuesday in May, 1984. Williamsburg's councilmen are elected at large, and its recent annexation of a portion of James City County, effective midnight December 31, 1983, resulted in an increase in the city's population of less than five percent.

"Notwithstanding any provision of law to the contrary there shall be an election for members of council on the first Tuesday in May following the effective date of annexation. If council members are chosen on an at large basis the election shall be held for the unexpired portion of the term of each council member whose term extends beyond the July first or September first, whichever date by law applies to such council terms, immediately following the effective date of annexation. If council members are chosen on a ward basis, the election shall be held for each ward affected by the annexation; provided, however, such election shall not be held as a result of an annexation instituted under § 15.1-1034, or unless the city or town instituting annexation under § 15.1-1033 shall increase its population by more than five percent of its population existing at the time of the passage of the ordinance referred to in § 15.1-1033." (Emphasis added.)

The question presented is whether the placement of the proviso containing the emphasized language quoted above limits application of the "five percent" exemption contained in the proviso to cities and towns whose council members are chosen on a ward basis, or whether the exemption applies as well to a city in which at large elections are held.

It is generally held that the office of a proviso is to restrain or modify immediately preceding matter. If the rule of strict construction of the scope of a proviso is applied here, the exemption provided in § 15.1-1054 would apply only to a city or a town whose council members are chosen on a ward basis, because the proviso is attached by semicolon to the clause relating to the required election in such a city or town after an annexation. On the other hand, it is also held that:
If, from the context, and a comparison of all the provisions relating to the same subject matter, it is clear that it was intended to give the proviso an effect beyond the phrase immediately preceding it, or a scope beyond the section of which it is a part, it will be construed as restraining or qualifying preceding sections relating to the same subject matter of the proviso, or as tantamount to the enactment of a separate section, without regard to its position and connection. Norfolk & P. Traction Co. v. White, 113 Va. 102, 106, 73 S.E. 467 (1912).

Norfolk & P. Traction Co. v. White, 113 Va. 102, 106, 73 S.E. 467 (1912).

Similar reasoning has been applied to the significance of punctuation. Moreover, the entire statute must be examined to determine the true legislative intention of a part, and a fair and reasonable interpretation of the part must be gathered from the context in which it is found. See VEPCO v. Citizens, 222 Va. 866, 869, 284 S.E.2d 613 (1981); McDaniel v. Commonwealth, 199 Va. 287, 292, 69 S.E.2d 633 (1952); Buzzard v. Commonwealth, 134 Va. 541, 553, 114 S.E. 684 (1922). The last paragraph of § 15.1-1054 was added by amendment in Ch. 401, Acts of Assembly of 1974. Chapter 401 started as House Bill No. 700, the original text of which ended with a period after the word "annexation." The proviso was proposed as an amendment in the Senate, which later was agreed to by the House. See Journal of the House of Delegates, 1974 Session, Volume 2, page 1517. There is no readily apparent reason why, in enacting the exemption, the General Assembly would intend to differentiate between municipalities which elect their council members at large and those which elect by ward. Indeed, if there were to be a purpose to favor one over the other in this regard, I observe that the potential for adverse impact on equality of local legislative representation by an addition of up to five percent of a city's entire population, and the resultant need for a new election, would be greater in a city which elects by wards than in one which elects at large. In my opinion, therefore, the exemption in § 15.1-1054 from the required election after an annexation instituted pursuant to § 15.1-1033 applies to any city or town whose population is not thereby increased more than five percent, regardless of whether the municipality elects its council on an at large basis or by ward. Accordingly, under the circumstances described, Williamsburg is not required to have an election of its council members in May, 1984, under the provisions of § 15.1-1054.

(Punctuation is said to be the most fallible of all means to interpret a statute, and in Virginia it is not used in aid of interpretation except at last resort. See, e.g., Harris v. Commonwealth, 142 Va. 620, 624, 123 S.E. 578 (1925); Withers' Case 109 Va. 837, 840, 65 S.E. 16 (1909); See generally, 2A Sands, Sutherland Statutory Construction § 47.15 (4th ed. 1973).)
of these provisions would be exempt from application of the antitrust laws by reason of the state action exemption.

Danville, Va., Ordinance 69-6.3 (Aug. 22, 1969)\(^1\) establishes the conditions for the operation of a community antenna television ("CATV") system within the corporate limits of that city. The provisions in question of § 7(f) of the ordinance provide, in part:

"Neither the grantee hereunder, any shareholder of the grantee, officer, agent, nor employee of the said grantee shall engage in the business of selling, repairing, or installing television receivers, radio receivers, or accessories for such receivers within the City of Danville, Virginia during the term of this franchise, and the grantee shall not allow any of its shareholders, officers, agents or employees to so engage in any such business."

A city may not exercise any power which is not expressly or impliedly granted to it by statute or by the Constitution or which is not indispensable. Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980). Consequently, the first step in responding to your inquiry is to identify the authority available to the city to enact the above cited provision.

Section 15.1-23.1 provides in part:

"The governing body of any county, city or town may grant a license or franchise, or issue a certificate of public convenience and necessity to no more than one community antenna television system, and impose a tax thereon.... It may regulate such systems, including the establishment of fees and rates, and assignment of channels for public use and operate such channels assigned for public use, or provide for such regulation and operation by such agents as the governing body may direct."

This statute was enacted in 1970. Danville's ordinance was adopted in 1969. While this provision could not have served as Danville's authority at the time the ordinance was adopted, it is clear now that the city has the right to grant CATV franchises and to regulate such systems pursuant to § 15.1-23.1. At the time the provision was adopted, § 124 of the Constitution of 1902 provided:

"No street railway, gas, water, steam, or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone, or bridge, company, nor any corporation, association, person or partnership engaged in these or like enterprises shall be permitted to use the streets, alleys, or public grounds of a city or town without the previous consent of the corporate authorities of such city or town."\(^2\) (Emphasis added.)

A CATV system is a "like enterprise" within the meaning of § 124. See 1968-1969 Report of the Attorney General at 236. The authority to grant franchises and enter into contracts in pursuance thereof was afforded by § 125 of the Constitution of 1902\(^3\) and by §§ 15.1-307 to 15.1-316 of the Code. I conclude that the city is authorized to grant a CATV franchise, both by the Constitution and § 15.1-23.1.

I turn to your second question on the applicability of antitrust statutes to the provision of the ordinance in question. In this case, the ordinance prohibits the franchisee from engaging in the business of selling, repairing or installing television receivers or accessories.

Municipal action not taken pursuant to a clearly articulated policy of this State to displace competition is subject to the prohibitions of the Sherman Act. Community Communications Co. v. Boulder, 455 U.S. 40 (1982); Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). The constitutional and statutory provisions described
above plainly contemplate the displacement of competition in certain aspects of the operation of public utilities or similar enterprises. The city's ordinance, however, must be reasonably related to regulation of cable television systems in order to gain the protection of the state action exemption. We have not been presented with sufficient facts by which to make a determination that the enforcement of the particular provision in question is reasonably related to regulation of a cable system. Consequently, based upon the present information, I cannot conclude that enforcement of the provisions of § 7(f) would be exempt from application of the antitrust laws.

1Provisions of the ordinance other than § 7(f) have been amended on three separate occasions. In each case the remaining terms and provisions were expressly continued in full force and effect but were not reenacted.

2This provision appears in the 1971 Constitution as Art. VII, § 8. Identical authority is granted by § 15.1-375 of the Code.

3Section 125 appears in substantially identical form in the 1971 Constitution as Art. VII, § 9.

4Nothing in this opinion should be construed as expressing an opinion as to the existence of a cause of action under antitrust or other laws. But see, generally, 12 McQuillin Municipal Corporations § 34.87 (3rd ed. 1970).

APPEAL. APPEAL BOND NOT AUTHORIZED IN APPEAL OF TRAFFIC INFRACTION CONVICTION FROM GENERAL DISTRICT COURT TO CIRCUIT COURT.

February 27, 1984

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You have asked whether an appeal bond must be posted in the event of an appeal of a traffic infraction conviction from a general district court to a circuit court. If such a bond is authorized, you have further inquired what the applicable deadline is for filing the bond.

My review of the Code of Virginia discloses only one statute that expressly refers to an appeal bond in an appeal to a circuit court. Section 16.1-107 explicitly requires an appeal bond to be posted in an appeal of any civil case as set forth under § 16.1-106. Section 16.1-106 provides an automatic right of appeal to a circuit court in any civil case "in which the matter in controversy is of greater value than fifty dollars...or when the case involves the constitutionality or validity of a statute of the Commonwealth...or of an ordinance or bylaw of a municipal corporation...."

It is my opinion that this quoted language demonstrates that these sections are inapplicable to cases involving traffic infractions. My examination of the remainder of the Code reveals no other statute applicable to traffic offenses which contains express language equivalent to that in § 16.1-107. Sections 19.2-254.1 and 19.2-258.1, which set forth the procedure for the trial of traffic infractions and which refer to an appeal to the circuit court, are silent as to an appeal bond.

I conclude that this silence is intentional and signifies that an appeal bond is not authorized if a traffic case is appealed to a circuit court. To do otherwise would contravene the Supreme Court of Virginia's observation in Godlewski v. Gray, 221 Va. 1092, 1096, 277 S.E.2d 213 (1981): "A contrary holding would have to be based on a
presumption, that the omission was inadvertent and would require us to 'impute to the legislature gross carelessness, or ignorance'...."

I note that this distinction between civil cases and traffic infractions makes sense in terms of the rationale underlying the requirement of an appeal bond. The purpose of a bond is to protect the interests of the prevailing party during the pendency of an appeal. In the case of the Commonwealth or a locality, however, the Code provides protections not available to private litigants. For example, § 46.1-423.3 authorizes the revocation or suspension of a driver's license in the event of the non-payment of a fine for a traffic offense.2

In light of my conclusion that appeal bonds should not be required in traffic appeals, there is no need to address your second question.

2See, also, § 19.2-353.2.

APPEAL. DRIVING UNDER INFLUENCE CONVICTIONS. APPEAL TO CIRCUIT COURT MUST BE MADE WITHIN TEN DAYS OF CONVICTION AND IS TRIAL DE NOVO.

September 2, 1983

The Honorable Fred W. Bateman, Chief Judge
Seventh Judicial Circuit

You have asked my opinion on several questions relating to the right of appeal, the time limit for appeal and the extent of the review under the following circumstances:

A person is accused, convicted and sentenced in general district court for a first offense of Driving Under the Influence ("DUI"); a portion of the sentence, including license revocation, is suspended upon condition that the defendant enter and successfully complete the Virginia Alcohol Safety Action Program ("VASAP"), remaining alcohol free while operating a motor vehicle during the participation in said program. Two months thereafter, defendant is again convicted in general district court on a DUI charge, which results in the general district court revoking the suspension and reimposing the prior sentence imposed after the first conviction.

You specifically asked the following questions:

(1) Must the defendant appeal to circuit court within ten days from the date of conviction?

(2) Is the defendant entitled to a trial de novo on all issues, including guilt and punishment?

(3) Is the defendant entitled to an appeal limited to the revocation of suspension?

(4) If the third question is answered in the affirmative, is the appellate court limited to determining whether the defendant violated the conditions of the suspension, or may the appellate court impose a completely different sentence, e.g., revoke the fine and license suspension, but suspend a jail sentence?
The answers to the factual situation are governed by §§ 16.1-132 and 16.1-136 of the Code of Virginia.¹

Section 16.1-132 expressly limits the time for appealing a conviction from the lower court to ten days from such conviction. In the hypothetical case, a defendant's right of appeal would have expired prior to the time the lower court took the subsequent action to revoke the suspension and to reimpose the original sentence. Accordingly, in answer to your first question, an appeal must be taken within ten days from the date of conviction.

I will answer the second and third questions together. The last sentence of § 16.1-132 grants a right of appeal from any order revoking a suspension. By necessary implication, the appeal is limited to that order, and does not extend to a trial de novo on the original conviction. In an appeal from a conviction in the general district court to a court of record, the defendant receives a new trial which annuls the judgment of the inferior court as completely as if there had been no previous trial. Buck v. City of Danville, 213 Va. 387, 192 S.E.2d 758 (1972). The trial de novo in the court of record may indeed result in a greater or lesser sentence. Manns v. Allman, 324 F.Supp. 1149 (W.D. Va. 1971). On the other hand, an appeal from an order of a lower court forfeiting a recognizance or revoking a suspension of sentence, as permitted in the last sentence of § 16.1-132, must, of necessity, be limited to a trial in the court of record to the only issue which could be presented; i.e., the judgment of the lower court in forfeiting the recognizance or revoking the suspension of sentence. Had the legislature intended to extend a right for a new trial in the appellate court to the original issue of guilt or innocence, the ten-day limitation for appealing from the date of conviction would be meaningless. Moreover, § 16.1-136 expressly draws a distinction between appeals from the original conviction and appeals from any subsequent order revoking any suspension of sentence. In the former case, the accused is entitled to trial by jury; in the latter instance, no such trial is provided. I am, therefore, of the opinion that a convicted defendant who appeals from an order revoking a previously suspended sentence is not entitled to a trial de novo on the issues of guilt and punishment, but is entitled to an appeal limited to the order of revocation of the suspension of his sentence.

In answer to the fourth question, based on the same rationale expressed above, I am of the opinion that the appellate court is limited to the validity of the lower court's judgment in revoking the suspension of sentence, and may not impose a different sentence or different terms of suspension. Even though § 16.1-136 provides for an appeal to be heard de novo in the appellate court, I am of the opinion that the language applies only when the conviction is being appealed. The only issue before the court in a revocation proceeding is whether the evidence supports the judgment of the lower court in revoking the suspension of sentence.

You also inquired whether a trial court is justified in revoking a suspended sentence which was conditioned upon successful completion of VASAP, if VASAP terminates the defendant's participation in the program for cause. I answer this question in the affirmative. When a defendant is terminated from participating in the program prior to successful completion, it cannot be said that he has complied with the conditions of the suspension of the license revocation. Sections 18.2-271 and 18.2-271.1, the statutory provisions which create the basis for the court's action of suspension, clearly contemplate successful completion of an alcohol rehabilitation program as a condition prerequisite to the suspension of the revocation of a defendant's operator's license. Accordingly, the failure of the defendant to complete the VASAP program constitutes cause to revoke the suspended sentence and impose sentence.
Chapter 16.1-132 provides: "[a]ny person convicted in a court not of record of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court of the county or corporation or hustings court of the corporation, as the case may be. There shall also be an appeal of right from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence."

Section 16.1-136 provides: "[a]ny appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and, except in the case of an appeal from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court."

AVIATION. PERMIT AND HEARING REQUIREMENTS OF § 5.1-8 NOT APPLICABLE TO CONSTRUCTION OF PARTIAL, PARALLEL TAXIWAY.

August 22, 1983

The Honorable James H. Ward
Commonwealth's Attorney for Middlesex County

You have asked whether construction of a partial taxiway adjacent to the present runway of Middlesex County's Airport (Hummel Field) is an extension of the present runway subject to the provisions of § 5.1-8 of the Code of Virginia. You further ask what steps must be taken to protect the rights of the residents and property owners in the immediate vicinity of the airport.

Section 5.1-8 requires, inter alia, that a permit be issued by the Department of Aviation (the "Department") before an airport's runway may be extended. This provision further requires that if an airport is listed in the Virginia Air Transportation System Plan, the Department must consider the "reviews and comments of appropriate state agencies" and cause a public hearing to be held in the locality before deciding upon issuance of a permit. Id. Hummel Field is listed in the Virginia Air Transportation System Plan.

The threshold question is whether the construction of a partial, parallel taxiway would constitute the extension of Hummel Field's runway within the meaning of § 5.1-8. Based upon my understanding of the facts, in my opinion it would not.

You have indicated that the parallel taxiway would not be used for the actual takeoff and landing of aircraft, but rather would permit those aircraft which are preparing to take off, or have just landed, to taxi on a surface other than the active runway. The term "runway" is not defined for purposes of § 5.1-8. Webster defines "runway" as an artificially surfaced strip of ground on a landing field for the landing and takeoff of aircraft. A parallel taxiway on which planes do not land or take off would not be a runway. This conclusion is further supported by the provisions of § 5.1-8. Webster defines "runway" as an artificially surfaced strip of ground on a landing field for the landing and takeoff would not be a runway. This conclusion is further supported by the provisions of § 5.1-8. The Department, in determining whether to issue the permit must consider safety factors relevant to landing or departing aircraft in proximity to any other airfield as well as the economic, social and environmental effects of the extension of a runway. These factors are pertinent to the extension of a runway because an extension may enable an airport to accommodate larger and/or faster aircraft, which aircraft are,
in many instances, louder as well. In addition, a runway extension may require the taking of private property through condemnation.

By contrast, the construction of the partial parallel taxiway on current airport property would enhance the airport's safety by clearing the runway of taxiing aircraft but would not of itself dictate a greater level of operations or in any manner upgrade the airport's capacity to handle larger, and potentially more noisy, aircraft. Thus, construction of a taxiway would have minimal effect on the environmental, social and economic factors which are key matters of concern in the review and hearing process called for by § 5.1-8.

You also inquired as to the proper steps to protect the rights of the residents and property owners in the immediate vicinity of the airport before construction of such a taxiway may commence. As noted above, the review and hearing process called for in § 5.1-8 would not be required. Thus, while the owner of the airport is not obligated to take any particular factors into account, it is free to consider such factors as it deems appropriate, including the convenience and safety of airport users and the wishes and feelings of the residents and property owners in the immediate vicinity of the airport.

BLIND, VISUALLY HANDICAPPED, DEAF, HEARING Impaired, AND OTHERWISE PHYSICALLY DISABLED, ENTITLED TO BE ACCOMPANIED BY TRAINED AIDE DOG IN RESTAURANTS TO WHICH PUBLIC INVITED.

August 2, 1983

The Honorable Altamont Dickerson, Jr., Commissioner
Department of Rehabilitative Services

You ask whether § 63.1-171.2 of the Code of Virginia grants the deaf or hearing impaired the right to be accompanied by a "hearing dog" in places of public accommodation, including restaurants.

In pertinent part, § 63.1-171.2(c) provides:

"Every totally or partially blind person shall have the right to be accompanied by a dog trained as a guide dog, and every deaf or hearing impaired person shall have the right to be accompanied by a dog trained as a hearing dog on a blaze orange leash in any of the places listed in subsection (b)."

The referenced subsection (b) provides:

"The blind, the visually handicapped, the deaf, the hearing impaired and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons."

Because restaurants are not explicitly set forth in the legislative classification, the question is whether such facilities properly fall within the general language "places of public accommodation...and other places to which the general public is invited..."
1983-1984 REPORT OF THE ATTORNEY GENERAL

I am of the opinion that the General Assembly did not intend to exclude restaurants from the class of places in which the "blind, the visually handicapped, the deaf, the hearing impaired and the otherwise physically disabled..." are fully and equally entitled to be accommodated. A reasoned analysis of both the purpose and language of Section 63.1-171.2 supports this view. Although a statute which enumerates items is generally construed to exclude that which is not enumerated, Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967), such a rule of construction will not be employed when such construction will defeat the legislative purpose. The manifest purpose of the statute under question is to enable the "physically disabled to participate fully in the social and economic life of the State..." Section 63.1-171.1. (Emphasis added.) As remedial legislation, the language should be liberally interpreted to accomplish this legislative aim. City of Richmond v. Richmond Metropolitan Authority, 210 Va. 645, 172 S.E.2d 831 (1970); see also, Lyons v. Grether, 218 Va. 630, 239 S.E.2d 103 (1977) (physicians' offices included within the section's intendment).

Furthermore, it is reasonable to include restaurants within the meaning of "other places to which the general public is invited..." Words are given their common meaning, unless a contrary intent is legislatively manifest. Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 214 S.E.2d 145 (1975).

I am of the view that restaurants are included within the purview of § 63.1-171.2. Of course, the mere fact that a facility is advertised publicly as a restaurant is not sufficient, by itself, to come within the statute. The facility must be a place to which the general public is invited in order for the statute to be applicable thereto.

1Historically, the General Assembly had expressly provided the disabled with the right to be accompanied in restaurants by guide dogs. Prior to 1976, § 35-42.1 provided: "Notwithstanding any law or regulation pursuant thereto in conflict herewith, it shall be lawful for a blind person accompanied by a seeing eye dog to take such dog with him within the dining area of any restaurant or other eating place." In 1976, the phrase "into any place of public accommodation" was substituted for "within the dining area...place." See Ch. 596, Acts of Assembly of 1976. In 1981, the noted legislation was repealed as part of a comprehensive revision of the powers of the State Board of Health. See Ch. 468, Acts of Assembly of 1981. Inasmuch as § 63.1-171.2, enacted in 1972, provided the same guarantee, it was unnecessary to incorporate the guarantee into the new Title 35.1.

2Restaurants were expressly included by the General Assembly as a "place of public accommodation" in prior legislation. See Ch. 751, Acts of Assembly of 1978. Although that section has since been repealed, it is clear the General Assembly views a restaurant as a place of public accommodation.

BOARD OF MEDICINE. REPORT OF BOARD OF MEDICINE'S PSYCHIATRIC ADVISORY COMMITTEE MUST BE DISCLOSED TO SUBJECT IF USED AS BASIS FOR LICENSURE DECISION.

November 15, 1983

The Honorable George J. Carroll
Secretary-Treasurer
State Board of Medicine

You have asked whether the Board of Medicine must reveal the report of its Psychiatric Advisory Committee (the "PAC") to the subject of the report when the Board anticipates considering the report in a disciplinary hearing involving the subject before
the Board. Specifically, you have questioned whether the subject of such report has a statutory or constitutional right to the contents of the report in light of the provisions of § 54-317.5 of the Code of Virginia, the Privacy Protection Act, § 2.1-377 et seq. and the Freedom of Information Act, § 2.1-340 et seq.

The PAC is appointed pursuant to § 54-291.1 "to examine persons licensed...and advise the Board concerning the mental or emotional condition of such person when his mental or emotional condition is in issue before the Board." Section 54-291.1 also grants every PAC member immunity from civil liability resulting from any communication, finding, opinion, or conclusion made in the course of his duties as a member of that committee, absent bad faith or malicious intent. Accordingly, assuming the absence of bad faith or malicious intent, the disclosure of the contents of the PAC report to its subject will not result in civil liability to members of the PAC, and § 54-291.1 provides no basis to justify withholding such report.

Section 54-317.5 mandates the confidentiality of reports, information, or records received and maintained by the Board of Medicine in connection with possible disciplinary proceedings; however, that statute also lists a number of specific instances in which such information may be disclosed, one of which is during a disciplinary hearing before the Board. See § 54-317.5(1). Therefore, § 54-317.5(1) gives the Board the discretionary authority to release such report in a disciplinary hearing.

Turning to the question of whether the Virginia Freedom of Information Act prohibits disclosure of the PAC report to its subject, that Act mandates disclosure of certain information and exempts other information from its mandatory disclosure requirements. That information which is not required to be disclosed under the Act may be disclosed under it, however. Accordingly, I am of the opinion that the Virginia Freedom of Information Act does not prevent the disclosure of the PAC report to its subject and that no violation of that Act would result should such a disclosure occur.

Turning next to the question of whether the Privacy Protection Act prohibits the disclosure of the PAC report to its subject, the Privacy Protection Act provides that agencies maintaining personal information systems may disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated or necessary to accomplish a proper purpose of the agency. See § 2.1-380(1). Although the report of the PAC may fall within the definition of personal information found at § 2.1-379, the personal information system maintained by the Board of Medicine is specifically excluded from the provisions of that Act. Section 2.1-384(5). Thus, the Privacy Protection Act does not restrict the dissemination of the PAC report.

It is well-settled that the Fourteenth Amendment to the Constitution of the United States prohibits states from taking property without due process of law. In the broadest sense, due process requires general notice and a meaningful opportunity to be heard. Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015 (4th Cir. 1983). The revocation of a license or imposition of discipline may invoke property rights. Accordingly, in order to satisfy the requirements of due process, the Board should afford the physician who is the subject of a formal disciplinary hearing access to evidentiary material in its possession which will be considered by the Board when it makes its determination. Because the content of the PAC report is such evidentiary material, it should be provided to its subject. See Dick v. United States, 339 F.Supp. 1231 (D.D.C. 1972).

I am, therefore, of the opinion that the contents of the PAC report must be disclosed to the subject if it is to be considered by the Board as grounds for disciplinary action and that such disclosure is not forbidden by statute. The same conclusion would follow with respect to information verbally transmitted to the Board by the members of the PAC.
BOARDS OF SUPERVISORS. CHAIRMAN. VACANCY IN BOARD CHAIRMAN'S POSITION TO BE FILLED BY BOARD.

March 26, 1984

The Honorable James E. Buchholtz
County Attorney for Roanoke County

This is in reply to your request for my opinion whether, in the event the chairman of a county board of supervisors should resign prior to the end of his term, the vice-chairman of the board automatically assumes the responsibilities of the chairman for the remainder of the chairman's term. You refer to § 15.1-528 of the Code of Virginia, relating to the election and terms of the chairman and vice-chairman, and to a prior Opinion of this Office, contained in 1961-1962 Report of the Attorney General at 7, which construes the predecessor statute to § 15.1-528 to require the election of a new chairman upon such a resignation.

Section 15.1-528 reads as follows:

"The board shall, at its first meeting after election, elect one of its number as chairman, who shall preside at such meeting and all other meetings during the term for which so elected, if present. The board also may elect a vice-chairman who shall, if so elected, preside at meetings in the absence of the chairman and may discharge any other duty of the chairman during his absence or disability. Chairmen and vice-chairmen may be so elected to serve for terms corresponding with their terms as supervisors or may be elected annually. Whenever any board, at the time of such election, shall fail to designate the specific term of office for which a chairman or vice-chairman is elected, it shall be presumed that such chairman or vice-chairman was so elected for a term of one year or until his successor as chairman or vice-chairman shall have been elected. Provided, however, that if any board of supervisors has been enlarged by the election or appointment of additional members, as provided by law, during the year immediately preceding April one, nineteen hundred sixty-six, the board may, within ninety days after April one, nineteen hundred sixty-six, elect a new chairman and vice-chairman. In the case of boards enlarged hereafter, the board may within ninety days after the appointment or election of such additional members, elect a new chairman and vice-chairman. Chairmen and vice-chairmen may succeed themselves in office. In the case of the absence from any meeting of the chairman and vice-chairman, if any, the members present shall choose one of their number as temporary chairman."

The question presented in the 1962 Opinion was whether, upon resignation of the chairman, the board should reorganize and elect a new chairman to complete the term or, alternatively, whether the vice-chairman would succeed to the office of chairman. The Opinion noted that the statute does not provide for the vice-chairman to automatically succeed to the chairman's position when it becomes vacant, and held that the board should proceed to fill the vacancy by electing any one of its members chairman for the unexpired term.

The 1962 and 1966 amendments to the statute do not appear to affect the conclusion reached in the 1962 Opinion, nor do they work a restriction on the board's powers to elect its chairman and vice chairman. See Ch. 401, Acts of Assembly of 1962; Ch. 432, Acts of Assembly of 1966. The statute requires the board of supervisors to elect a chairman to serve for the term therein specified. Moreover, while it specifically provides that a vice-chairman, if elected, may discharge the chairman's
duties "during his absence or disability," it still does not provide for the vice-chairman automatically to succeed to the chairman's position if that position becomes vacant.

Taking all of the above into consideration, it is my opinion that, if the chairman resigns, the board of supervisors must fill the resulting vacancy by electing one of its members as its new chairman to serve for the unexpired term of that office. As you suggest, this could be accomplished by the board's adopting a specific resolution designating the vice-chairman as chairman.²

¹Note, in that regard, that the 1966 amendment conferred upon the board an additional power to choose a new chairman and vice-chairman upon enlargement of the board, without a vacancy having occurred in either of those offices, which is a power the board otherwise does not have. See § 24.1-79.2.
²Note, that if the board designates its present vice-chairman as the new chairman, the position of vice-chairman thereby is vacated.

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

February 23, 1984

The Honorable John H. Foote
County Attorney for Prince William County

You ask whether, and for how long prior to contacting the local department of social services, school administrators have the right to investigate allegations that a teacher has sexually abused one of his or her students. You have indicated that such allegations are referred to the school division staff for investigation prior to being referred to the local department of social services.

Section 63.1-248.3 of the Code of Virginia states in relevant part:

"A. [A]ny teacher or other person employed in a public ...school...who has reason to suspect that a child is an abused or neglected child, shall report the matter immediately except as hereinafter provided, to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred....[I]f the information is received by a teacher...such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith. The initial report may be an oral report but such report shall be reduced to writing by the child abuse coordinator of the local department on a form prescribed by the State Board of Welfare." (Emphasis added.)

Clearly, under the foregoing provisions, teachers and school administrators have a legal duty to report suspected child abuse to the local welfare or social services department. A teacher may report the suspected abuse directly to the social services department or may report the suspected abuse to the school principal. A school principal, as "the person in charge of the institution or department," must report the suspected abuse directly to the social services department. The principal may not satisfy the requirement of § 63.1-248.3(A) by alternatively informing other individuals within the school system about the suspected abuse. See 1982-1983 Report of the Attorney General at 57.
The local department of social services has primary responsibility for investigation of reports and complaints of child abuse and neglect. Even the role of law enforcement agencies is generally limited to cooperative action in support of the local welfare or social services department, except in those cases where the commission of a felony is suspected. See 1976-1977 Report of the Attorney General at 26. Nevertheless, where the suspected child abuse involves a teacher as the possible perpetrator of the abuse of a student, an investigation of the matter by the department of social services does not nullify the inherent authority of school officials to investigate the alleged misconduct of the teacher for purposes of possible discipline and/or dismissal. A school principal is responsible for the operation and management of the school to which he is assigned. See § 22.1-293(B). Finally, the local school board has exclusive authority over matters concerning the employment and supervision of local school personnel. See § 22.1-313(A).

The language of § 63.1-248.3 indicates that as little time as possible should intervene between when the child abuse is suspected and when it is reported to the department of social services. A teacher, by the language of the statute, is required to report the suspected abuse "immediately." See § 63.1-248.3(A). A principal is required to make the report "forthwith." See 1982-1983 Report of the Attorney General, supra. While a teacher is required to transmit information only when he has "reason to suspect" child abuse, it is certainly not necessary for the school division staff to investigate allegations prior to being transmitted to the department of social services.

It is my opinion, therefore, that immediately upon receiving information sufficient to create a reason to suspect child abuse, a school principal must contact the local department of social services in order to satisfy the requirements of § 63.1-248.3. In addition to making the report to the department of social services, the principal or other appropriate school officials may also investigate the matter when it involves school personnel and their students. This investigation may not supplant, delay or hinder that of the local social services department.

In order to assure that such reports are promptly investigated, the local social services or welfare department is required to ensure the availability of personnel who can respond promptly "on a twenty-four hours a day, seven days per week basis." See § 63.1-248.6(B).

I note that H.B. No. 650 presently pending before the General Assembly will, if adopted and signed into law, give the school division the responsibility for making the necessary investigation.

CIGARETTE SALES BELOW WHOLESALE COST ACT. ACT CONSTITUTIONAL. EXERCISE OF COMMONWEALTH'S POLICE POWER.

May 30, 1984

The Honorable Ford C. Quillen
Member, House of Delegates

You have asked for my opinion whether the Cigarette Sales Below Wholesale Cost Act, § 59.1-285 et seq. of the Code of Virginia (the "Cigarette Sales Act"), is constitutional.

In an earlier request, you asked for my opinion whether the Virginia Unfair Sales Act, § 59.1-10 et seq., was unconstitutional. By letter dated December 22, 1983, I advised that there was considerable doubt about the constitutional validity of that
particular Act. My conclusion was based on several features of the Unfair Sales Act that have been found objectionable by courts of other states with similar legislation. As you noted in your letter requesting this opinion, the General Assembly repealed the Unfair Sales Act during its 1984 session.

Like the Unfair Sales Act, the purpose of the Cigarette Sales Act is to prevent the adverse effects of below-cost pricing on a price cutter's competitors. The Cigarette Sales Act, however, differs from the Unfair Sales Act in several respects. The most important difference is that the Cigarette Sales Act, as its name implies, is not of general applicability. Rather, it applies only to sales of cigarettes and to such sales only on the wholesale level. The applicability of the Cigarette Sales Act is thus much narrower than that of the Unfair Sales Act.

In addition, unlike the Unfair Sales Act, the Cigarette Sales Act contains specific findings by the General Assembly regarding abuses in the wholesale cigarette sales industry and a finding "that the public interest will be promoted by the prohibition of such practices in the distribution of cigarettes...." Section 59.1-286. Thus, the Cigarette Sales Act is a narrowly tailored attempt to correct problems that the General Assembly has perceived as affecting the public interest.

Because the Cigarette Sales Act reaches only a limited class of sales of goods in the Commonwealth and because of the well established presumption that legislation is constitutional, see, e.g., Blue Cross v. Commonwealth, 221 Va. 349, 269 S.E.2d 827 (1980), the Cigarette Sales Act would probably be upheld by the courts of the Commonwealth as a valid exercise of the Commonwealth's police power. See May's Drug Stores v. State Tax Comm'n, 45 N.W.2d 245, 254 (Iowa 1950).

Several of the courts of other states that have invalidated similar legislation have explicitly found that the sale of cigarettes is not a business affected with the public interest. State v. Wender, 141 S.E.2d 359 (W.Va. 1965); Lane Distributors, Inc, v. Tilton, 81 A.2d 786 (N.J. 1951). These cases are thus distinguishable from Virginia's Cigarette Sales Act because of the General Assembly's findings to the contrary.

CIRCUIT COURTS. CLERKS. RECORDATION. RICHMOND. COURT CONSOLIDATION STATUTE NEITHER REQUIRES NOR PROHIBITS RECORDATION OF DOCUMENTS AFFECTING TITLE TO REAL ESTATE IN ONE LOCATION IN CITY OF RICHMOND; JUDGES FREE TO DEVISE CONSOLIDATION PLAN TO BEST MEET COURT NEEDS.

December 14, 1983

The Honorable James Edward Sheffield
Chief Judge
Circuit Court of the City of Richmond

This is in reply to your request for my opinion whether, pursuant to § 17-116.1(d) of the Code of Virginia, the judges of the Circuit Court of the City of Richmond may provide in their plan for consolidation of the court that all documents affecting title to real estate in the City of Richmond, which presently are filed and recorded in each of the two former divisions of the court, be filed and recorded only in the clerk's office located at the John Marshall Courts Building, 800 East Marshall Street.
Your question involves an interpretation of the following sentence of § 17-116.1(d):

"Any such plan shall provide for the consolidation of the circuit courts under one chief judge and the consolidation of the clerks' offices under one clerk and shall continue to provide for a clerk's office and a circuit court with full powers incident thereto in each of the two former divisions." (Emphasis supplied.)

To reach a fair construction of this sentence, an examination of the history pertaining to the Richmond Circuit Court is necessary.

In 1906, the General Assembly declared that the terms and conditions of any annexation ordinance "shall be deemed and held to be a binding and irrevocable contract in favor of the public" and that such terms were enforceable by mandamus or injunction.1 Chapter 221, Acts of Assembly of 1906. On April 10, 1910, the Corporation Court of the City of Manchester entered an order incorporating the annexation ordinance consolidating the Cities of Manchester and Richmond.2 Clause 17(g) of that Ordinance provided that the Corporation Court of the City of Manchester be redesignated as "Hustings Court of the City of Richmond, Part II" and that the court be permanently maintained and continued as a court of the consolidated municipality, with the same powers and jurisdiction as are associated with the present circuit courts. While the 1910 order does not clearly set forth the full extent of the clerk's powers, it is clear that the clerk's office serving the former City of Manchester would be authorized to receive and record deeds.

The next significant change in the court system in Richmond occurred in 1973 when the legislature established a single circuit court as the court of record in Richmond, and certain other cities. Chapter 544, Acts of Assembly of 1973; § 17-116.1. This court took the place of the former chancery, corporation, hustings, law and chancery, and law and equity courts which variously existed in Richmond and other cities. Subsection (b) of § 17-118.1 provided that Richmond's circuit court would consist of two divisions and prescribed the jurisdiction of each division in some detail, as follows:

"For the City of Richmond there shall be one circuit court. In that part of the city north of the south bank of the James river there shall be a division of such circuit court, which shall be called the Circuit Court of the City of Richmond, Division I, and shall have exclusive jurisdiction over each suit, motion, prosecution or thing now or heretofore properly pending in the former hustings, chancery, law & equity and circuit courts of the city and over the records of such courts, and for the city of Richmond in the part of the city south of the south bank of the James River there shall be a division of such circuit court, which shall be called the Circuit Court of the City of Richmond, Division II, and shall have exclusive jurisdiction over each suit, motion, prosecution or thing now or heretofore properly pending in the former Hustings Court of the City of Richmond, Part II and the former Corporation Court of the former city of Manchester and over the records of such courts. The Circuit Court of the City of Richmond, Division I, and the Circuit Court of the City of Richmond, Division II, shall be the sole courts of record for the city, and each shall have exclusive jurisdiction over adoptions, the probate and recordation of wills, the appointment, qualification and removal of fiduciaries and the settlement of their accounts, the docketing of judgments and the recordation of deeds and other papers authorized or required by law to be recorded or filed as to matters arising in that part of the city in which it sits, and over all appeals, removals and certifications from the district courts of the city as to matters arising in that part of the city in which it sits except that all appeals of traffic cases from the general district court of the city shall be to the Circuit Court of the City of Richmond, Division I, and each of the two divisions shall have separate terms of court and separate clerks' offices with independent clerks, to be located within the territorial limits of each Division, separate grand and petit jurors and
jury commissioners, and separate commissioners of accounts and in chancery, all of whom shall be elected, appointed, or selected from the city at large. The Circuit Court of the City of Richmond, Division I, and the Circuit Court of the City of Richmond, Division II, shall have concurrent jurisdiction of all other matters in the city of Richmond which the other circuit courts of the Commonwealth and the judges thereof have within their respective territorial limits and under Chapter 35 (§ 8-758 et seq.) of Title 8, Chapter 14 (§ 19.1-323 et seq.) of Title 19.1, but the Circuit Court of the City of Richmond, Division I, shall have exclusive jurisdiction under Chapter 13 (§ 53-295 et seq.) of Title 53. The present judges of the Hustings, Chancery and Law & Equity Courts of the City of Richmond shall be the judges of the Circuit Court of the City of Richmond, Division I, the present judges of the Hustings Court of the City of Richmond, Part II, shall be the judges of the Circuit Court of the City of Richmond, Division II. The Circuit Court of the City of Richmond, Division I, and the Circuit Court of the City of Richmond, Division II, shall be in the same circuit, and all judges thereof shall be permitted to sit in either or both divisions." (Emphasis added.)

This extensive description of the jurisdiction of each division of the Richmond Circuit Court reflected the accommodation of the practical operation of the court in Richmond and the requirements of the 1910 annexation ordinance.

At the same time, the General Assembly in subsection (c) of § 17-116.1 directed the judges of every city whose courts were consolidated to prepare and implement a plan of consolidation in each instance, and provided, in part, in § 17-116.1(c) as follows with respect to Richmond's circuit court and clerk:

"Such plan shall include, but not be limited to, designation of one chief clerk, and provision for consolidation of the clerk's offices, efficient utilization of facilities and equipment, organization of personnel and distribution of work, except that the Circuit Court of the City of Richmond, Division I, and the Circuit Court of the City of Richmond, Division II, shall each have a separate chief clerk, who shall be elected by the qualified voters of the city at large...." (Emphasis added.)

Eight years later, in 1981, the General Assembly enacted a bill which had the effect of consolidating the two divisions of Richmond Circuit Court into one by repealing subsections (b) and (c) of § 17-116.1, set out above in part. Chapter 628, Acts of Assembly. This Act was to take effect on December 31, 1983; therefore, subsections (b) and (c) of § 17-116.1 were to remain intact until that date.

Then in 1983, the General Assembly amended § 17-116.1 to provide that the consolidation become effective July 1, 1983 rather than December 31, 1983. Subsections (b) and (c) were not restored but the General Assembly added a new subsection to § 17 116.1 which provides:

"(d) The judges of the Circuit Court of the City of Richmond whose divisions are consolidated by Chapter 628 of the 1981 Acts of Assembly, with the advice of the chief judge of the thirteenth judicial circuit, shall prepare and implement a plan for consolidation of the two former divisions, which shall become effective January 1, 1984. Any such plan shall provide for the consolidation of the circuit courts under one chief judge and the consolidation of the clerks' offices under one clerk and shall continue to provide for a clerk's offices and a circuit court with full powers incident thereto in each of the two former divisions.

Notwithstanding any other provision of law, whenever a vacancy occurs or exists in the office of the clerk of either division of the Circuit Court of the City of Richmond prior to the effective date of the consolidation of the divisions, the clerk of the other division, without election, shall become the Clerk of the Circuit Court
of the City of Richmond and shall perform all the duties thereof until the expiration of that clerk's existing term of office." (Emphasis added.)

The foregoing review indicates the following:

(1) As a result of the 1910 merger, a court and clerk's office were maintained in south Richmond with the court having general jurisdiction.

(2) In 1973, the General Assembly affirmed the then present practice by elaborately prescribing the separate jurisdictions of the courts north and south of the James.

(3) In 1981, the General Assembly repealed the provisions prescribing separate jurisdiction for each court and created a situation which may have permitted the court, under the terms of a consolidation plan, to remove all functions of the court and its clerk's office to the north side of the James.

(4) In 1983, the General Assembly mandated that the consolidation plan must provide for the presence of a court and clerk's office with full powers south of the James.

Under § 1 of Article VI of the Constitution of Virginia (1971), only the General Assembly has the power to determine the jurisdiction of the courts of the Commonwealth. In 1973, the General Assembly prescribed exclusive jurisdiction for the south Richmond court; in 1981, it removed the exclusive jurisdiction provisions and, in effect, permitted the south Richmond court to be abolished; in 1983, the General Assembly did not reestablish the south Richmond court with exclusive jurisdiction but merely required the physical presence of a court and clerk's office south of the James.

This analysis indicates that the General Assembly intended and clearly moved in the direction of consolidating the functions and jurisdiction of the city's courts of record under an administrative plan to be prescribed by the court. The only limit imposed by the legislature was the 1983 requirement that the plan ensure the presence of a court and clerk's office south of the James. That must clearly be done.

Provisions relating to recordation of deeds and other documents affecting title to real estate are of vital importance to the commerce and economic relations of our citizens. It is critical that these documents be received and recorded in a manner which will facilitate public convenience and enhance public confidence. When the General Assembly mandated consolidation of the courts and their clerk's offices, it must have anticipated that the recordation functions be coordinated in such a manner as to ensure the public convenience and public confidence.

Given the mandate to consolidate and the concerns listed above, the question becomes whether the 1983 amendment providing for a clerk's office in south Richmond "with full powers incident thereto" means that the consolidation plan must permit recordation of deeds and other documents in each location, both south and north of the James. I do not believe that it does. To the contrary, I believe the court is free to devise that consolidation plan which will best achieve efficiency of operations.

I construe the provision "with full powers incident thereto" to be a legislative confirmation that the clerk's office south of the James shall have the authority to act in whatever capacity the court prescribes through its consolidation plan. In a similar manner, the court, when sitting south of the James, shall have full powers. This is not a mandate of exclusive jurisdiction which the General Assembly repealed in 1981 but a confirmation of the requirement to provide for a continued presence of the court and clerk's office south of the James and of authority of each to act lawfully in accordance with the consolidation plan.
1See Clause 22 of Ch. 221, the text of which essentially is replicated in § 15.1-1121.  
2Recorded in Common Law Order Book 10 at page 327, Clerk's Office of Richmond  
Circuit Court, Tenth and Hull Streets.  
3The provisions of § 17-116.1(d) do not require the court to permit filing in both  
places, nor do they prohibit such a situation. While technology may permit documents to  
be filed and received in two locations without creating confusion in the title searching  
process, the cost of such may be prohibitive at this time. As a consequence, the court  
may prescribe, as part of its consolidation plan, that deeds and other documents shall be  
filed in only one location.  
While the General Assembly obviously desired to accommodate the need of the  
citizens of south Richmond, it recognized the paramount need for consolidation and  
permitted the court to prepare the administrative details of the plan.

CITIES. EMPLOYEES. RETIREMENT SYSTEM. HEALTH INSURANCE.

March 9, 1984

The Honorable Glenn B. McElhaney  
Member, House of Delegates

This is in response to your inquiry whether the City of Virginia Beach has the power  
to permit its employees to continue as participants in the city's group health insurance  
program after their retirement from the city with the retiree paying the insurance  
premium.

Section 3.05 of the Charter of the City of Virginia Beach provides, inter alia, that  
council shall have the authority "[t]o provide for the...compensation of all officers and  
employees of the city." In addition, § 15.1-7.3 of the Code of Virginia provides that the  
governing body of every county, city or town may provide for its officers and employees  
group life, accident, and health insurance programs. Finally, § 51-112 in that title of the  
Code denoted "Pensions and Retirement" provides in pertinent part:

"The governing body of each county, city and town may, by ordinance adopted by a  
recorded vote of a majority of the members elected...establish a system of  
pensions, including death benefits, covering injured, retired or superannuated  
officers and employees of such county, city or town...and it may...provide for such  
pensions, including death benefits, and for group life insurance covering the officers  
and employees of such county, city or town, and for group accident and sickness  
insurance covering the officers and employees of such county, city or town and  
their dependents." (Emphasis added.)

Obtaining adequate health insurance at reasonable rates is an understandable  
concern of retirees and those planning for their retirement years. The ability of an  
employer to make available to its retirees the option to participate at their own cost in  
group insurance plans is a component of the employer's compensation package.

Based upon the section of the Virginia Beach Charter and the sections of the Code  
cited above, I am of the opinion that City Council of Virginia Beach does have the  
authority to permit its retired employees to continue as participants in the City's group  
health insurance program after their retirement.
The City Charter was adopted as Ch. 147, Acts of Assembly of 1962, and most recently amended by Ch. 89, Acts of Assembly of 1981.

I note that § 51-112 does not repeat the phrase "injured, retired or superannuated" a second time before "officers and employees" in that portion of the section referring to group accident and sickness insurance. I do not attach any significance to that omission. As indicated above, the section is in the title described as "Pensions and Retirement" and a fair reading of the section leads to the conclusion that such retired "employees" would be included within the scope of the authority conferred upon the localities by the section.

CITIES AND COUNTIES. REGIONAL CRIMINAL JUSTICE TRAINING ACADEMIES. NO AUTHORITY TO INCORPORATE.

March 22, 1984

The Honorable Richard N. Harris, Director
Department of Criminal Justice Services

You have asked several questions relating to the incorporation of regional criminal justice training academies which are created pursuant to § 15.1-21 of the Code of Virginia.

In an earlier Opinion to you, found in the 1972-1973 Report of the Attorney General at 56, this Office advised that cities and counties could avail themselves of the authority conferred by § 15.1-21 to create regional academies as legal or administrative entities to accept grants from the Division of Justice and Crime Prevention. The Opinion further stated that there could be no grant of power to the entity exceeding that reposing in each of the local governing bodies.

I am unaware of any general authority for a city or town to incorporate a component part of its local government to exercise a governmental function. The regional units created pursuant to § 15.1-21 as criminal justice training academies may exercise only the powers and authority which are possessed by the governmental subdivisions which participate in the joint enterprise. Consequently, I am of the opinion that there is no authority by which regional criminal justice training academies may incorporate to execute the powers and duties delegated to such entities pursuant to § 15.1-21.

In view of the foregoing, it is unnecessary to respond to the other questions presented in your letter.

CITIES AND TOWNS. COUNCILS. CHARTERS. CHARTER FOR TOWN OF COLUMBIA AUTHORIZES COUNCIL TO APPOINT SPECIAL POLICEMAN ON PART-TIME BASIS; GOVERNING BODY OF TOWN CONTINUOUS BODY FROM FIRST COUNCIL.

July 25, 1983

The Honorable Thomas J. Michie, Jr.
Member, Senate of Virginia
This is in reply to your request for my opinion whether the Town of Columbia, Virginia, has the authority, pursuant either to its charter or to general law, to hire a special policeman on a part-time basis without an election on the part of the citizens of the town. You relate that the town does not have a sheriff or policeman of any type.

Section 3 of the charter for the Town of Columbia provides that "[t]here shall be a mayor and six councilmen for said town, who shall compose its board of council...." Section 4 appoints six named individuals as the first board of council until their successors are elected and qualified according to law. Section 4 goes on to state that "the said board, as soon as organized and qualified according to law,...may appoint a town collector and police force for the proper government of the town...." (Emphasis added.) Although the power to appoint a police force is conferred in the section which names specifically a first board of council, I am of the opinion that the successors to those named individual board members collectively retain that power, along with any other powers conferred by general law.

Unlike the United States Congress and state legislatures, a duly organized municipal governing body, in legal contemplation, is a continuous body, and its power is a continuing power, regardless of changes in its personnel, and even though the terms of all its members expire at the same time. See 56 Am.Jur.2d Municipal Corporations § 141 (1971); 62 C.J.S. Municipal Corporations § 386 (1949); 4 McQuillin Municipal Corporations § 13.40 (3d rev. ed. 1979).

Section 15.1-13 of the Code of Virginia provides as follows:

"The governing bodies of cities and towns, for the purpose of carrying into effect the enumerated powers conferred upon them may make ordinances and prescribe fines or other punishment for violation thereof, keep a city or town guard, appoint a collector of its taxes and levies, and such other officers as they may deem proper, define their powers, prescribe their duties and compensation, and take from any of them a bond, with sureties, in such penalty as to the governing body may seem fit, payable to the city or town by its corporate name and with condition for the faithful discharge of such duties." (Emphasis added.)

In my opinion § 15.1-13, when read together with the charter power to appoint a police force, authorizes the board of the Town of Columbia to appoint a policeman on such terms as will meet the town needs. Accordingly, your inquiry is answered in the affirmative.

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1The charter was enacted as Ch. 238, Acts of Assembly of 1879.
2See § 1 of the charter (the town shall be subject to the laws then in force or which may thereafter be enacted, relating to the government of towns of less than five thousand inhabitants, not inconsistent with the charter); § 15.1-7 of the Code of Virginia ("all powers granted to counties, cities and towns shall be vested in their respective governing bodies.")
3In this particular case, application of the principle requires that §§ 3 and 4 of the town's charter be read together. If these sections are read separately as dealing with unrelated subjects, the power to appoint a police force for the proper government of the town then expired with the "first" board of council, which was scheduled to be in office less than three months. Acts of the legislature are to be construed so as to avoid absurd consequences. See, e.g., F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 249-250, 198 S.E.2d 595 (1973); see, generally, 17 M.J. Statutes, § 54 (1979).
CITIES AND TOWNS. SALE OF PROPERTY. DEFINITIONS. "PUBLIC BUILDINGS" AND "OTHER PUBLIC PLACES" FOR PURPOSES OF RESTRICTIONS ON SALE OF CITY PROPERTY MEAN PLACES OR BUILDINGS DEVOTED TO USE BY PUBLIC AT LARGE OR BY MUNICIPALITY ITSELF.

December 2, 1983

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

This is in reply to your request for my opinion concerning the applicability of § 9.06 of the Charter for the City of Alexandria¹ and § 15.1-307 of the Code of Virginia to properties purchased and sold by the city in administering its housing program. You relate that, for the purposes of eliminating blight and of providing housing opportunities to low and moderate income persons, the city has adopted a program in which it acquires properties and then resells them, either immediately after purchase in an "as is" condition, or after they first are rehabilitated by the city. None is converted to a public use at any time. You ask whether such properties constitute "public buildings" or "other public places" for purposes of § 9.06 of the city charter and § 15.1-307, and specifically:

1. Whether § 9.06 requires planning commission approval of the city's acquisition of such property.

2. Whether § 9.06 requires planning commission approval of the sale of such property.

3. Whether § 15.1-307 requires that the sale of such property be by ordinance.

I begin with question number 3 first. The pertinent part of § 15.1-307 reads as follows:

"The rights of no city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges and other public places and its gas, water and electric works shall be sold, except by an ordinance passed by a recorded affirmative vote of three fourths of all the members elected to the council...." (Emphasis added.)

The term "public places" for purposes of the above quoted portion of § 15.1-307 has not been statutorily defined. The Supreme Court of Virginia has stated that the three fourths vote limitation contained in Art. VII, § 9 of the Constitution of Virginia (1971)² applies only to the sale of municipal property "dedicated to the public use,"³ of the character designated in the first clause of Art. VII, § 9.⁴ Applying the rule of construction that the unqualified words of a statute should be given their ordinary and popular meaning, given the context in which they are used,⁵ I conclude that the term "public places" as used in Art. VII, § 9 and § 15.1-307 means places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.⁶ The same conclusion is reached by referring to the words and phrases with which the phrase "other public places" is associated,⁷ that is: waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks and bridges. In my opinion, property acquired by the city and then resold to low income persons as part of its housing assistance program, without ever being dedicated to use by the public at large or by the city itself,⁸ does not fit into the category of "public places" as contemplated in Art. VII, § 9 and § 15.1-307. Because § 15.1-307 does not apply to the properties in question, the third question, above is answered in the negative.⁹

With respect to the first two questions posed above, § 9.06 of the Alexandria city charter, relating to adoption of a master plan for the city by the city planning
commission, and subsequent approval of the same by city council, provides in relevant part, as follows:

"thereafter no street, square, park or other public way, ground, open space, public building or structure, shall be constructed or authorized in the city...until and unless the general location, character and extent thereof has been submitted to and approved by the commission. No widening, extension, narrowing, enlargement, vacation or change in the use of streets and other public ways, grounds and places within the city, nor the sale of any land held by the city, shall be authorized to take place unless such transactions shall have been first submitted to and approved by the commission...."

By its terms, § 9.06 applies to construction or authorization of public buildings or structures and the sale of any land held by the city. It does not require planning commission approval of the acquisition of such buildings or lands. Accordingly, the first question is answered in the negative. As for the sale of land held by the city, the land intended to be included in that phrase must be determined by reference to the entire language of § 9.06. In so doing, I conclude that § 9.06 is meant to apply to sales of land held by the city for use by the public at large or by the city itself, but that it does not apply to properties acquired and sold as part of the city's housing assistance program. Those properties are neither acquired nor held for, nor are they ever devoted to, public uses in the common acceptance of that term or as contemplated in § 9.06. Accordingly, the second question also is answered in the negative.

1The charter was enacted in Ch. 536, Acts of Assembly of 1950. Section 9.06 since has been amended by Ch. 564, Acts of Assembly of 1952; Ch. 262, Acts of Assembly of 1956; and Ch. 61, Acts of Assembly of 1962.

2The quoted portion of § 15.1-307 implements the first paragraph of Art. VII, § 9, which provides as follows: "No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members elected to the governing body." (Emphasis added.)


4In eminent domain cases, where it most frequently must address the term, the Supreme Court has endorsed the concept that "public use implies possession, occupation and enjoyment of the land by the public at large, or by public agencies. See e.g., Phillips v. Foster, 215 Va. 543, 211 S.E.2d 93 (1975); City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).


6"Public place" is defined, generally, as follows: "A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (e.g., a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro." Black's Law Dictionary, 1107 (rev. 5th ed. 1979).


8Note that the Supreme Court has recognized a distinction between property purchased or owned by a city for governmental purposes and not yet dedicated to a public use and property purchased for that purpose which actually has been dedicated, with
respect to a city's power to sell property. See City of Williamsburg v. Lyell, 132 Va. 455, 112 S.E. 666 (1922); Head-Lipscomb, Etc. Co. v. Bristol, 127 Va. 659, 105 S.E. 500 (1920).

The City of Alexandria is authorized by § 2.04.2 of its charter to acquire and dispose of land or buildings in the city, for the purpose of providing housing for low or moderate income persons or to remove blight.

Note that § 3.08 of Alexandria's charter, relating to city council rules of procedure, contemplates council action either by ordinance or resolution, within the limitations imposed by § 3.09. See, also, §§ 2-16 through 2-19 of the Alexandria City Code. Section 17A-4 of the city code provides for city acquisition and development of land and buildings in its housing and community development program upon council authorization by resolution.


CIVIL PROCEDURE. CLERKS. WRIT TAXES AND FEES. TRANSFERRED ACTIONS. PORTIONS OF SUIT ORDERED TRANSFERRED TO LAW SIDE OF COURT NOT A NEW PROCEEDING FOR PURPOSES OF ASSESSING WRIT TAXES AND FEES. SECTION 8.01-270.

August 25, 1983

The Honorable J. H. Wood, Jr., Clerk
Circuit Court of Clarke County

This is in response to your inquiry regarding the assessment of writ taxes and fees in two cases, both of which were originally part of a chancery suit, and transferred by court order to the law docket with instructions that the clerk assign law numbers. The remaining issues were retained on the chancery side of the court.

One case involves issues contained in the original bill of complaint, and the other involves issues contained in defendant's cross-bill. The court refused to consolidate the two actions for trial but granted leave to all parties to file a motion for consolidation at a later date. You ask whether you may assess writ taxes and fees in the two law cases.

At the outset, it should be noted that the action of the court in this case was not a normal transfer of the case from one side of the court to the other pursuant to § 8.01-270 of the Code of Virginia. Usually, a transfer is made when the plaintiff brings an action on the equity side when he should have proceeded at law, or vice versa. In such cases, the action is transferred to the proper side of the court and the clerk makes an adjustment in the fee, resulting in a refund or an additional assessment. If the fee on the law side as provided in § 14.1-112(17) is greater than the chancery filing fee as provided in § 14.1-113, the clerk collects the difference. If the fee is less, the clerk makes a refund. See 1969-1970 Report of the Attorney General at 52.

In the instant case, the court retained a part of the original suit on the chancery side and transferred some of the issues to the law side. Some of the issues transferred were in the original bill of complaint and others were raised in the defendant's cross-bill. This action of the court is not contemplated by § 8.01-270. As a consequence, there is no statutory basis for assessing additional filing fees or writ taxes. Here, the complainant has already paid the filing fee imposed by § 14.1-113.2 that suit is still pending. The statute expressly prohibits charging a fee for filing a cross-bill in any pending suit. Moreover, the parties in the two law cases are the same as the equity suit and the issues are the same as raised either in the original bill of complaint or the cross-bill.
I am, therefore, of the opinion that there is no provision in the statute for assessing additional fees or writ taxes by the clerk in the two cases which have been docketed on the law side of the court by reason of a partial transfer of issues originating in the chancery suit.

Section 8.01-270 provides: "No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and, without such direction, any party to the suit or action shall have the right at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court.

After any such amendment has been made, the case shall be placed by the clerk on the proper docket of the court and proceed and be determined upon such amended pleadings."

Section 14.1-113 reads, in pertinent part: "In all chancery causes the clerk's fee chargeable to the plaintiff shall be forty dollars to be paid by the plaintiff at the time of instituting the suit, which shall include the furnishing of a duly certified copy of the final decree. However, no fee shall be charged for the filing of a cross-bill in any pending suit."

CIVIL REMEDIES AND PROCEDURE. GARNISHMENT. MEANING OF "BUSINESS, TRADE OR PROFESSIONAL CREDIT TRANSACTION."

January 11, 1984

The Honorable Charles M. Stone, Judge
Twenty-First Judicial District
Henry County General District Court

You have requested my opinion (1) as to the meaning of "business, trade or professional credit transaction" as that phrase is used in § 8.01-511 of the Code of Virginia, effective January 1, 1984, and (2) who makes the determination as to whether a particular situation comes within such meaning and, therefore, may require the judgment creditor to provide the judgment debtor's social security number.

Section 8.01-511 provides in pertinent part: "Except as hereinafter provided, no summons shall be issued pursuant to this section for the garnishment of wages, salaries, commissions or other earnings unless it...(iii) contains...the social security number of the judgment debtor.... This section contains the proviso that "if the judgment which the judgment creditor seeks to enforce (i) does not involve a business, trade or professional credit transaction entered into on or after January 1, 1984...then upon a representation by the judgment creditor that he had made a diligent good faith effort to secure the social security number of the judgment debtor and has been unable to do so, the garnishment shall be issued without the necessity for such number."

The Code does not provide a definition of "business, trade or professional credit transaction"; therefore, these terms must be given their common, everyday meanings. Within the context of § 8.01-511, this phrase implies a commercial relationship between creditor and debtor, i.e., in the ordinary course of its business, trade or profession, the creditor has extended credit to the debtor for the purchase of goods or services or the use of money. I am of the opinion that this phrase applies to a cause of action and
subsequent judgment based upon an extension of credit if the judgment creditor in the ordinary course of its business, trade or profession extended the credit.

In the example you pose in your inquiry, a bank which has loaned money to a debtor to purchase an automobile would come within the meaning of this phrase as used in § 8.01-511. Section 6.1-11 provides that the permissible business of a bank shall include "loaning money on real and personal security, or collateral...."

Section 8.01-511 provides the answer to your second inquiry, for it states in pertinent part that "[n]o summons shall be issued pursuant to this section...against the wages of a judgment debtor unless the judgment creditor, his agent or attorney shall allege in his suggestion [for summons in garnishment] that the judgment for which enforcement is sought...(ii) does not involve a business, trade or professional credit transaction...." I am of the opinion that the judgment creditor determines whether its judgment is based upon a transaction within the meaning of the phrase in issue. If such creditor alleges its judgment was not based upon a business, trade or professional credit transaction and a diligent good faith effort has been made to secure the judgment debtor's social security number, the clerk must issue the summons in garnishment without setting forth a social security number. Questions regarding the allegation may be resolved by the court.

CIVIL REMEDIES AND PROCEDURE. INTERROGATORIES.

January 18, 1984

The Honorable David K. Mapp, Jr.
Sheriff for the City of Norfolk

This is in reply to your inquiry whether contempt proceedings upon failure of a judgment debtor to appear on an interrogatory summons are criminal or civil in nature. In Norfolk, civil papers from the General District Court are served by the High Constable's Office, while criminal papers are served by the Sheriff's Office.

Contempt proceedings are generally classified as criminal and civil. The purpose of criminal proceedings is to preserve the power and vindicate the dignity of the court; they are punitive in nature. Criminal proceedings are brought by the Commonwealth separately from the civil case in which the contempt has arisen, and normally result in a definite period of imprisonment as punishment for a specific past act. Civil contempt proceedings, on the other hand, are primarily for the purpose of enforcing the rights of another party in a civil lawsuit. The contemptor is imprisoned for an indefinite period, that is, until he performs the act required of him. In this sense, he is said to "hold the keys" for his own release. Civil contempt proceedings are ordinarily handled as part of the pending civil action. United Steelworkers v. Newport News Shipbldg., 220 Va. 547, 549, 260 S.E.2d 222, 224 (1979); Local 333B, United Marine Div. v. Commonwealth, 193 Va. 773, 779, 71 S.E.2d 159, 163 (1952).

Despite the general classification of contempt proceedings as civil and criminal, it is not always easy to classify a particular act as belonging to either; it may have the characteristics of both. Local 333B, United Marine Div. v. Commonwealth, supra, 193 Va. at 779, 71 S.E.2d at 163.

Contempt proceedings against a judgment debtor who fails to appear in response to an interrogatory summons are among those which have some of the characteristics of both criminal and civil contempt. They have generally been viewed as civil proceedings, however. Section 8.01-508 of the Code of Virginia appears clearly to contemplate civil
contempt; it permits the incarceration of such a debtor "until he shall make proper answers...." See, also, Early v. Province, 218 Va. 605, 239 S.E.2d 98 (1977); 1982-1983 Report of the Attorney General at 71; Fox v. Capital Co., 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed. 67 (1936).

Such a debtor may, however, be charged with criminal contempt for failure to obey an order of the court. See § 18.2-456(5). Such a proceeding would be brought by the Commonwealth as a separate criminal case, with a view to assessing a fine or a definite period of imprisonment.

For the foregoing reasons, a judgment debtor such as you describe may be charged at the discretion of the court with either criminal or civil contempt, depending on the purpose and nature of proceedings.

CLERKS. COMPENSATION BOARD BUDGET DECISION NOT SUBJECT TO JUDICIAL REVIEW.

July 27, 1983

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

You have asked whether the repeal of § 14.1-52.1 of the Code of Virginia leaves clerks of the circuit courts without a right of appeal from the decision of the State Compensation Board ("Compensation Board") fixing the salaries and expenses of the office of the clerks as provided in Title 14.1, Ch. 2, Art. 3, § 14.1-136 et seq.

The right to appeal to the judiciary from the decision of the Compensation Board is expressly granted to all constitutional officers, except the clerks of the circuit courts, by the provisions of §§ 14.1-50, 14.1-51 and 14.1-52. Section 14.1-52.1 extended the right of appeal to clerks of the circuit courts "in the manner provided in § 14.1-52." By enactment of Ch. 589, Acts of Assembly of 1982, § 14.1-52.1 was repealed and the annual salaries of clerks of the circuit courts are fixed pursuant to § 14.1-143.2. Expenses of the office including salaries of assistants continue to be fixed by the Compensation Board.

With the repeal of § 14.1-52.1, there is no statutory authority which gives standing to clerks of the circuit courts to appeal from the decision of the Compensation Board. Whether this circumstance was intended by the General Assembly or was an inadvertent oversight, the conclusion is unavoidable that there is no authority for an appeal. Your question is therefore answered in the affirmative.

CLERKS. LIMITED PARTNERSHIPS RECORDATION OF CERTIFICATIONS. METHOD AND COST OF INDEXING.

December 22, 1983

The Honorable Russell V. Presley, Clerk
Circuit Court of Buchanan County

You ask whether, pursuant to § 50-75 of the Code of Virginia, a limited partnership consisting of approximately 5,000 investors as limited partners would have to pay fifty
cents per name for each and every limited partner listed before the Certificate of Limited Partnership is recorded. You also ask whether each name has to be indexed.

Initially, the recordation of partnerships, whether limited or general, was governed by §§ 50-74 and 50-75. In 1972, the General Assembly exempted limited partnerships from the operation of § 50-74(a). Chapter 50, Acts of Assembly of 1972.

At its 1981 session, the General Assembly enacted subsection (3) to § 50-45, specifically providing for recordation and fees of limited partnership certificates, and removing limited partnerships from the operation of 50-75. Ch. 277, Acts of Assembly of 1981. That amendment provides:

"The clerk with whom the certificate provided for in paragraph (a) of subsection (1) of this section is filed shall keep a book, which may be the same book provided for in § 50-75, in which all such certificates shall be recorded, with their dates of record, and shall keep an index in which shall be the name of the partnership and the names of the general partners. The clerk shall be entitled to a fee as provided by § 14.1-112. (Emphasis supplied.)"

Contrasted with § 50-75, which requires "the names of each and every person composing the partnership" to be registered in a book, § 50-45 limits the names to be registered to the names of the general partners in addition to the firm name.

Consequently, § 50-75 is no longer applicable to limited partnerships. Thus, the limited partnership would not have to pay fifty cents for each limited partner listed nor would you have to index each of their names.

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CLERKS. RECORDATION. CERTIFICATE OF SATISFACTION WITH NOTE MARKED "PAID IN FULL" BY ATTORNEY SHOULD BE RECORDED IF IN SUBSTANTIAL COMPLIANCE WITH § 55-66.3.

May 8, 1984

The Honorable Diane Bruce, Clerk
Circuit Court of Rappahannock County

You have asked several questions relative to your responsibility to record a certificate of satisfaction presented pursuant to § 55-66.3 of the Code of Virginia.

Your letter reads in part as follows:

"In this case the note was cancelled by the attorney who was recording the Certificate of Satisfaction. We refused recordation of the certificate because we believe, in the absence of an endorsement assigning the note to a third party, 'duly cancelled' means the noteholder, not a third party, must cancel the note by writing 'Paid in Full' on the face of the note and then dating and signing it."

You enclosed a copy of a bond dated August 30, 1983 in the amount of $87,500 drawn payable to Margaret C. Graham, a resident of Maryland, or order. You also enclosed a copy of a certificate of satisfaction, the form of which is that set forth in § 55-66.4:1, bearing the signature and acknowledgement of Margaret C. Graham, noteholder."
Your specific questions and my replies thereto are as follows:

"1. Must the note be produced before the clerk before a Certificate of Satisfaction can be recorded?"

The answer to this question depends upon the availability of the note. Unless it has been lost or destroyed, it must be presented at the time of releasing the deed of trust.

The language of the pertinent portion of § 55-66.3 quoted in footnote 1 is clear and unequivocal. Before a certificate of satisfaction is to be recorded, the instrument evidencing the debt to be released or satisfied must be produced before the clerk, or an affidavit must be filed with the certificate of satisfaction to the effect that the evidence of the debt has been lost or destroyed and cannot be produced.

"2. If the note must be produced, must it be cancelled?"

The answer to this question is in the affirmative. If the instrument is presented (as opposed to filing an affidavit), § 55-66.3 requires that the instrument evidencing the debt be duly cancelled.

"3. If the note must be cancelled, must the noteholder, or assignee, cancel the note, or can anyone who has physical possession of the note cancel it, and what kind of notation constitutes a 'duly cancelled' note?"

The word "duly" has a definite significance in the law. It means "in a proper way, or regularly, or according to law." Robertson v. Perkins, 129 U.S. 233, 236 (1889); Cheshire v. First Presbyterian Church, 220 N.C. 393, 17 S.E.2d 344 (1941); Black's Law Dictionary 450 (5th ed. 1979). Without passing on the sufficiency of the cancellation of the instrument in question, I believe that, within the context of § 55-66.3, the meaning of "duly cancelled" may be gained by reference to § 8.3-605 which refers to discharge of a party by cancellation or renunciation. Section 8.3-605, in part, reads as follows:

"(1) The holder of an instrument may even without consideration discharge any party

(a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature...."

Whether the notation "paid in full" placed on the bond in question was sufficient to duly cancel the obligation of the payors depends upon the intention of the bond holder to cancel her rights as the holder and the identity of the person purporting to cancel the instrument. It is not necessary in every instance that the holder endorse, or actually sign the instrument, in order to comply with § 8.3-605(1)(a). As suggested by § 55-66.3, the act of cancellation may be undertaken by the holder's agent, attorney or attorney-in-fact.

"4. Can the clerk refuse to record a properly acknowledged Certificate of Satisfaction if the note is not produced and duly cancelled?"

It is clear under § 55-66.3 that the clerk may not record the certificate in the absence of a duly cancelled note or affidavit. With respect to the authority of the clerk to inquire into whether the note is duly cancelled, this Office has consistently taken the position that the clerk to whom an instrument is presented for recordation is not charged with the duty, nor is he empowered, to inquire into its legal sufficiency if the instrument is properly signed and acknowledged. See Opinion to the Honorable Rosemary F. Davis, dated March 12, 1984; Reports of the Attorney General: 1971-1972 at 65; and 1965-1966 at 41. The instant case is a clear example of the rationale for that position.
surface it may be questionable whether the instrument evidencing the debt was duly cancelled by the holder, due to an absence of endorsement or other evidence of the authority of the attorney to present the instrument or cancel it. It is entirely possible, however, that the notation of cancellation was made by the holder’s agent, attorney or attorney-in-fact and that such was entirely consistent with the holder’s intention to discharge the makers from the obligation. Any interested party is free to challenge the sufficiency of the cancellation in an appropriate proceeding, but the clerk is not the proper official to make that determination.

I am, therefore, of the opinion that the clerk is obligated by § 55-106 to record any certificate of satisfaction which is in substantial compliance with § 55-66.3, despite any doubt the clerk may have as to the legal sufficiency of the cancellation of the instrument which evidences the obligation being released.

Section 55-66.3 provides in pertinent part: "Such certificate of satisfaction or marginal entry of payment or satisfaction shall be signed by the creditor or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release and if such debt be evidenced by a separate obligation the note, bond or other evidence of debt secured by such lien, duly cancelled, shall be produced before the clerk in whose office such encumbrance is recorded, or an affidavit shall be filed or recorded with the certificate of satisfaction, by the creditor, or his duly authorized agent, attorney or attorney-in-fact, with such clerk, to the effect that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney-in-fact, who was, when the debt was so satisfied, entitled and authorized to receive the same, and that such note, bond or other evidence of the debt secured by the lien has been cancelled and delivered to the person by whom it was paid or has been cancelled and delivered to the person by whom it was paid or has been lost or destroyed and cannot be produced as herein required...."

Even though the instrument is identified as a bond and the certificate of satisfaction refers to a note, that discrepancy is immaterial. The bond clearly meets all of the criteria for a negotiable instrument as defined in § 8.3-104 (a portion of the Uniform Commercial Code), is obviously the instrument which evidences the debt and is the instrument referred to in the certificate of satisfaction.

CLERKS. RECORDATION. INSTRUMENTS RECORDED IN OFFICE OF CLERK OF CIRCUIT COURT MAY NOT BE EXPUNGED, ERASED, OR REMOVED WITHOUT SPECIFIC APPROVAL IN LAW.

May 8, 1984

The Honorable Warren E. Barry, Clerk
Circuit Court of Fairfax County

You have asked for my opinion whether a clerk of a circuit court "has the duty and/or the power to expunge or erase from the record an instrument which has been improperly recorded." You have indicated the types of errors as follows: a deed of trust inadvertently recorded in the wrong county, an instrument recorded without the grantor's signature, a trust recorded without the trustee's signature, an instrument which has not been notarized, and a covenant in which no property description is given.
Section 17-45 of the Code of Virginia provides in part:

"None of the records or papers of a court shall be removed by the clerk nor allowed by him to be removed out of the county or city wherein the clerk's office is kept, except: (i) on the order of the court or judge;...and (iv) in such other cases as are specially provided for by law. Any clerk violating this section shall be liable to any party injured thereby in a sum not exceeding $600."

This civil provision is buttressed by a criminal statute which provides: "[i]f a clerk of any court or other public officer fraudulently make a false entry, or erase, alter, secrete, or destroy any record, including a microphotographic copy, in his keeping and belonging to his office, he shall be guilty of a Class I misdemeanor...." Section 18.2-472.

While the Code does make provision for the removal of some records from the clerk's office, no statutory provision has been made for the expungement or erasure of the types of recorded instruments as set out in your question. An Opinion found in the 1977-1978 Report of the Attorney General at 59 concluded that the removal of recorded instruments was improper without a specific authorization in the law.2

I note that $55-106.2 provides that all writings that have been admitted to record for three years are conclusively presumed to have been in proper form for recording, except in cases of fraud. Further, $55-122 et seq. validates certain acts, deeds and acknowledgements similar to certain of the situations you question. The General Assembly in the 1984 session modified $55-122 et seq. by moving the validation date forward to January 1, 1992. This action shows a continued legislative interest in the integrity of instruments admitted to record. See Ch. 35, Acts of Assembly of 1984.

In light of the foregoing, it is my opinion that the clerk does not have authority to unilaterally erase or expunge instruments which he has previously recorded. To correct the problems you cite, a corrected instrument may be recorded or the incorrect instrument may be removed by court order pursuant to § 17-45.

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1Expungement of certain criminal records at § 19.2-392.1 et seq. and the destruction of contracts of sale admitted to record at least ten years at § 17-46.

2Interpreting §§ 17-44 and 17-45.

CLERKS. RECORDATION FEE. ASSIGNMENTS.

August 3, 1983

The Honorable Katherine G. Mock, Clerk
Circuit Court of Washington County

You have asked what constitutes a reasonable, fair and consistent recordation fee for an assignment which has several names on the instrument. You advised that some clerks are presently charging twenty-five cents per name for documents with more than two names.

Section 14.1-112 of the Code of Virginia provides the fee schedule that the clerks of circuit court are entitled to charge. For recording and indexing in the proper book any writing, a charge is permitted according to the number of pages. There is no statutory provision for a recordation fee based on the number of names appearing on an assignment which is to be recorded. See 1979-1980 Report of the Attorney General at 81.
Generally, § 14.1-112 states that the "provisions of this section shall control the fees charged by clerks of circuit courts...." Section 14.1-112 makes no provision for a per name indexing fee. Therefore, except to the extent the number of names adds to the length of the instrument, there is no statutory authority that permits a clerk to charge a fee which is related to the number of names on the instrument being recorded.

CLERKS. RECORDATION OF DOCUMENT RELATING TO OR AFFECTING REAL PROPERTY.

March 12, 1984

The Honorable Rosemary F. Davis, Clerk
Circuit Court of Nelson County

You have asked whether a writing enclosed with your letter is a document which is authorized by law to be recorded in the deed book. The writing reads as follows:

"At a meeting of the Orchard Park Corporation on 12 July 1982, it was agreed that Mrs. Vera K. Thompson in exchange for her real estate and personal property would have built for her by the Corporation a 5 room house which she would enjoy rent free for her life time, the Corporation paying taxes and insurance, Mrs. Thompson paying lights, heat, maintenance and other monthly expenses.

"House will be built by the Corporation without any indebtedness to Mrs. Vera K. Thompson personally.

"Present at the meeting were John Seaman, Jr., President, Vera K. Thompson, Vice-President and Catherine H. C. Seaman, Secretary-Treasurer."

The writing is signed and acknowledged.

Without passing upon the legal sufficiency of this document, it appears that the parties thereto desired to memorialize their intent to exchange unspecified real and personal property.

Section 55-106 of the Code of Virginia imposes a duty on the clerk to record any writing that "is or may be recorded" and is properly signed and acknowledged. This Office has previously opined, however, that it is not within the power of the clerk to inquire further to determine whether an instrument presented for filing is sufficient to meet the requirements of any particular provision of law. See 1971-1972 Report of the Attorney General at 65.

Section 17-60 provides that certain properly acknowledged writings including "all contracts in reference to real estate...and all other writings relating to or affecting real estate which are authorized to be recorded, shall...be recorded in a book to be known as the deed book." In a previous Opinion construing that Code section, this Office held that if the document is a memorandum or note of a promise, contract, agreement, representation or assurance made with respect to real estate, then it should be admitted to record and taxed accordingly. See 1958-1959 Report of the Attorney General at 31.

In light of the foregoing, I am of the opinion that the document in question falls within the construction of the phrases "contract in reference to real estate" and "other writings relating to or affecting real estate" and, therefore, it should be recorded.
The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester

You have asked my opinion on the indexing of a certificate of partial satisfaction. You wish to be advised if the names of the grantors and trustees shown on the certificate should be reversed when indexing. For the reasons which follow, your inquiry is answered in the affirmative.

A certificate of partial satisfaction serves the same purpose as a release deed. Section 55-66.3 of the Code of Virginia reads in pertinent part:

"If such debt is not evidenced by a separate obligation an affidavit shall be filed or recorded with the certificate of satisfaction by the creditor, his duly authorized agent or attorney or attorney-in-fact with such clerk to the effect that the debt therein secured and intended to be released or discharged has been paid to such creditor....

** **

[The certificate of satisfaction or marginal entry shall operate as a release of the encumbrance as to which such payment or satisfaction is entered and, if the encumbrance be by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectually as if such certificate of satisfaction or marginal entry were a formal deed of release duly executed and recorded."

The form of the certificate of satisfaction and certificate of partial satisfaction prescribed in § 55-66.4:1 is designed to provide all pertinent data in the deed of trust which is being released, in whole or in part. Therefore, the names of the grantors, trustees and makers of the note (generally the grantors or their successors) are necessary to adequately identify the parties in the deed of trust and the debt which is secured by the deed of trust.

The trustees in the deed of trust are, in effect, reconveying title to the parties who originally conveyed the property to the trustees, whether a deed of release or a certificate of satisfaction is utilized for that purpose. Consequently, the clerk should treat the trustees as grantors for the purpose of indexing. Similarly, the names of the grantors shown on the certificate will be indexed in the grantee's index.

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COMPREHENSIVE CONFLICT OF INTERESTS ACT. APPLICABILITY TO § 15.1-73.4.

January 10, 1984

The Honorable Vivian E. Watts
Member, House of Delegates

In your recent letter, you make reference to my opinion addressed to you under date of November 17, 1983, and ask an additional question relating to the disclosure requirements of § 15.1-73.4 of the Code of Virginia.

In my Opinion of November 17, 1983, I concluded that the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act") superseded the requirement of § 15.1-73.4 that members of the board of supervisors of certain counties disclose any business or financial relationship in certain zoning transactions coming before the board.
of supervisors and disqualify themselves from participating in such transaction. I reached that conclusion because the Act contains a disclosure requirement applicable to members of a board of supervisors and it contains a further provision providing for repeal of inconsistent law.

In your letter of December 14 you state: "§ 15.1-73.4(b) provides that parties of interest to a rezoning must disclose such campaign contributions at the time of the rezoning request." You inquire if the requirement in § 15.1-73.4(b) has been affected by the Act. That subsection reads as follows:

"In any such zoning case described in subparagraph (a) hereof pending before an urban county board of supervisors, the applicant in the rezoning case shall, prior to any hearing on the matter, file with the board a statement in writing and under oath identifying by name and last known address each person, corporation, partnership or other association specified in the first paragraph of subsection (a) hereof; and the requirements of this section shall be applicable only in respect to those so identified." (Emphasis added.)

The foregoing provision requires an applicant in a rezoning case to identify the name and address of the persons, etc., who have been specified as a result of compliance with subsection (a)--nothing more. There is no requirement in § 15.1-73.4 that "parties of interest" in a zoning transaction disclose their campaign contributions as indicated in your letter.

The conclusion expressed in my November 17, 1983 Opinion was confined to the disclosure requirements of members of the board of supervisors. Those requirements are now governed by the new Act. The Act does not pertain to disclosure by applicants for rezoning, however, and, therefore, it does not supersede the disclosure requirements in § 15.1-73.4(b) which are applicable only to applicants for rezoning. Because the burden of disclosure is upon an entirely different party and one not subject to the Act, the repeal provisions of § 2.1-599 of the Act do not come into play. Thus, the disclosure provisions of § 15.1-73.4(b) are still in force.

In view of the foregoing, it is unnecessary to respond to your second inquiry as to whether the preemption clause in the Fair Election Practices Act has always applied to subsection (b) of § 15.1-73.4.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. BOARD OF SUPERVISORS. FINANCIAL DISCLOSURE PURSUANT TO § 2.1-613(A). EFFECT OF DEADLINE FALLING ON HOLIDAY OR SUNDAY. HOLIDAYS. EFFECT ON DEADLINE OF FINANCIAL DISCLOSURE PURSUANT TO § 2.1-613.

January 31, 1984

The Honorable Geraldine R. Keyes
County Attorney for Accomack County

This is an amplification of my opinion to you under date of January 23, 1984, interpreting § 2.1-613(A) of the Code of Virginia. In that opinion, I concluded that members of the Board of Supervisors of Accomack County who failed to file the disclosure statement required by § 2.1-613(A) on or before assuming office, did not comply with that section. Under the statute, disclosure statements must be filed by members of the boards of supervisors as a condition to assuming office. I concluded that the time an officer assumes office is when he qualifies for the office. By virtue of
Art. VII, § 5 of the Constitution of Virginia (1971), the county governing body normally takes office on the first day of January following the November election.

You now request my opinion on whether there was a compliance with the statute by members who filed their disclosure statements on Tuesday, January 3, 1984, in view of the fact that January 1 and 2 were legal holidays.

By virtue of § 2.1-21, New Year's Day is a legal holiday as to the transaction of all business. Section 1-13.27 provides that when any proceeding is directed to take place on a particular day of a month, and that day happens to be Sunday, or any legal holiday, the proceeding shall take place on the next day which is neither Sunday nor such legal holiday. The probative question here is whether the members filed the required disclosures on or before assuming office. Despite the fact that the terms of office commenced on January 1, 1984, the first business day for filing any proceeding or performing any required act was January 3. Consequently, members could have complied with § 2.1-613 by filing on that date, despite the fact that their terms of office commenced prior thereto. My response to your inquiry, therefore, is the same as my prior opinion of January 23, 1984, with one modification. The members who filed the disclosure statement on or before January 3, 1984, complied with § 2.1-613(A), irrespective of the fact that their terms began on the first of January.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. CITY COUNCIL MEMBER MAY NOT HAVE PERSONAL INTEREST IN CONTRACT WITH COUNCIL, WITH ANY AGENCY OF CITY SUBJECT TO ULTIMATE CONTROL OF COUNCIL OR ANY OTHER AGENCY IF MAJORITY OF MEMBERS APPOINTED BY COUNCIL.

July 5, 1983

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

This is in reply to your letter of June 25, 1983, requesting an Opinion regarding the application of the Comprehensive Conflict of Interests Act as it pertains to city council members in a city of less than 10,000 population. You have specifically asked:

"[I]s there any restriction on the city, through its various departments, procuring goods and services on a routine daily basis from a business which is owned by a member of the city council? These would be items of a nature that would not be offered for competitive bidding such as 25 lbs. of nails, 1,000 square feet of roofing material, etc."

Section 2.1-606(A) of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act"), generally prohibits a member of city council from having a personal interest in a contract with the council, as well as with any agency of the city which is subject to the ultimate control of the council or any other agency if the majority of the members of such agency are appointed by that city council.

Section 2.1-608, however, creates general exceptions to the contract prohibitions contained in §§ 2.1-604 through 2.1-607. Two exceptions may apply in the instant case. First, if each contract does not exceed $100, then § 2.1-608(A)(6) would exempt such contract from the prohibitions of § 2.1-606. Care must be taken, however, to assure that this exception is not used to thwart the purpose of the Act, given the express intent of the General Assembly that the Act "be liberally construed to accomplish its purpose and any exception...to its applicability...be narrowly construed."
Second, in a city of less than 10,000 population, if (1) the total of the contracts does not exceed $10,000 per year; or (2) the total exceeds $10,000 but does not exceed $25,000 and the contracts are awarded as a result of sealed bids and disclosure is made in accordance with § 2.1-613, then the prohibitions of §§ 2.1-604 through 2.1-607 do not apply.

I, therefore, am of the opinion that although the Act generally prohibits a city council member from having a personal interest in contracts with the city council (or agencies controlled by the council or agencies the majority of whose members are appointed by the council), there are exceptions within the Act that may allow such contracts. In the factual situation posited by you, the goods and services may be furnished by the business owned by a council member within the limitations above specified.

1See § 2.1-600 for the meaning of "personal interest." Ownership of the business would constitute such an interest.

2Section 2.1-606(A) provides, in part: "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."

3Section 2.1-608(A) provides in part: "The provisions of §§ 2.1-604 through 2.1-607 shall not apply to:

6. Contracts for the purchase of goods or services when the contract does not exceed $100."

4See § 2.1-599.

5See § 2.1-608(A) which provides in part: "The provisions of §§ 2.1-604 through 2.1-607 shall not apply to:

3. Contracts between the government or school board of a town or city with a population of less than 10,000 and an officer or employee of that town or city government or school board when the total of such contracts between the town or city government or school board and the officer or employee of that town or city government or school board or a business controlled by him does not exceed $10,000 per year or such amount exceeds $10,000 and is less than $25,000 but results from contracts arising from awards made on a sealed bid basis and such officer or employee has made disclosure as provided for in § 2.1-613...."

The Honorable Robert L. Pugh, Acting President
Virginia Highlands Community College

This is in response to your request for my opinion whether a conflict of interests exists involving the relationship between Highlands Community College (the "College")
and a vending company (the "Company") in which an assistant professor of the College has a "personal interest." The law governing conflict of interests is the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia, (the "Act").

In the information which you provide you indicate that an assistant professor of the College has a "personal interest" in a Company which is a concessionaire for the College. You enclosed a copy of a written agreement with the College which includes payment of a portion of the profits to the College. This agreement contains explicit terms which bind the Company and the College. The agreement indicates that it is in effect from July 1, 1981 to June 30, 1982, with automatic renewal each year for four consecutive one-year terms.

It is my opinion that the agreement between the Company and the College is a contract for purposes of the Act. Section 2.1-600 defines a "contract" as "any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the General Assembly or political subdivision...." (Emphasis added.) The agreement between the Company and the College is an agreement to which a governmental agency is a party and is, therefore, a contract pursuant to the Act.

The assistant professor is a State employee with a "personal interest" in the Company. Because a "contract" exists between the State agency which employs him and the Company in which he has a personal interest, § 2.1-605 of the Act applies.

Section 2.1-605(A) states that no employee of any State governmental agency shall have a personal interest in a contract with the governmental agency which employs him other than his own contract of employment. Thus, this assistant professor's situation creates a conflict of interests due to his having a "personal interest in a contract" between the Company and the College.

The Act provides certain exceptions and exemptions which are to be narrowly construed. Section 2.1-608 provides exceptions applicable to § 2.1-605; however, from the facts which you have presented none of these exceptions applies. It is my opinion that the agreement constitutes a "contract" for purposes of the Act and is prohibited by § 2.1-605(A).

1"Personal interest" is defined in § 2.1-600. In this case it means the employee owns in excess of three percent of the equity in the Company, or receives income in excess of $10,000 annually from the Company.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. CONTRACTING PROHIBITIONS CONTAINED IN ARTICLE 3 APPLY ONLY TO OFFICERS AND EMPLOYEES OF GOVERNMENTAL AGENCIES.

July 27, 1983

The Honorable H. Bryan Mitchell, Executive Director
Virginia Historic Landmarks Commission

This is in reply to your recent letter requesting an Opinion regarding the application of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"). You have advised that the State Historic Preservation Officer, who is responsible for administering a federal program of historic preservation activities
in Virginia, appoints a State Review Board (the "Board") to advise him on the award of federal grants to individuals and organizations for historic preservation projects. One of the members of the Board, an architect, has been retained by a current applicant for federal grant assistance to serve as project architect. You have asked (1) whether, if the State Historic Preservation Officer awards a grant to the client of the Board member and the grant includes funds for payment to the project architect, does the Board member/architect have a conflict of interests under § 2.1-605; and (2) if the grant specifically excludes use of grant funds for payment to the architect, does such exclusion remove any conflict of interests, or does a conflict remain due to an indirect benefit accruing to the Board member?

The contracting prohibitions contained in Art. 3 of the Act (which includes § 2.1-605) apply only to officers and employees of governmental agencies. The Board was created pursuant to 16 U.S.C. 470a(c)(1)(B) to advise the State Historic Preservation Officer regarding the award of federal grants for historic preservation projects. It does not exercise a regulatory or sovereign power or duty. Consequently, I am of the opinion that the Board is an advisory agency and, therefore, the contracting provisions of Art. 3 of the Act do not apply to its members. Thus, the answer to your first question is in the negative. The change in method of payment to the architect that you propose in the second question would not affect this conclusion.

Even though not prohibited from having an interest in the grants, a situation may arise, however, where § 2.1-610 would require the architect/member to disqualify himself from participating in deliberations on behalf of the Board. This section requires officers and employees of all agencies, whether governmental agencies or advisory agencies, to disqualify themselves from participating in any transaction on behalf of an agency when the (1) officer or employee has a personal interest in the transaction before his agency and (2) the transaction has specific application to his personal interest. Therefore, if the architect/member has a personal interest in the transaction and the transaction has specific application to his personal interest, he must disclose his interest in writing and disqualify himself from participating in the transaction on behalf of the Board. If the member of the Board receives more than $10,000 per year from the applicant, whether he is paid from grant funds or not, the architect/member would have a personal interest in any transaction before the Board involving the applicant. Thus, the member would be required to disqualify himself from participating in any action regarding the applicant and his disqualification shall be noted in the records of the agency if the transaction before the Board is one of "specific application."

If you have any questions concerning the distinction between transactions of general application and those of specific application, please contact this Office. Because the Act is remedial, it must be liberally construed to promote public interest and questions should be resolved in favor of disclosure and disqualification. In addition, while certain matters may be legally permitted under the Act, there may be occasions in which prudence would dictate that an officer abstain from action. These situations must, of course, be considered on a case-by-case basis.

1Section 2.1-600 defines "governmental agency" to mean "each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties."

2"Personal interest" includes ownership in a corporation, firm, partnership or other business entity in excess of three percent of the total equity of such entity, income from a corporation, firm, partnership or other business entity in excess of $10,000 per year, or personal liability on behalf of a corporation, firm, partnership or other business entity in
excess of three percent of the total assets of such entity. See § 2.1-600. "Personal interest in a transaction" will be deemed to exist, inter alia, where the officer or employee has a personal interest in a firm, corporation, partnership or business entity that will benefit or suffer from the action of the agency considering the transaction. See § 2.1-600.

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

COMPREHENSIVE CONFLICT OF INTERESTS ACT. DISCLOSURE OF INTERESTS. BOARD OF SUPERVISORS. FINANCIAL DISCLOSURE PURSUANT TO § 2.1-613(A). EFFECT OF DEADLINE FALLING ON HOLIDAY OR SUNDAY. HOLIDAYS. EFFECT ON DEADLINE OF FINANCIAL DISCLOSURE PURSUANT TO § 2.1-613.

January 23, 1984

The Honorable Geraldine R. Keyes
County Attorney for the County of Accomack

This is in response to your letter of January 11, 1984, in which you asked whether the present Accomack County Board of Supervisors is a lawfully constituted board by virtue of the failure of a majority of the members to file financial disclosure forms required by § 2.1-613 of the Code of Virginia on or before January 1, 1984. You advised that the forms were filed prior to the first meeting of the board on January 9, 1984.

The opinion herein expressed is rendered pursuant to § 2.1-118 for the purpose of interpreting a statutory provision, and is not to be confused with an advisory opinion pursuant to § 2.1-632. The latter statute contemplates a question relating to an individual officer being first presented to the Commonwealth's attorney for the locality involved.

Section 2.1-613(A), a part of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act"), provides, in pertinent part, as follows:

"The members of every governing body of each county and city and of towns with populations in excess of 3,500...shall file, as a condition to assuming office or employment, a disclosure statement of his personal interests and such other information as is specified on the form set forth in § 2.1-614 and thereafter shall file such a statement annually on or before January 15."

The foregoing provision is clear in its requirement that the financial disclosure statements must be filed as a condition to assuming an office or employment. The term "assuming office or employment" is not defined in the Code. In common usage, "assume" means taking to or upon oneself. See New York Central Railroad Co. v. General Motors Corp., 182 F.Supp. 273 (D.C. Ohio 1960). In the context of § 2.1-613(A), I am of the opinion that "assuming office or employment" means the time when the person qualifies for the office, or the employment with the governmental agency commences. In the case of members of the board of supervisors, the time would normally be the first day of January of the year the term commences. See Art. VII, § 5 of the Constitution of Virginia (1971). Based upon the facts stated in your letter, I am of the opinion that the members who did not file their disclosure statements on or before January 1 did not comply with § 2.1-613, albeit they did file on or before the date of the first meeting of the board.
The question remains, however, as to the consequences of the failure of a majority of the board to timely comply with the requirement of § 2.1-613. Section 2.1-613 is silent on the effect of a failure to comply within the specified time. It is, therefore, necessary to determine if such a failure constitutes a basis for declaring the office vacant. In my opinion, in the absence of a willful failure, it does not.

Section 15.1-40 provides that a failure of an officer to qualify and give bond as required by § 15.1-39 on or before the day on which his term begins results in the office being deemed vacant. Had the General Assembly intended such a result when the disclosure required by § 2.1-613 is not filed before assuming office, it would have so provided. Instead, § 2.1-627 provides in part:

"Any person who willfully violates any of the provisions of Articles 2 through 6 of this chapter shall be guilty of a Class I misdemeanor. A willful violation under this section is one in which the person engages in conduct, performs some act or refuses to perform some act in which he knows, or should know, that the conduct is prohibited or required by this chapter."

Additionally, § 2.1-628 provides that upon conviction, the judge or jury trying the case, in addition to any other fine or penalty provided by law, may order the forfeiture of office.

In view of the specific penalties provided in the Act for violations, I am of the opinion that the failure of a majority of the board members to file the required forms before assuming office was not in compliance with § 2.1-613, thereby possibly subjecting those members to the provisions of § 2.1-627 and 2.1-628, if it can be established that the noncompliance was willful. From the recited facts, it appears that the officers were laboring under a mistaken belief that the forms were to be filed on or before January 15. That is the date specified in § 2.1-613 for filing the form in each year of the term except for the year the officer assumes office. Assuming a good faith error, there appears to be no basis for prosecution under § 2.1-627, or declaring the offices forfeited under § 2.1-628. The question of whether the members of the board of supervisors willfully failed to comply with § 2.1-613, however, should be first presented to the Commonwealth's attorney for Accomack County.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. DISQUALIFICATION REQUIRED OF SCHOOL BOARD MEMBER HAVING PERSONAL INTEREST IN TRANSACTION BEFORE BOARD WHICH HAS SPECIFIC APPLICATION TO PERSONAL INTEREST.

August 15, 1983

The Honorable Arthur R. Giesen, Jr.
Member, House of Delegates

This is in reply to your recent letter regarding the application of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"), to the following situation: the wife of a recently appointed school board member is and has been for several years employed as secretary to the superintendent of schools and you have asked for guidelines regarding whether the school board member may participate in the consideration of, or voting on, certain matters which may come before the board.

Section 2.1-610 provides that an officer or employee of a governmental or advisory agency shall "disqualify himself from participating in any transaction on behalf of his agency when (i) he has a personal interest in the transaction and (ii) the transaction has specific application to his personal interest." A "personal interest" exists where a
personal and financial benefit accrues to the officer or employee or his spouse or other relative residing in the same household. Section 2.1-600. In the instant case, the wife's employment by the school board constitutes a "personal interest" of the member in her contract with the school board, and thus, in all matters involving her which come before the board. The board member would, therefore, be required to disqualify himself from participating in any transaction if it has "specific application" to his personal interest.

In construing the former Conflict of Interests Act, the forerunner to the present Act, this Office held that when a transaction involves a relatively few officials' interest, the transaction would be "not of general application." 1978-1979 Report of the Attorney General at 304. On the other hand, as a transaction affects a broader segment of the community, it becomes one of general application. See 1982-1983 Report of the Attorney General at 684. The phrase "not of general application" was used in the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 (the "former Act") repealed by Ch. 410, Acts of the Assembly of 1983. I am of the opinion that the change of language used to identify transactions which would require disqualification, from "not of general application" in the former Conflict of Interests Act to "specific application" in the new Act, was not intended to be substantive, but rather to clarify the identifying phrase by expressing it in positive terms rather than in negative terms.

In accordance with prior Opinions of this Office,1 I conclude that where decisions of the school board will affect only a few employees, e.g., salary or other employee matters related to the identity of a specific employee, the transaction becomes one of "specific application" and would trigger the disclosure and disqualification requirements of § 2.1-610.

You have specifically referred to the following matters which may come before the board:

a. contracts of employment,
b. salary considerations and adjustments for employees of the school system,
c. budgetary matters,
d. other employee compensation proposals, such as health insurance, etc.,
e. teacher certification deliberations.

Regarding a. through d., I am of the opinion that if the individual contract, salary, etc., of the board member's wife is before the board, or if contract, salary, etc., concern a small group of employees, one of whom is the board member's wife, then the matter is one of specific application as to the board member and the disclosure and disqualification requirements of § 2.1-610 would apply. Because the board member's wife is not a teacher, he, through his wife, would have no personal interest in teacher certification transactions. Consequently, he would not be required by § 2.1-610 to refrain from participating in such deliberations.

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1. This Office held in a prior Opinion dated June 30, 1983, to you that such facts did not constitute a violation of the Act which prohibits certain degrees of nepotism between school employees and members of the school board.
2. A school board member would be considered an officer of a governmental agency for the purposes of the Act.
COMPREHENSIVE CONFLICT OF INTERESTS ACT. GRANTS AWARDED BY COMMISSION MAY NOT BE AWARDED TO COMMISSION MEMBER OR TO BUSINESS ENTITY IN WHICH COMMISSION MEMBER HAS PERSONAL INTEREST.

August 24, 1983

The Honorable H. Bryan Mitchell, Executive Director
Virginia Historic Landmarks Commission

This is in reply to your recent letter regarding the application of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"). You have asked whether a member of the Virginia Historic Landmarks Commission (the "Commission") is prohibited from having an interest in a grant awarded by the State Historic Preservation Officer. You have advised that the grant awards are routinely made in the name of the Commission.

Section 2.1-605(A) prohibits an officer or employee of any governmental agency of State government, which would include a member of the Commission, from having a personal interest in a contract with his own governmental agency, other than his own contract of employment. 1 A Commission member would have a "personal interest" in a contract with his agency if (1) he is a party to the contract or (2) he has a personal interest in a firm, corporation, partnership or other business entity which is a party to the contract. Section 2.1-600. Therefore, if the Commission member is an applicant for a grant awarded by the Commission, he would have a personal interest in a contract with his own agency. Likewise, if a Commission member has a "personal interest" in a firm, corporation, partnership or other business entity which is a recipient of a grant made by the Commission, the Commission member would have a personal interest in a contract with his own agency. Any such "personal interest" in a contract which accrues to a Commission member is prohibited unless specifically excepted by the Act. I am unaware of any exception which would apply in the circumstances you have described.

Accordingly, I am of the opinion that a Commission member may not have a personal interest in a grant awarded by the Commission.

1This prohibition does not apply to members of advisory agencies such as the State Review Board which was the subject of a previous Opinion to you dated July 27, 1983.

2Such personal interest would exist by reason of (1) an ownership interest of more than three percent of the total equity of such entity; (2) income from the entity in excess of $10,000 per year; and (3) personal liability on behalf of the entity in excess of three percent of the total assets of such entity. Section 2.1-600.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. PERSONAL INTEREST IN PARENT COMPANY CONSTITUTES PERSONAL INTEREST IN ITS WHOLLY-OWNED SUBSIDIARY.

July 6, 1983

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

This is in reply to your letter of June 24, 1983, requesting an Opinion regarding the application of the newly enacted Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"). You have advised that one of the
members of the Chesapeake Redevelopment and Housing Authority (the "Authority") is employed by MMM Design Group ("MMM"). His salary exceeds $10,000 per year. Baldwin and Gregg, Ltd. ("Baldwin and Gregg"), a recently acquired, wholly owned subsidiary of MMM, has provided engineering services for the Authority for some years. The member owns no stock in nor does he receive any salary from Baldwin and Gregg. You have asked whether the continued employment of Baldwin and Gregg by the Authority would be in violation of the Act.

Section 2.1-607(A) prohibits an officer or an employee of any governmental agency of local government, which would include a member of the Authority, from having a personal interest in a contract with the agency of which he is an officer or employee other than his own contract of employment. Because of his receiving more than $10,000 per year from MMM, the member would have a personal interest in MMM. The question then becomes whether a personal interest in MMM (and its contracts) constitutes such an interest in Baldwin and Gregg (and its contracts). This Office has held, in a similar situation, that because the parent company owned all the voting stock of the subsidiary and controlled the subsidiary, a State officer who had a material financial interest in the parent company also had a material financial interest in the wholly owned subsidiary and, therefore, contracts between the subsidiary and the officer's agency were prohibited. Likewise, I am of the opinion that because Baldwin and Gregg is a wholly owned subsidiary of MMM, a personal interest in MMM constitutes a personal interest in Baldwin and Gregg, and therefore, contracts between the Authority and Baldwin and Gregg would be prohibited by the Act.

For the same reasons which prohibit the personal interest in the contract, I am of the opinion that the member would have a personal interest in any transaction before the Authority relating to Baldwin and Gregg. If such a transaction be one of "specific application," the member would, therefore, be required to comply with the disclosure and disqualification requirements of § 2.1-610.

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1 See § 2.1-600 which provides that a "personal interest" shall exist, inter alia, by reason of income in excess of $10,000 per year from a corporation, firm, partnership or other business entity.

2 Section 2.1-600 defines "personal interest in a contract" as "a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in the firm, corporation, partnership or other business entity which is a party to the contract."


4 Because of the member's having authority to participate in the procurement or letting of the contract on behalf of his agency, the exception created in § 2.1-608(A)(4) would not apply.

5 Section 2.1-610 provides, in part: "Each officer...of local governmental agencies...shall disqualify himself from participating in any transaction on behalf of his agency when (i) he has a personal interest in the transaction and (ii) the transaction has specific application to his personal interest. He shall not vote or in any manner act on behalf of his agency in such transaction of specific application and his disqualification shall be noted in the records of the agency."
The Honorable Vivian E. Watts  
Member, House of Delegates

You have asked if the provisions of § 15.1-73.4 of the Code of Virginia, requiring certain disclosures by members of urban county boards of supervisors in proceedings involving zoning changes, are enforceable in light of the provisions of the 1983 Comprehensive Conflict of Interests Act, and whether a member may vote on a rezoning request by one who makes a campaign contribution to such member.

Section 15.1-73.4 requires a member of the board of supervisors in a county having a population in excess of 240,000 inhabitants and having adopted an urban county form of government to make full disclosure of any business or financial relationship which the member has in certain zoning transactions coming before the board of supervisors. This section was originally enacted as Ch. 774, Acts of Assembly of 1968. It was amended and reenacted as Ch. 654, Acts of Assembly of 1970, the same session of the General Assembly which first enacted the Virginia Conflict of Interests Act, Ch. 463, Acts of Assembly of 1970. Section 2.1-347, a part of the 1970 Virginia Conflict of Interests Act (repealed by Ch. 410, Acts of Assembly of 1983) read in part:

"The General Assembly intends by this chapter to establish a single body of law applicable to all State and local government officers and employees on the subject of conflict of interests so that the standards of conduct of such officers and employees may be uniform throughout the Commonwealth, and that this chapter shall repeal and supersede all general and special acts, charter provisions and local ordinances which purport to deal with matters covered by this chapter and are inconsistent with this chapter." (Emphasis added.)

As introduced, the 1983 Comprehensive Conflict of Interests Act, Senate Bill 23, contained a provision reaffirming the Legislature's intent to provide a uniform standard and to supersede all other acts, ordinances, etc. which were less stringent. The Bill also contained the following language:

"Nothing in this chapter shall be construed as repealing or prohibiting any such acts, ordinances or regulations, authorized by law, of any governmental agency or advisory agency, including nepotism regulations more stringent than the provisions in §§ 2.1-604 through 2.1-607, which govern the conduct of the officer and employees of such agency, unless such acts, ordinances or regulations are inconsistent with the provisions of this chapter." (Emphasis added.)

This language would have continued acts imposing more stringent requirements. After the Bill passed the Senate, however, the House added amendments to it and the Joint Conference Committee Report on the Bill eliminated this language. Elimination by the General Assembly of the specific language authorizing more stringent standards and retention of the language providing that the 1983 Act supersedes all other provisions of law dealing with conflict of interests must be interpreted as an intent to preclude enactment by any other governmental entity of standards and procedures dealing with conflict matters.

Accordingly, even though repeal by implication is not favored, I must conclude that it is appropriate here where the General Assembly has so clearly indicated its intent. I am, therefore, of the opinion that the new Act has superseded the disclosure provisions of § 15.1-73.4 and those disclosure requirements are no longer enforceable.

Your second inquiry concerns disqualification of a member from voting on a zoning matter because the member received a campaign contribution from the owner of the
A gift or donation is "a financial relationship" contemplated in § 15.1-73.4; that section does not purport to exclude "political contributions." Neither does the 1983 Comprehensive Conflict of Interests Act refer specifically to such contributions. Whether a particular financial interest on the part of a member of the board constitutes a "personal interest" in a transaction as contemplated in § 2.1-610 depends upon the financial interest involved and whether the transaction has specific application to his personal interest. It will be necessary to refer to the definition of those terms as provided in § 2.1-600 to determine if such interest is present on a case-by-case basis. I point out, however, that in a previous opinion, found in the 1982-1983 Report of the Attorney General at 662, I concluded that the acceptance of a campaign contribution does not in itself create a material financial interest (now "personal interest"). It is necessary in each case to determine if the member has an interest in the entity itself. The mere acceptance of a political contribution would not, standing alone, require disqualification under the conflicts law.

Even though § 15.1-73.4 includes gifts and donations, I doubt that the section can be used as authority for the county to require disclosure of campaign contributions above a specified amount. The disclosure of campaign contributions is governed by the Fair Election Practices Act, Ch. 9, Title 24.1. This is a requirement of disclosure imposed on candidates for office, unrelated to the disclosure of personal interests of officers in transactions being considered by the agency of which they are members. I point out that § 24.1-251 (a part of the Fair Elections Practices Act) contains a preemption clause, as follows:

"Elections to which this chapter is applicable shall not be subject to further regulation by local law, and this chapter shall constitute the exclusive and entire fair election practices law of the Commonwealth."

Other than the general requirement in § 15.1-73.4 to disclose gifts and donations exceeding one hundred dollars, I am not advised of any statutory authority by which a county is authorized to require such disclosure. In absence of some legislative enactment which could be an indication of legislative intent contrary to that expressed in § 24.1-251. I am of the opinion that a county may not require additional disclosure of campaign contributions.

1 The definition of "business or financial relationship" is very broad, including the member's immediate household and extends to gifts or donations in excess of one hundred dollars.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. SUPREME COURT OF VIRGINIA GOVERNMENTAL AGENCY OF WHICH CIRCUIT COURT JUDGE IS OFFICER.

July 6, 1983

The Honorable Philip L. Russo, Judge
Second Judicial Circuit

This is in reply to your letter of June 27, 1983, requesting an Opinion regarding the application of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"), effective July 1, 1983. You advise that you, your wife and your three children are the owners of all of the outstanding common stock of a corporation (the "corporation") that sells paint, wallpaper and sundries. You have asked (1) whether, for the purposes of the Act, your governmental agency is the Supreme Court
of Virginia, or whether it is the Second Judicial Circuit; and (2) if, at the time of contracting with a governmental agency other than your own, the Act requires disclosure of your interests in the corporation to your agency.

This Office has held that for the purposes of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 (the "former Act"), general district court judges are officers of the Supreme Court of Virginia. Likewise, I am of the opinion that judges of circuit courts are officers of the Supreme Court of Virginia for the purposes of the new Act.

Section 2.1-605(A) provides that an officer of a governmental agency of State government, which would include a circuit court judge, may not have a personal interest in a contract with his own agency. Because of the ownership interest of you and your other relatives who reside in your household, you would have a personal interest in the corporation. Therefore, just as under the former Act, the corporation would be prohibited from contracting with your agency.

Further, § 2.1-605(B) provides that an officer of a State governmental agency may not have a personal interest in a contract with another State governmental agency unless the contract is

"(i) awarded as a result of competitive sealed bidding or competitive negotiations as defined in § 11-37 of the Code of Virginia or (ii) ... awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public."

Accordingly, if the corporation were to enter into a contract with a State governmental agency other than your own, the bidding requirements of § 2.1-605(B) would have to be complied with. The disclosure provisions of § 2.1-349(a)(2) of the former Act were not carried over into the new Act, thereby eliminating the need, in most instances, for written disclosure of an officer's or employee's personal interest at the time of the contract.

The Act does not restrict contracting between a State officer or employee and governmental agencies of local government as did § 2.1-349(a)(2) of the former Act, which required compliance with certain disclosure and bidding requirements in such instances.

In summary, I am of the opinion that for the purposes of the Act, you are considered to be an officer of the Supreme Court of Virginia, a State governmental agency. Additionally, I am of the opinion that (1) you may not have a personal interest in a contract with your own agency; (2) if you have a personal interest in a contract with a State governmental agency other than your own, although written disclosure is not required at the time of formation of a contract, you must comply with the requirements of 2.1-605(B) and (3) the new Act does not place any limitations on contracts between an officer or employee of a State governmental agency and a local governmental agency.

1See 1973-1974 Report of the Attorney General at 206 (disclosures under the former Act should be made to the Chief Justice of the Supreme Court of Virginia).
2Compare 1973-1974 Report of the Attorney General, supra (holding that for the purposes of the Virginia Conflict of Interests Act, a general district court judge is an officer serving at the State level of government).
3Section 2.1-600 defines "personal interest" to include "a personal and financial benefit or liability accruing to an officer or employee or to such person's spouse, or any other relative who resides in the same household. Such interest shall exist by reason of (i) ownership in real or personal property, tangible or intangible; (ii) ownership in a
corporation, firm, partnership or other business entity; (iii) income from a corporation, partnership or other business entity; or (iv) personal liability on behalf of a corporation, firm, partnership or other business entity; however, unless the ownership interest in an entity exceeds three percent of the total equity of such entity, or the liability on behalf of an entity exceeds three percent of the total assets of such entity, or the annual income, and/or property or use of such property, from such entity exceeds $10,000 or may reasonably be anticipated to exceed $10,000, such interest shall not constitute a 'personal interest' within the meaning of this chapter; also, "personal interest in a contract" means "a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in the firm, corporation, partnership or other business entity which is a party to the contract."

4I point out, however, that although the disclosure requirement formerly found in § 2.1-349(a)(2) of the old Act was eliminated in the new Act, written disclosure at the time of contracting may be required in specific instances when an officer or employee wishes to avail himself of certain exemptions contained in the Act. See, e.g., paragraphs 1, 3 and 5 of § 2.1-608(A).

5The requirement of annual written disclosure of financial interests of members of the judiciary is continued under the new Act. See § 2.1-612.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. TEACHER MAY NOT BE EMPLOYED BY SAME SCHOOL BOARD OF WHICH HER HUSBAND IS MEMBER UNLESS SHE WAS REGULARLY EMPLOYED BY ANY SCHOOL BOARD PRIOR TO HIS APPOINTMENT.

August 24, 1983

The Honorable Beverly C. "John" Read
Commonwealth's Attorney for Rockbridge County and the City of Lexington

This is in reply to your letter requesting an opinion regarding the application of the Comprehensive Conflict of Interests Act, § 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"), to the following situation. A teacher who was employed by the Rockbridge County School Board is being considered for the positions of principal and assistant principal. Subsequent to her employment as a teacher, her husband was elected to the Rockbridge County School Board. You have asked whether there would be a violation of the Act if she were promoted to principal or assistant principal.

Section 2.1-615 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 § 2.1-615, however, exempts from this general prohibition:

"[A]ny person within such relationship or relationships 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 teacher had been regularly employed by the school board prior to the appointment of her husband to the board, the general prohibition of § 2.1-615 would not apply and the continued employment of the teacher would not be in violation of the Act. The promotion of the teacher to a principal or an assistant principal would not alter this conclusion. The prohibition contained in § 2.1-615 against employing to a greater extent after the appointment of the spouse applies only to substitute teachers and would not, therefore, prohibit the promotion contemplated in the instant case.
You have also inquired whether the school board member must disqualify himself from participating in matters that come before the board relating to his wife's employment or promotion. This question was answered in an opinion to the Honorable Arthur R. Giesen, Jr., dated August 15, 1983.

1Section 2.1-615 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."

2See 1982-1983 Report of the Attorney General at 691, which held that there was no violation of § 2.1-349.1 (a portion of the now repealed Virginia Conflict of Interests Act which contains language identical to that found in § 2.1-615) where the husband of the secretary of long standing to the superintendent of schools was appointed to the school board.


CONSERVATION AND ECONOMIC DEVELOPMENT. STATE PARKS. BOARD HAS AUTHORITY TO RESTRICT VEHICULAR BEACH TRAFFIC AT FALSE CAPE STATE PARK AND ADOPT PERMIT SYSTEM TO IMPLEMENT SUCH RESTRICTION.

October 24, 1983

The Honorable Fred W. Walker, Director
Department of Conservation and Economic Development

You have posed two questions regarding the authority of the Board of Conservation and Economic Development (the "Board") to control access to False Cape State Park ("False Cape"). You have asked whether the Board has the authority to control beach traffic within False Cape and, if so, whether the Board can establish a permit system to control such traffic.

You indicate that False Cape consists of approximately 4,300 acres of land, bordered by the Atlantic Ocean on the east, the North Carolina border on the south, and by Back Bay on the west. To the north False Cape is adjoined by Back Bay National Wildlife Refuge (the "Refuge"), which is owned by the federal government and administered by the United States Department of the Interior's Fish and Wildlife Service ("USFWS"). At the present time, the right to travel through the Refuge by use of motor vehicles on the beach is controlled by USFWS through the use of a permit system. Federal authorities patrol the Refuge and strictly enforce the permit system.

The Division of Parks (now known as the Division of Parks and Recreation), one of the Divisions established under the Board pursuant to § 10-8.1 of the Code of Virginia, has the authority to acquire lands of scenic beauty and recreational utility for the observation, education, health and pleasure of the people of the Commonwealth. See Ch. 2, Title 10 and in particular § 10-21 thereof. Moreover, § 10-12.1(b) states as follows:

"The Board shall have power to adopt such rules and regulations from time to time, not in conflict with the laws of this State concerning the use of properties under its control as will tend to the protection of such property and the public thereon and may impose charges and fees for the use of such property; violation of any such rule and regulation adopted under this paragraph shall constitute a misdemeanor..."
and upon conviction be fined not less than five nor more than one hundred dollars for each offense."

This broad statute has been used by the Board to adopt and publish regulations to control all manner of public conduct in all State parks, including but not limited to, the presence of animals, hours of operation, boating, camping, swimming, picnics, hunting and fishing, sports and games, traffic and parking (Virginia State Parks Regulations effective January 15, 1976). One of these regulations (Regulation No. 4) has already established a permit system applicable to acts officially authorized or licensed to be carried out in a State park. Regulation No. 29 forbids vehicles to be driven in areas not authorized and Regulation No. 30 forbids vehicles to be parked in areas not authorized. Regulation No. 12 excludes the unauthorized public from any State parks at night.

I am of the opinion that § 10-12.1(b) grants the Board statutory authority to control vehicular traffic within all State parks. It has already exercised that authority by adopting regulations which currently affect all State parks. The answer to your first question is, therefore, in the affirmative.

Despite the general application of the present Regulations, I see no reason why, under the same authority, the Board cannot adopt rules applicable to specific properties under its control. The answer to your second question is, therefore, also in the affirmative. The Board can establish a permit system to control beach traffic within False Cape State Park.

CONSOLIDATED LABORATORY SERVICES. 1984-1986 APPROPRIATIONS ACT AND § 2.1-424(5) AUTHORIZE DIVISION TO COLLECT LABORATORY FEES FROM LOCAL GOVERNMENTS FOR TESTING OF WATER SAMPLES FROM LOCAL WATER SUPPLY FACILITIES.

June 26, 1984

The Honorable John C. Buchanan
Member, Senate of Virginia

You inquire whether the Division of Consolidated Laboratory Services is authorized by any act of the General Assembly to collect laboratory fees from local governments for testing of water samples from local water supply facilities.

The Department of General Services (the "Department"), of which the Division of Consolidated Laboratory Services (the "Division") is a part, is authorized by § 2.1-424(5) of the Code of Virginia to establish fees for services rendered by the Department where general fund appropriations are not applicable. See Opinion to the Honorable Charles W. Jackson, Sheriff of the County of Westmoreland, dated August 2, 1983.

Item 68 of § 1-22 of the 1984-1985 Appropriations Act, Ch. 755, Acts of Assembly of 1984, provides: "No general fund amounts are included in the program Laboratory Services for drinking water testing for local governments and commercial water companies....These activities will be supported solely from service charges." Although the amendments to § 2.1-429 by Ch. 275, Acts of Assembly of 1984, may appear to prohibit the imposition of such service charges if testing of water samples is specifically mandated by law or if it is a test for disease considered by the State Department of Health to be critical, the repealer provision in § 4-11.00 of the Appropriations Act mandates a conclusion to the contrary."
In light of the foregoing, I am of the opinion that, under the provisions of the Appropriations Act and § 2.1-424(5) of the Code, the Division of Consolidated Laboratory Services may charge local governments for testing water samples.

1Section 2.1-424 provides in pertinent part: "The Department shall have the following general powers, all of which, with the approval of the Director of the Department, may be exercised by a division of the Department with respect to matters assigned to that division....

5. Establish fee schedules which may be collectible from users when general fund appropriations are not applicable to the services rendered...."

"Section 4-11.00 of the Appropriations Act provides: "All acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed."

CONSTITUTION. AMENDMENTS. GENERAL ASSEMBLY MAY CONSIDER PROPOSED CONSTITUTIONAL AMENDMENT ON SECOND REFERENCE AT SECOND REGULAR SESSION AFTER ELECTION TO HOUSE OF DElegates.

March 19, 1984

The Honorable Elliot S. Schewel
Member, Senate of Virginia

On February 22, 1984, you inquired whether it was necessary for the General Assembly to enact legislation specifically providing for submission to the voters of a proposed constitutional amendment which the General Assembly has, itself, approved in accordance with the Constitution. In response, I advised in an opinion to you dated February 28, 1984, that only the General Assembly may provide for submission to the voters of a proposed amendment; that it was the legislature's constitutional responsibility to determine the manner and time of a submission; that if the General Assembly failed to provide for submission in November, 1984, of a proposal which it had approved a second time in its 1984 regular session, it would not violate the provisions of § 1 of Art. XII of the Constitution; and, finally, that in the event of such failure, the State Board of Elections did not have authority to prescribe the form of a question pertaining to the proposal and place it upon the ballot at the next general election.

Although your inquiry was in general terms, it was related to Senate Joint Resolution No. 28, your proposal to amend the Constitution to place certain constraints on the rate of growth of State spending. At the time of your first inquiry and my response, S.J.R. No. 28 was pending in the House Committee on Privileges and Elections. Your proposal had previously been approved by the 1983 session of the General Assembly and you had introduced it again at the 1984 regular session in accordance with the constitutional requirement that the legislature approve proposals at two separate sessions with an intervening general election for members of the House of Delegates. There was, of course, a general election of members of the House of Delegates in November, 1983.

Although the Senate approved S.J.R. No. 28 at the 1984 regular session, the House of Delegates did not. Rather, the House Committee determined to carry the resolution over to the 1985 session.
With the foregoing background, you now ask whether the General Assembly may act upon S.J.R. No. 28 at the 1985 session in accordance with the constitutionally prescribed method for amending the Constitution.

Article XII, § 1 reads as follows:

"Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters." (Emphasis added.)

While much of the above quoted language was initially included in the Constitution of 1902, the emphasized language was first added to § 196 of the Constitution in 1928, on the recommendation of the Commission to Suggest Amendments to the Constitution of Virginia. That Commission saw no reason to restrict the General Assembly's ability to act on a proposed amendment to a regular session of the General Assembly and stated the operative limitation to be that "[i]n no event could the reference to the people be made until after the regular session, next following the session, either regular or extra, at which the proposed amendment was first agreed to." See House Document No. 2, 1927 Extra Session of the General Assembly 119. Within this limitation, the Assembly was free to act on proposed constitutional amendments at any of its sessions. The reference to "extra session" was necessary because the General Assembly met in regular session only once every two years under the former Constitution. See Art. IV, § 46 Constitution of Virginia (1902). The provision regulating the number of sessions and, as will be seen, the provision pertaining to legislative continuity must be read with the provision prescribing the amendment process in order to construe the meaning and intent of the latter provision. See Board of Supervisors v. Cox, 155 Va. 687, 156 S.E. 755 (1931).

The successor to Art. IV, § 46, relating to sessions of the General Assembly, is Article IV, § 6 of the Constitution of Virginia (1971), which now requires the Assembly to meet once each year, rather than once every two years as required under the former Constitution, and thus, each General Assembly now has two regular sessions rather than one. This requirement of annual sessions was adopted by the General Assembly against the recommendation of the Commission on Constitutional Revision and after considerable debate in the Senate at the 1969 extra session. See Report of the Commission on Constitutional Revision, House Document No. 1, 1969 Extra Session 123, 132-139; Proceedings and Debates of the Senate of Virginia pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970, 349-361 (1971). I find nothing in the above or any of the other available documents concerning the 1969-1970 constitutional revision which indicates that the Assembly in proposing annual sessions intended to limit or affect the power of future assemblies to act upon proposed constitutional amendments under Art. XII, § 1 of the 1971 Constitution, as that section was carried over from Art. XV, § 196 of the 1902 Constitution.

There are two independent bases which lead to the inescapable conclusion that a proposal for a constitutional amendment, passed by one session of the General Assembly
and introduced for second consideration at the first regular session (the "long" session) following the intervening election of members of the House of Delegates, may be carried over and properly considered at the following regular session (the "short" session). It is clear from § 7 of Art. IV and the debates on that section that the General Assembly has the authority to "provide for legislative continuity between sessions occurring during the term for which members of the House of Delegates are elected." As explained by Senator Breeden during the debates, "If...we permitted a continuity between the two sessions we could go home and some measure that had not been passed could be taken up where we left off when we come back next year....[E]xperience tells me there are a lot of things that could be left where they are, and maybe profitably so, because they could be considered at greater length and could be perfected in language and intent and purpose." Proceedings and Debates of the Senate of Virginia pertaining to Amendment of the Constitution 350. Of course, both the Senate and House of Delegates have provided for legislative continuity by adopting rules which permit "any bill or resolution" introduced in an even-numbered year session to be carried over to the "following odd-numbered year regular session." See Rule 20(e), Rules of the Senate; Rule 24(a), Rules of the House of Delegates. There is no suggestion in the Constitution, in the debates or in the Rules that resolutions proposing constitutional amendments are excluded from the General Assembly's carry over authority. To the contrary, both the Senate and House Rules refer to "any...resolution...."

The second basis is that, in contrast to the constitutional provisions in other states, Virginia's Constitution places no limit on the subject matter of a special session of the General Assembly, and, in that regard, a special session is indistinguishable from a regular session. See Art. IV, § 6; I A. Howard, Commentaries on the Constitution of Virginia 500 (1974); 1981-1982 Report of the Attorney General at 188. That being the case, it would be illogical to hold that a General Assembly, under the circumstances presented here, may not consider a proposed constitutional amendment on second reference at its second regular session and must instead always convene in a separate special session for that purpose, as a literal reading of the words of Art. XII, § 1, quoted and emphasized above, would appear to require. I do not believe the framers of the present Constitution intended such a result, nor is there any evidence that they ever considered that such a situation could arise.

I am mindful of the Supreme Court's opinion of Coleman v. Pross, 219 Va. 143, 246 S.E.2d 613 (1978). That case concerned whether the General Assembly could satisfy the constitutionally prescribed process for amendments if it changed the language of a proposed amendment at the second session of the General Assembly to consider the proposal. The Court held that there must be strict compliance with the specified prerequisites rather than adherence to the more lax standard of substantial compliance. Accordingly, the Court held that the proposal could not be amended on its second consideration. It is important to note that the Court held that strict compliance "is required in order that all proposed constitutional amendments shall receive the deliberate consideration and careful scrutiny that they deserve." 219 Va. at 154. If the proposal could be changed at the second session, then its language would be considered only by one session of the legislature. In your situation, however, the proposal, without any language change, will be subjected to the "deliberate consideration and careful scrutiny" of three sessions of the legislature -- the 1983 session at which it was first approved, the 1984 session which decided to carry over the measure, and the 1985 session.

Taking all of the above into consideration, and reading Art. IV, §§ 6 and 7 together with Art. XII, § 1, I am of the opinion that where, as here, a proposed constitutional amendment has been agreed to by the General Assembly and referred to its first regular session after the general election of members of the House of Delegates, the proposal may be acted upon at that session or at any subsequent special or regular session of that
General Assembly which meets during that particular term for which members of the House have been elected.\(^3\)

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\(^1\)Section 196 uses the word "extra" rather than the word "special."

\(^2\)Compare the provisions of Art. IV, § 6 concerning a "reconvened session" (no other business may be considered at a reconvened session except bills returned by the Governor).

\(^3\)Article IV, § 7 of the Constitution and the Rules referenced above do not permit legislative continuity, or carry over, beyond the term for which members of the House have been elected.

As indicated in footnote 2 hereof, the reconvened session to consider gubernatorial vetoes may not consider additional legislation. Of course, a special session may be called to coincide with the reconvened session.

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CONSTITUTION. APPROPRIATIONS. COURTS. ARTICLE IV, § 12 OF CONSTITUTION OF VIRGINIA (1971) DOES NOT INVALIDATE APPROPRIATIONS ACT OF 1982. GENERAL ASSEMBLY ACTING WITHIN RECOGNIZED AUTHORITY WHEN IT ESTABLISHES RESTRICTION WITH REGARD TO EXPENDITURES PROVIDING SECURITY DEPUTIES FOR COURT ROOMS IN CIVIL CASES.

January 23, 1984

The Honorable Fred E. Martin, Jr., Judge
General District Court
City of Norfolk, Civil Division

This is in response to your request for my opinion whether Ch. 654, Acts of Assembly of 1982, as amended by Ch. 622, Acts of Assembly of 1983 (hereinafter "Appropriations Act"), is unconstitutional due to the fact that it has the effect of amending the law regarding court security without so stating in the title of the Act.

The relevant statutes which provide for courtroom security are §§ 53.1-119 and 53.1-120 of the Code of Virginia. Section 53.1-119 mandates that the sheriff provide officers to attend courts in his jurisdiction while they are in session and as the judges may require. Section 53.1-120 (previously § 53-168.1) requires the sheriff designate deputies specifically for the purpose of protecting the courtrooms and the courthouses from violence and disruption. The annual salary of each full-time deputy sheriff responsible primarily for courtroom security is determined by the sheriff who employs him and is to be reported to the Compensation Board by the sheriff when he files his report for allowance of expenses. See § 14.1-73.1:1. These salaries must conform to the requirements set forth in § 14.1-73.1:2.

The section of the Appropriations Act which places a restriction upon the type of courtroom security which may be provided is § 1-39, Item 94, which states that:

"Out of the amount for Financial Assistance to Local Law Enforcement Officials except in special cases when the judge specifically orders it, and notwithstanding the provisions of § 53-168.1 or any other section of the Code of Virginia, no expenditures shall be made to provide courtroom security deputies for civil cases...."

Title 14.1, Ch. 1, Art. 9 is cited as authority for the restriction.
Article IV, § 12 of the Constitution of Virginia (1971) states in pertinent part that: "[n]o law shall embrace more than one object, which shall be expressed in its title." Article IV, § 12 does not require the title of an act to serve as an index or digest of the various provisions in the act. It merely requires that the subjects contained in the statute which are not specified in the title be germane to, or in furtherance of, the object specifically expressed in the title; or, that there be a legitimate and natural association with the object expressed by the title. See Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966); Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940). See, also, 1975-1976 Report of the Attorney General at 74. The title of an Act of the General Assembly is sufficient if it gives notice as to the general subject of the Act and of the interests likely to be affected by it. As long as the subjects which are embraced by the Act, but are not specified in the title, have congruity or a natural connection with, or are cognate or germane to the subject matter of the title, then the constitutional requirement of Art. IV, § 12 is met. See Commonwealth v. Dodson, supra; see, also, 1977-1978 Report of the Attorney General at 27. It is recognized, particularly in the instance of an appropriations bill, that the Constitution does not require that the title consist of an index of the numerous effective provisions, conditions, terms and repeaters in the bill. See 1982-1983 Report of the Attorney General at 426.

The Supreme Court of Virginia has stated with regard to the forerunner of Art. IV, § 12:

"[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."

Town of Narrows v. Giles County, 128 Va. 572, 582, 105 S.E. 82, 85 (1920). Further, the Court has stated that conditions or restrictions placed upon appropriations are legislative matters. Commonwealth v. Dodson, supra. The General Assembly may designate the purpose for which appropriations should be used. See 1982-1983 Report of the Attorney General at 13.

It is, therefore, my opinion that § 1-39, Item 94, of the Appropriations Act does not conflict with Art. IV, § 12 of the Constitution. The General Assembly is acting within its recognized authority when it establishes a restriction with regard to expenditures providing security deputies in civil cases. This limitation on the appropriations of sheriffs funds need not be included in the title of the Appropriations Act. It has a legitimate and natural association with the object expressed by the title, namely appropriation of funds. It should be noted that Item 94 permits the court in "special cases" to order security deputies. Thus, the restriction does not preclude judges from requiring that the sheriff provide security deputies in civil matters which would conform with the "special cases" exception.

CONSTITUTION. ART. IV, §§ 12, 15 AND 16 AND ART. IX, § 6 DO NOT INVALIDATE INNOVATIVE TECHNOLOGY AUTHORITY ACT OF 1984, S.B. 240.

April 4, 1984

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked four questions regarding the constitutionality of Senate Bill 240, the Innovative Technology Authority Act of 1984 (the "Act"). Your first question and the focus of your concern is directed to § 14 of the Act which provides, in part, that "[t]he
Governor is hereby authorized to provide for the formation of a nonstock corporation to carry out the purpose of this article." You wish to know whether § 14 of the Act violates Art. IV, §§ 12, 15 and 16 as well as Art. IX, § 6 of the Constitution of Virginia (1971).

Your opinion request proceeds from the assumption that § 14 of the Act creates a private, nonstock corporation. It is upon this assumption that you ask whether Art. IX, § 6 of the Constitution prohibits the General Assembly from creating such private, nonstock corporation. The first sentence of that section of the Constitution reads:

"The creation of corporations, and the extension and amendment of charters whether heretofore or hereafter granted, shall be provided for by general law, and no charter shall be granted, amended or extended by a special act...." (Emphasis added.)

I am unable to agree with the assumption that Senate Bill 240 creates or charters the private, nonstock corporation. As noted in the provision quoted in the first paragraph of this Opinion, the Act does not create but merely authorizes the Governor "to provide for the formation of a nonstock corporation...." In undertaking this responsibility, the Governor is subject to all the requirements of general law found in Title 13.1, Ch. 2 of the Code of Virginia in forming the nonstock corporation. Therefore, there is no violation of Art. IX, § 6 of the Constitution.

For similar reasons, the Act does not violate Art. IV, § 12, the first sentence of which provides: "No law shall embrace more than one object, which shall be expressed in its title." You are concerned that the creation of the nonstock corporation is not mentioned in the title of the bill. As concluded above, the Act does not create a nonstock corporation. It merely authorizes the Governor to form such a nonstock corporation. More importantly, the Supreme Court of Virginia has ruled:

"[The constitutional provision concerning titles of bills] does not require the title to be an index or digest of the various provisions of the Act. The section is designed to prevent employment of deceptive titles which would conceal rather than reveal the true character of legislation; to prevent the members of the General Assembly and the public from being misled by the title; and to prohibit the bringing together into one act subjects which are adverse or dissimilar and have no kindred connection. The section was not intended to block honest legislation, and it is to be liberally construed." Development Authority v. Coyner, 207 Va. 351, 354, 150 S.E.2d 87, 91 (1966).

The Court has also stated:

"[A]lthough 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, such is not objectionable 'if what is authorized by the [A]ct is germane to or in furtherance of the object expressed in the title, or has a legitimate and natural association therewith.'" Board v. Chippenham Hosp., 219 Va. 65, 72, 245 S.E.2d 430, 434-435 (1978)(quoting Fallon Florist v. City of Roanoke, 190 Va. 564, 587, 58 S.E.2d 316, 327 (1950)).

Lastly, acts of the General Assembly enjoy a presumption of constitutionality both as to the title and text. Chippenham Hospital, supra, 219 Va. at 71, 245 S.E.2d at 434. Given these facts and authorities, it is my opinion that 1984 Senate Bill 240 does not violate Art. IV, § 12 of the Constitution.

The third of your four questions addresses the requirement of Art. IV, § 15 which, in its second paragraph, provides: "No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association or
individual." You note that § 14 of the Act provides that the "nonstock corporation shall not be deemed to be a state or governmental agency, advisory agency, public body or agency or instrumentality for purposes of [eight chapters] Title 2.1, Chapter 7 of Title 11 and Chapter 3.2 of Title 51 of the Code of Virginia...."

It appears that you have assumed that this provision exempts the private, nonstock corporation from the operation of the provisions of these general laws. In fact, this is not the case. None of these provisions of the Code applies to private, nonstock corporations; therefore, the provision does not furnish an exemption from their operation. What the language of § 14 of the Act achieves is to put into the law a provision which expressly negates any inference that the private, nonstock corporation should be treated as though it were a public body, agency or instrumentality of the Commonwealth by reason of its formation by the Governor, its board of directors being composed in part of State officials or its relationship to the Innovative Technology Authority which is created and constituted a political subdivision of the Commonwealth under § 3 of the Act.

Your fourth question asks whether Art. IV, § 16 of the Constitution would be violated by an appropriation by the General Assembly to or for the benefit of the nonstock corporation. Section 14 of the Act neither appropriates nor calls for an appropriation to the private, nonstock corporation, either directly or indirectly. After prohibiting appropriations to churches or sectarian societies, Art. IV, § 16 adds this additional prohibition: "Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth...." (Emphasis added.)

This constitutional prohibition may be avoided if the organization to which the appropriation is made is not "charitable" or, if charitable, is "owned or controlled by the Commonwealth." A nonstock corporation organized in accordance with Ch. 2 of Title 13.1 of the Code is not owned by any entity. See §§ 13.1-211 and 13.1-249.

Whether the nonstock corporation is "charitable" is not clear. The use of the word "charitable" is not further defined by the Constitution. The Supreme Court of Virginia has defined "charitable" in the context of exemption from taxation and, in one case, borrowed from the Webster's New Collegiate Dictionary definition of "charitable" as, 'Liberal in benefactions to the poor; beneficent." City of Richmond v. United Givers Fund, 205 Va. 432, 436, 137 S.E.2d 876, 879 (1964). The same case defines the word somewhat more broadly as being limited to an institution which is "organized and conducted to perform some service of public good or welfare...." Id. (citing 84 C.J.S. Taxation § 282 (1954)). It does not appear that the private, nonstock corporation authorized to be formed by the Governor would come within the meaning of the word "charitable" under the first definition, whereas it is likely that it would be covered under the second, broader definition. Nevertheless, in view of the following conclusion, it is unnecessary to reach the issue whether the nonstock corporation is "charitable."

You note your concern that "the nonstock corporation is exempt from so many of the requirements of Title 2.1, it would appear the nonstock corporation would not be controlled by the Commonwealth." Whether the nonstock corporation is "controlled" by the Commonwealth is not finally determined by the provisions of Senate Bill 240. That determination must finally depend upon the articles of incorporation adopted pursuant to the authority of § 13.1-231 of the Code, subject to those specific requirements in the Act pertaining to the composition of the board of directors, the provisions for distribution of net assets on dissolution and the equitable allocation of economic benefits accruing during the life of the nonstock corporation. Given the presumption of constitutionality recited earlier in this Opinion, I find nothing in the Innovative Technology Authority Act of 1984 which violates Art. IV, § 16 of the Constitution of Virginia.
A. Howard, Commentaries on the Constitution of Virginia 551 (1974). Professor Howard describes the constitutional provision as "a section whose language and ambit are not the clearest."

CONSTITUTION. LEGISLATION. NO LAW SHALL EMBRACE MORE THAN ONE OBJECT. APPROPRIATION ACT DOES NOT VIOLATE ART. IV, § 12.

March 9, 1984

The Honorable Frank Medico
Member, House of Delegates

You have asked whether the Appropriation Act would violate the requirement of Article IV, § 12 of the Constitution of Virginia (1971) that "[n]o law shall embrace more than one object," if that act effectively amends various provisions of the Code of Virginia. As examples of your concern, you cite two items found in the 1983 Appropriation Act, Ch. 622, Acts of Assembly of 1983, each of which had the effect of abolishing a State agency created elsewhere by the Code and transferring the functions of the abolished agency to another State agency. The title to Ch. 622, Acts of Assembly of 1983, did not refer to the Code provisions which were superseded by the two items referred to by you.

The forerunner to § 12 of Art. IV first appeared in the Constitution of Virginia in 1851 and it has been continued in virtually the same language. I A. Howard, Commentaries on the Constitution of Virginia 527 (1974). One of the earliest cases to construe the constitutional provision is Commonwealth v. Brown, 91 Va. 782, 21 S.E. 357 (1895), and many still regard it as the leading case expounding the controlling principles. In Brown, the Supreme Court of Virginia stated that the purpose of the section was

"to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar...and to prevent surprise or fraud in legislation...."

"And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of a diverse nature...the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. All that is required...is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title." 91 Va. at 771. (Emphasis added.)

In Town of Narrows v. Giles County, 128 Va. 572, 583, 105 S.E. 82 (1920), the Court observed that the generality of the title of an act incorporating a municipality would not be objectionable under the predecessor § 12 of Art. IV although the act usually provides, not merely for the formation of the corporation, but also for its powers, legislative, judicial, police and taxing, and for all machinery for their effective exercise.
Significantly, the Supreme Court has had an opportunity to apply the predecessor of § 12 of Art. IV to an appropriation act. Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940). That case involved a review of Governor Price's veto of seven provisions of the 1940 Appropriation Act which the Governor had concluded violated the predecessor to § 12 of Art. IV. One of the provisions pertained to the Office of Legislative Director. The dissenting opinion in Dodson described that particular provision as changing "a vital part of the administrative system of State government" by substantially changing the established method of filling such an important office and by dividing "the responsibility of two most essential administrative offices established by general law." 176 Va. at 315, 316. (Emphasis added.) Nevertheless, despite this substantial change to State administrative offices and responsibilities established by general law, the Supreme Court of Virginia held that inclusion of the provisions making such changes in the general Appropriation Act did not violate the Constitution; nor did failure to list the provisions in the title of the Appropriation Act violate the Constitution. While the Supreme Court did not explicitly state that it was bound to defer to the legislature in determining what provisions are pertinent and related to the general object of a bill, the Court implicitly did extend deference to the legislature's wisdom in this regard.

The Supreme Court has repeatedly held that all acts of the General Assembly are presumed to be constitutional unless the contrary is clearly shown. Every reasonable doubt shall be resolved in favor of an act's constitutionality and courts "cannot strike down a statute enacted by the General Assembly unless it clearly appears that such statute does contravene some provision of the Constitution." Development Authority v. Coyner, 207 Va. 351, 355, 150 S.E.2d 87 (1966).

Turning to the Appropriation Act, it is reasonable to assume that the provisions of such an inclusive act will affect many portions of the fabric of Virginia's government. As long as the subjects which are embraced by the act have congruity or a natural connection with, or are cognate or germane to the subject matter of the title, then inclusion of those subjects in the act does not violate the constitutional prohibition against a bill's having more than one object. Moreover, the title of the act is sufficient if it gives notice of the general subject of the act and the interests likely to be affected.

In summary, § 12 of Art. IV applies to the Appropriation Act, but, as the Supreme Court held in the Dodson case, the inclusion of provisions in such an act amending the organization of Virginia's government in a manner contrary to that established by general law does not violate the Constitution if those provisions have congruity or are germane to the subject matter of the act.

CONSTITUTIONAL LAW. SPECIAL LEGISLATION. MINING AND MINERALS. URANIUM. STATUTE. AUTHORIZING MINING OF URANIUM IN ONLY ONE COUNTY WOULD VIOLATE ART. IV, § 14 OF CONSTITUTION OF VIRGINIA.

May 17, 1984

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

You have asked whether legislation enabling uranium mining to take place in Virginia must have statewide applicability or whether it is constitutionally permissible to adopt legislation that would limit the licensing and operation of uranium mining to one site-specific area.

In constitutional theory, the General Assembly has plenary power and the Constitution acts only as a limitation on its authority. See I A. Howard, Commentaries
on the Constitution of Virginia 536 (1974). As stated by the Supreme Court of Virginia, "[t]he Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited and except so far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power." Newport News v. Elizabeth City, 189 Va. 825, 831, 55 S.E.2d 56 (1949).

Article IV, § 14 of the Constitution of Virginia (1971) does contain limitations on the General Assembly's power, however, and, in pertinent part, that section provides:

"The General Assembly shall not enact any local, special, or private law in the following cases:

(12) Regulating labor, trade, mining, or manufacturing, or the rate of interest on money...." (Emphasis added.)

Thus, the Constitution forbids the General Assembly to adopt a local law regulating mining. Section 15 of Art. IV, however, does permit the General Assembly to adopt general laws in areas such as mining.

The distinction between general laws which are permitted and local laws which are not must be determined on a case-by-case basis. As stated by Professor Howard,

"Laws that apply perfectly to all persons and places within the State are more nearly abstractions than realities: a general law, therefore, is perhaps better defined as one that applies to all who are similarly situated. A law might embrace only one area or one relatively small class of persons and still be a general law if the classification involved can be seen as a reasonable, nonarbitrary, and appropriate one that was not made circuitously to single out and discriminate in favor of, or against, a particular group or locality." I A. Howard at 543, footnote omitted.

As indicated above, general legislation may unquestionably contain classifications, and the limitation of § 14 of Art. IV has not prevented judicial approval of some complicated population and other classifications that may, in fact, limit the applicability of general legislation to one locality. For example, in Ex parte Settle, 114 Va. 715, 718, 77 S.E. 496 (1913), the Supreme Court upheld a statute whose population classification limited its effect to one county, stating "the fact that a law applies only to certain territorial districts does not render it unconstitutional, provided it applies to all districts and all persons who are similarly situated, and to all parts of the State where like conditions exist." See Newport News v. Elizabeth City, supra at 841.

While the Supreme Court has, on occasion, struck down as invalid special legislation certain acts having effect in only one county (see County Bd. of Sup'rs v. Am. Trailer Co., 193 Va. 72, 68 S.E.2d 115 (1951)), the Court has made it abundantly clear that "[t]he fact that the act applies only to [one] county would not necessarily brand it as a special or local law." Id. 193 Va. at 78, 68 S.E.2d at 120. In that case, the Court again acknowledged that classification is permissible provided it is natural, reasonable and appropriate to the occasion.

The statute in question in American Trailer sought to give any county adjoining a county having a population density in excess of 1,000 per square mile (in actuality only Fairfax County qualified) the authority to regulate trailer camps. The Court inquired of the reason for separating Fairfax from other localities to be given this authority and found no basis other than the stated fact that Fairfax adjoined a county having a population density in excess of 1,000 per square mile. The Court stated it would have upheld the act if any conceivable basis could be stated to justify the "separation" of Fairfax County from the other counties. Nevertheless, because there was no reasonable
basis for separating Fairfax and because the act excluded from its operation counties "in similar situations," the Court found the act to be an unconstitutional local act.

A presumption of constitutionality attaches to acts of the General Assembly. As pointed out by Professor Howard in his commentary on Art. IV, § 14.

"One aid to upholding statutes attacked as special legislation is the usual rule that a court will not enquire into legislative motives. The court may look closely at the purpose and effect of a statute which is couched in general terms, but where the court considers the plain language of a statute to provide a reasonable classification, it will not go behind the face of the statute to see if there is a legislative intent that the statute operate locally or specially." I A. Howard at 544.

To be declared invalid, an act must be clearly repugnant to some constitutional provision. Peery v. Board of Funeral Directors, 203 Va. 161, 123 S.E.2d 94 (1961).

Based upon the foregoing principles, it is clear that a local law regulating mining activities would probably be declared by a court to violate § 14 of Art. IV. Nevertheless, based upon the Supreme Court of Virginia decisions construing the Constitution, it is equally clear that the General Assembly has the authority to adopt a statute regulating mining and that statute may contain reasonable classifications. I am of the opinion that a statute containing such classifications, whether based upon geological, geographical or other factors, would be constitutional. The possibility that a site fitting such a legislatively prescribed classification may be found in only one county or even in only one place would not require a court to hold that the statute was a local statute prohibited by the Constitution of Virginia.

1 In § 45.1-300 of the Code, pertaining to oil and gas wells, the General Assembly referred to areas having "outcropping" of certain stratas, the depth of the wells, and whether there would be penetration of a certain type of underground material, among other factors, in describing a classification of wells not subject to the jurisdiction of the Oil and Gas Conservation Commission.

CONSTITUTIONAL OFFICERS. ASSOCIATION DUES APPROVED BY COMPENSATION BOARD NOT SUBJECT TO LOCAL GOVERNING BODY APPROVAL.

August 15, 1983

The Honorable Ray M. Dodson
Sheriff of Page County

You have asked whether the Page County Board of Supervisors may refuse to authorize the payment of dues for membership in the State Sheriffs Associations or otherwise require that such dues be made subject to the approval of the board of supervisors.

By virtue of Articles 7 and 9, Ch. 1 of Title 14.1 of the Code of Virginia, the Compensation Board is authorized to fix the expenses and allowances for the sheriff's office. See 1979-1980 Report of the Attorney General at 97; 1974-1975 Report of the Attorney General at 387. By memorandum dated June 20, 1983 addressed to the sheriffs of all counties and cities in the Commonwealth, the Compensation Board has authorized the payment of State Sheriffs Association dues with the following statement:
"You may pay your State Sheriffs association dues, for the principal officer only from the Office Expense category. In the event this category is not listed on your budget allowance sheet, the Compensation Board will make an additional allowance for the membership fee for the principal officer only. You may not pay dues to any other association from this category."

The same memorandum later states that "[the Compensation Board encourages your participation in your professional association...."

Prior Opinions of this Office held that, except for limited purposes, such as purchases through a centralized system, the local governing body may not exercise control over the offices of the constitutional officers. See Reports of the Attorney General: 1981-1982 at 96; 1978-1979 at 56. Thus, I am of the opinion that the Page County Board of Supervisors is without authority to deny the payment of your dues in the State Sheriffs Association.

CONSTITUTIONAL OFFICERS. CITIES. CHARTERS. COUNCILS. REFERENDUM. FAIRFAX CITY COUNCIL DOES NOT HAVE AUTHORITY TO ABOLISH CONSTITUTIONAL OFFICES OF COMMISSIONER OF REVENUE AND TREASURER; COUNCIL MAY REQUEST GENERAL ASSEMBLY ACTION IN CONJUNCTION WITH CHARTER AMENDMENTS; COUNCIL HAS CHARTER AUTHORITY TO HOLD ADVISORY REFERENDUM ON SUCH ABOLITION.

August 1, 1983

The Honorable Juanita W. Dickerson
Commissioner of the Revenue for the City of Fairfax

This is in reply to your letter in which you request my opinion on the following questions concerning the powers of the council of the City of Fairfax:

"1. Does the City Council have the authority to abolish the Constitutional Offices of Commissioner or Revenue and/or Treasurer?

2. Does the City Council have the authority to hold an advisory referendum for the abolition of these Constitutional Offices before obtaining special legislative action from the General Assembly for such referendum?"

Article VII, § 4 of the Constitution of Virginia (1971) requires the election, in each county and city, of a treasurer and a commissioner of revenue. Article VII, § 4 also gives the General Assembly the authority to abolish those offices in specified cases, as follows:

"The General Assembly may provide for...city officers... without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held."

This language was expressly designed to give city and county citizens the option to dispense with any or all of their constitutional offices, including those of treasurer and commissioner of revenue. See II A. Howard, Commentaries on the Constitution of Virginia 827 (1974); 1976-1977 Report of the Attorney General at 253.
The General Assembly has not enacted a general law permitting automatic elimination of either of these two constitutional offices upon the required vote of the citizens of a city. Section 3.5 of the charter for the City of Fairfax mandates the election of city officers required by the laws of the State to be elected, including a treasurer and a commissioner of revenue. The charter does not make provision for the elimination of either of those offices. Moreover, it is to be noted that under Art. VII, § 4, city council does not have and could not be given the authority to eliminate a constitutional office exclusively on its own motion. Instead, such elimination would require both an act of the General Assembly and a referendum of the qualified voters of the city. Accordingly, in answer to your first question, Fairfax City Council does not have the authority to abolish the offices of commissioner of revenue and treasurer, although it may request the General Assembly to authorize a referendum on the question which could result in such abolition, in conjunction with obtaining amendments to its charter pursuant to Ch. 17 of Title 15.1. See § 15.1-836.1.

With regard to your second question, concerning an advisory referendum on whether constitutional offices should be abolished, § 24.1-165 provides, in relevant part, as follows:

"Notwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, the provisions of this section shall govern special elections. No referendum shall be placed on the ballot, unless specifically authorized by statute, or municipal charter provisions of the Cities of Chesapeake, Norfolk, Newport News, Virginia Beach and Fairfax existing January 1, 1975...." (Emphasis added.)

Section 3.8 of Fairfax's charter, which has been in force since the charter's enactment in 1966, specifically authorizes an advisory referendum, as follows:

"The City Council, by majority vote of the entire Council, may submit to the qualified voters of the City for advisory purposes, any question or group of questions relating to the affairs of the City. Any such advisory referendum shall be conducted in the manner provided for bond elections, but the results thereof shall not be binding upon the City Council. There shall be no right of appeal from or recount of the results of an advisory referendum."

In my opinion, the question of whether the offices of city treasurer and commissioner of revenue ought to be abolished relates to the affairs of the city. Accordingly, in answer to your second question, city council does have the authority to hold such a referendum without seeking special legislative action from the General Assembly for the same. It is to be noted that, by the terms of § 3.8, the results of the referendum are not binding and could not of themselves cause or result in the abolition of any constitutional office.

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1 The present city charter was enacted in Ch. 319, Acts of Assembly of 1966.
2 See § 15.1-40.1, which provides, in part, that with certain exceptions not applicable here, "[t]here shall be elected by the qualified voters of each county and city a treasurer...and a commissioner of revenue." See, also, § 24.1-86.
3 Section 15.1-836.1 provides as follows: "Notwithstanding any provision of law to the contrary, the statutes found within this chapter shall not be used as authorization for the ordering of, or the holding of, any election or referendum the results of which would cause or result in the abolition of any office set forth in § 4 of Article VII of the Constitution of Virginia unless and until the abolition of any such office or offices has first been provided for by a general law or special act on such question alone and approved in a referendum." (Emphasis added.)
Prior Opinions of this Office consistently held that, absent specific statutory authority, a referendum may not be held to take the sense of the people on a local issue. See, e.g., 1976-1977 Report of the Attorney General at 73 and Opinions therein cited.

Note that § 3.8 purportedly was amended and reenacted as of February 28, 1975, but, significantly, as ultimately enacted, the bill made no change in the language of § 3.8, which was originally contained in Ch. 319, Acts of Assembly of 1966. See S.B. 581, 1975 session of the General Assembly, and Ch. 93, Acts of Assembly of 1975.

CONSTITUTIONAL OFFICERS. CITY COUNCIL MAY NOT APPROPRIATE LESS THAN AMOUNT SET BY STATE COMPENSATION BOARD.

May 8, 1984

The Honorable John T. Atkinson
Treasurer for the City of Virginia Beach

You have asked several questions regarding the supplementation of the salary of a city treasurer under § 14.1-55 of the Code of Virginia. In part, you inquire:

"(1) May a city, once a supplement has been established to compensate for additional duties performed, remove said supplement when the principal of an office changes, even though the duties are the same, or have increased, and are performed in a proper professional manner?

(2) May a city only supplement a principal's salary to compensate for additional duties performed?

(3) May a city exercise the above discretion in an arbitrary and capricious fashion when compared to its other established supplemental pay policies?

(4) May a city use a supplemental pay plan for the employees of an office, as leverage to prevent the principal from requesting the proper salary as outlined in § 14.1-55?"

Additionally, you have asked several questions regarding the judicial remedy for a violation, if any, of the public board's duties with respect to the aforementioned queries.

The 1983 amendment to § 14.1-55 deleted the language regarding the supplementation of the salaries of city treasurers. The deleted language now appears in the general appropriation act which reads, in part:

"Nothing herein contained shall prevent the governing body of any county or city from supplementing the salary of the treasurer or officer in such county or city for additional services not required by general law; provided however, that any such supplemental salary shall be paid wholly by such county or city."

Section 14.1-11.4 also states:

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

I shall answer your questions seriatim.

This Office has previously opined that salary supplements paid to constitutional officers may be reduced or eliminated at any time by action of the city council. See 1974-1975 Report of the Attorney General at 340. Thus, the answer to your first question is in the affirmative.

In response to your second question, § 14.1-11.4 provides that the decision to supplement an officer's salary lies in the discretion of the governing body of the city. Whether the governing body supplements such salary to compensate for additional duties, or otherwise, is within this discretion.

Your third inquiry is difficult to evaluate because you have not set forth the other "established supplemental pay policies" to which you refer. This Office has addressed, however, the issue of due process requirements with respect to allowances paid to a county clerk. In an Opinion found in the 1982-1983 Report of the Attorney General at 78, this Office held that a board of supervisors is entitled to summarily stop paying a county clerk such an allowance. In analyzing the due process requirements, that Opinion compared the situation to that of the allowance of a supplement to a circuit court clerk. The Opinion noted that neither situation presented a question of deprivation of a liberty or property interest within the due process provisions of the Fourteenth Amendment. A local governing body, therefore, enjoys wide discretion when adopting supplemental pay policies.

The salary of a city treasurer is fixed by the State Compensation Board, subject to the parameters set forth in § 14.1-55 and the general appropriation act. See §§ 14.1-50 and 14.1-51. With regard to your remaining questions, an Opinion found in the 1978-1979 Report of the Attorney General at 56, held inter alia that (1) a local governing body may not approve a budget for the operation of a constitutional office which contains an appropriation for salaries, expenses and other allowances less than that approved by the State Compensation Board; (2) by appropriating funds for the operation of a constitutional office which are less than the sums fixed by the State Compensation Board, the local governing body exceeds its authority; and (3) an action for mandamus will lie to compel a public board to perform the ministerial duty of paying the salary of the constitutional officer at the amount fixed by the State Compensation Board.

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1See, e.g., Ch. 755, Acts of Assembly of 1984, § 4-5.02b2(d).

CONSTITUTIONAL OFFICERS. COMMISSIONER OF REVENUE MUST RESIDE IN PLACE WHERE HE HOLDS OFFICE IN ORDER TO RETAIN OFFICE, UNLESS ONE OF EXCEPTIONS PROVIDED UNDER § 15.1-52 APPLIES.

May 30, 1984

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

This is in response to your request for my opinion whether you may move to Roanoke City and retain your office as Commissioner of Revenue for Roanoke County.
You further inquire whether you may run for the Office of Commissioner of Revenue for Roanoke City while you are Commissioner of Revenue for Roanoke County.

Article VII, § 4 of the Constitution of Virginia (1971) provides that a commissioner of revenue shall be elected by the qualified voters of each county and city. Section 15.1-40.1 of the Code of Virginia incorporates this constitutional requirement. Section 15.1-51 provides that every county officer, with certain exceptions not here applicable, at the time of his election or appointment, shall have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed or in the city wherein the courthouse of the county is or in a city which is wholly within the boundaries of the county.

Section 15.1-52 states:

"If any officer, required by the preceding section (§ 15.1-51) to be a resident at the time of his election or appointment of the county, city...for which he is elected or appointed, or of the city wherein the courthouse of such county is or in a city wholly within the boundaries of such county, remove therefrom, except from the county to such city or from such city to the county...his office shall be deemed vacant." (Emphasis added.)

Because Roanoke County conforms to the special situation where the city is wholly contained within the boundaries of the county, it is my opinion that the § 15.1-52 exception is applicable. You may reside in Roanoke City and remain Commissioner of Revenue for Roanoke County.

Your second inquiry, whether you could continue to hold your office in Roanoke County while running for the office of Commissioner of Revenue for Roanoke City, is also answered in the affirmative. Inasmuch as Roanoke City is wholly within the boundaries of Roanoke County, you may lawfully move to the city and remain Commissioner of Revenue in the County. If you are resident of Roanoke City, you may properly run for the office of commissioner of revenue for the city. See § 15.1-51. You are correct in your understanding that if elected in the city, you cannot hold both offices.

1For the purposes of §§ 15.1-51 and 15.1-52, a commissioner of revenue is a county or city officer.

2Roanoke City is wholly within Roanoke County.

COSTS. GENERAL DISTRICT COURTS. CASES. NO SEPARATE FEE FOR COUNTERCLAIMS AND CROSS-CLAIMS.

November 7, 1983

The Honorable Edgar L. Turlington, Jr., Judge
General District Court
Thirteenth Judicial District

This is in reply to your recent letter in which you ask if a general district court is authorized to collect a fee for processing a counterclaim and a cross-claim.
Fees for services of general district courts in civil cases are fixed by § 14.1-125 of the Code of Virginia. That section which is effective until January 1, 1985, provides in pertinent part, as follows:

"Fees in civil cases for services performed by the judges or clerks of general district courts or magistrates in the event any such services are performed by magistrates in civil cases shall be as follows, and, unless otherwise provided, shall be included in the taxed costs and shall not be refundable, except in case of error or as herein provided.

(1) For all court and magistrate services in each distress, detinue, interrogatory summons, unlawful detainer, civil warrant, notice of motion, garnishment, attachment issued, or other civil proceeding, eight dollars unless otherwise provided in this section." (Emphasis added.)

Counterclaims and cross-claims in actions at law are controlled by § 8.01-281 and Rules 3:8 and 3:9 of the Rules of the Supreme Court of Virginia. A counterclaim is a claim asserted by a defendant against a plaintiff in an action brought by the plaintiff against the defendant. It is not a separate proceeding, despite the fact the court may order a separate trial of any cause of action asserted in a counterclaim. See Rule 3:8. A defendant may also assert a cross-claim for any cause of action he may have against one or more defendants growing out of any matter pleaded in the motion for judgment. Rule 3:9 expressly provides that a "cross-claim is a new action and all provisions of these Rules applicable to notices of motion for judgment shall apply to cross-claims, except those provisions requiring payment of writ tax and clerk's fees...." (Emphasis added.)

In view of the foregoing, I am of the opinion that neither a counterclaim nor a cross-bill is a separate "civil proceeding" within the contemplation of § 14.1-125, and accordingly, no separate fee is authorized for services rendered by the district court in processing such claims.

The foregoing conclusion is consistent with the legislative intent expressed in § 14.1-113, which fixes the clerk's fees in chancery causes. That section prohibits charging a fee for filing of a cross-bill in any pending suit. See Opinion of the Attorney General to the Honorable J. W. Wood, Jr., dated August 25, 1983.

COUNTRIES. APPROPRIATIONS. ORDINANCES. RESOLUTIONS.

The Honorable J. G. Overstreet
County Attorney for Bedford County

This is in reply to your request for my opinion whether the Board of Supervisors of Bedford County may make appropriations by resolution or whether ordinances are necessary to do so.

As you point out, there is no constitutional or statutory provision which specifically directs the method of appropriation of funds by the board of supervisors of a county with a traditional form of government. It is recognized, however, both in the Constitution and by the General Assembly in various statutes, that local governing bodies will make appropriations either by ordinance or by resolution. Article VII, § 7 of the Constitution of Virginia (1971), for example, provides that "[n]o ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority
A distinction between ordinances and resolutions is recognized, to the effect that an ordinance is equivalent to a law or statute, which sets forth a continuing, permanent rule of action, while a resolution is adopted to dispose of administrative matters of a temporary or special nature. See 1976-1977 Report of the Attorney General at 289; see, generally, 62 C.J.S. Municipal Corporations § 411 (1949). The terms also have been used interchangeably, the difference being that an ordinance connotes a more formal and solemn declaration than does a resolution. Id. In any event, a resolution is a legislative act of the local governing body, and, in the absence of a statutory requirement that an appropriation be made by ordinance, I am of the opinion that it may be made by resolution of the board of supervisors.

1Sections 15.1-605, 15.1-640 and 15.1-766, which apply to other forms of county government, provide in each case that money shall not be drawn from the county treasury nor any expenditure obligation incurred except in pursuance of appropriation resolutions.

2See, also, §§ 15.1-812, 15.1-818 and 15.1-819, which refer to appropriations ordinances and resolutions of cities.

3See Southern Ry. Co. v. City of Danville, 175 Va. 300, 306, 7 S.E.2d 896 (1940): "The word 'ordinance' denoting the act of a city council simply distinguishes it from the word 'law,' which applies to an act of the State legislature. As a term of municipal law, it is equivalent to either 'law' or 'statute' as a term of state legislative action and carries with it by natural, if not necessary, implication the usual incidents of such action. Both ordinances and laws are acts of a deliberative, representative and legislative body. An ordinance, duly enacted, has the force and effect of law. It is a law.


5A local governing body may choose any reasonable method of exercising its authority to appropriate funds, where the method is not specified. See Commonwealth v. Arlington County Bd., 217 Va. 558, 574, 232 S.E.2d 30 (1977).

COUNTIES. BOARDS OF SUPERVISORS. DEBT. CONSTITUTION. COUNTY MAY CONTRACT DEBT ONLY AS AUTHORIZED BY CONSTITUTION; MAY NOT BORROW FROM LENDING INSTITUTIONS IN ANTICIPATION OF LITERARY FUND LOAN PROCEEDS.

March 9, 1984

The Honorable Lynn C. Brownley
Commonwealth's Attorney for Westmoreland County

This is in reply to your request for my opinion whether the Westmoreland County Board of Supervisors may borrow money from lending institutions for a period of one
year, without approval of the voters in a referendum, in anticipation of receipt of proceeds of a loan from the Literary Fund to finance new school construction.

Article VII, § 10 of the Constitution of Virginia (1971) places a strict limitation on the authority of a county to borrow money without the consent of the voters. See American-LaFrance v. Arlington County, 164 Va. 1, 178 S.E. 783 (1935); 1974-1975 Report of the Attorney General at 241. Article VII, § 10(b) limits the General Assembly's power to authorize county borrowing without voter approval as follows:

"No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing body of the county, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt." (Emphasis added.)

Subsection 10(a)(1) excepts obligations issued in anticipation of the collection of the revenues of the county for the current year, provided that such obligations mature within one year from the date of their issue, are not past due, and do not exceed the revenue for the year; subsection 10(a)(3) excepts revenue bonds payable exclusively from receipts of a water system or other specific undertaking, or secured by contributions of other units of government.

The General Assembly has authorized temporary county borrowing for the purpose of "meeting casual deficits in the revenue, or creating a debt in anticipation of the collection of the revenue of the county...." Section 15.1-545; see § 15.1-546 (such loans to be repaid in the same fiscal year in which borrowed). In my opinion, future proceeds of a school construction loan from the Literary Fund to a local school board should not be considered as revenues anticipated to be collected by the county as contemplated in Art. VII, § 10(a)(1) and § 15.1-545 of the Code. Thus, temporary borrowing by the county in anticipation of such loan proceeds does not fall within the exception authorized by Art. VII, § 10(a)(1), nor within any of the other exceptions authorized in Art. VII, § 10(b). Compare 1974-1975 Report of the Attorney General at 346 (county school board may not borrow temporarily from commercial lenders in anticipation of proceeds from school bonds sold to the Virginia Public School Authority). Accordingly, your inquiry is answered in the negative.

1See generally, § 22.1-146 et seq. of the Code of Virginia, as to Literary Fund loans to local school boards.

2See also, § 15.1-545.1, which provides that a county may borrow "in advance of grants and reimbursements due the county from the federal and State governments for the purpose of meeting appropriations made for the then current fiscal year." In my opinion, money requested from the Literary Fund by way of a school board loan application to the Board of Education does not constitute a grant or reimbursement due the county from the State within the intent of this section.
COUNTIES. BOARDS OF SUPERVISORS. INSURANCE. ECONOMIC DEVELOPMENT AUTHORITIES. PARK AUTHORITIES. LIBRARIES. SANITARY DISTRICTS. COUNTY BOARD OF SUPERVISORS MAY PROVIDE LIABILITY INSURANCE OR SELF-INSURANCE FOR SANITARY DISTRICT EMPLOYEES; MAY NOT PROVIDE INSURANCE FOR EMPLOYEES OF ECONOMIC DEVELOPMENT AUTHORITY, PARK AUTHORITY OR LIBRARY BOARD.

August 30, 1983

The Honorable David T. Stitt
County Attorney for Fairfax County

This is in reply to your request for my opinion concerning the applicability of § 15.1-506.1 of the Code of Virginia, relating to provision of liability insurance or self-insurance for the public officers and employees of the Fairfax County Economic Development Authority, the Fairfax County Park Authority, the Fairfax County Library Board and the Reston and McLean Community Centers. In each case you ask, first, whether the Board of Supervisors of Fairfax County may provide liability insurance or self-insurance for officers and employees of the named entities, and, in the alternative, whether the entities themselves may provide insurance or self-insurance for their officers and employees.

Section 15.1-506.1 provides as follows:

"The board of supervisors of any county and the governing body of any political or governmental subdivision may provide liability insurance, or may provide self-insurance, for certain or all of its officers and employees and volunteers who are not employees of the governing body and members of commissions and boards recognized by the local governing body to cover the costs and expenses incident to liability, including those for settlement, suit or satisfaction of judgment, arising from the conduct of its officials, employees, volunteers and board and commission members in the discharge of their duties. The liability insurance coverage shall be placed with insurance companies authorized to do business in this State by the State Corporation Commission."

The related inquiries which must be made in each instance are whether the officers and employees of the entity may be considered as county officers and employees, and whether the entity may be considered as a separate "political or governmental subdivision." I will discuss each entity in order.

1. Fairfax County Economic Development Authority. This authority was created by Ch. 643, Acts of Assembly of 1964 as "a political subdivision of the Commonwealth with such public and corporate powers as are granted in this Act...." See § 1 of Ch. 643. Section 3 provides that the authority is to be governed by a commission appointed by the county governing body, which shall exercise and perform all powers and duties of the authority. Section 6 confers certain listed powers upon the authority, among which are included, in subsection (e) thereof, the power "[t]o employ a director and such other agents and employees as may be necessary, to serve at the pleasure of the commission," and to fix their compensation and prescribe their duties.

It is clear from the above recited declarations of the General Assembly that the Fairfax County Economic Development Authority is a "political or governmental subdivision" separate from the county, with a separate governing body. I am of the opinion that, for purposes of § 15.1-506.1, the authority's officers and employees are not officers and employees of the county board of supervisors and, accordingly, the board of supervisors may not provide liability insurance or self-insurance for those employees. Compare 1978-1979 Report of the Attorney General at 116 and 141 (employees of various
authorities which are similarly separate and distinct legal entities). I am further of the opinion that, because the authority was created expressly as a separate political subdivision, it may itself provide insurance or self-insurance for its officers and employees pursuant to § 15.1-506.1.

2. Fairfax County Park Authority. A park authority created by local ordinance is a "public body politic and corporate." See § 15.1-1230. Once created, it is "deemed to be an instrumentality exercising public and essential governmental functions to provide for the public health and welfare" with, among other powers, the power to regulate its internal affairs and to do all things necessary to carry out the powers expressly granted to it. See § 15.1-1232. An authority's powers are exercised by its members, who are appointed by the county governing body. See § 15.1-1231. Prior Opinions of this Office have held similarly constituted and empowered entities to be political subdivisions. See, e.g., Reports of the Attorney General: 1980-1981 at 277 (Fairfax County Water Authority); 1974-1975 at 538 (James City Service Authority). Prior Opinions of this Office also have recognized park authorities as governmental entities independent of local governing bodies. See Reports of the Attorney General: 1977-1978 at 298; 1961-1962 at 51. Accordingly, I am of the opinion that the Fairfax County Park Authority is a separate political subdivision for purposes of § 15.1-506.1, and, consistent with the conclusion stated above, the county board of supervisors may not provide insurance for the authority's employees. The authority itself may provide liability insurance or self-insurance for its officers and employees.

3. Fairfax County Library Board. I assume from the information provided with your letter that a county library board has been established which, pursuant to statute, has management and control of the free public library system. See §§ 42.1-35 and 42.1-36. Prior Opinions of this Office held that the library board's power of management and control over the free public library system includes the power to manage and control the personnel therein, and that employees of the county library board are not employees of the county board of supervisors. See Reports of the Attorney General: 1980-1981 at 227; 1978-1979 at 116; 1977-1978 at 233; 1975-1976 at 80. Consistent with the views expressed in those Opinions, I am of the opinion that a library board's officers and employees are not officers and employees of the board of supervisors for purposes of § 15.1-506.1, and that, therefore, the board of supervisors may not provide liability insurance or self-insurance for those employees.

The second inquiry to be made is whether the library board is a "political or governmental subdivision" which may itself provide such insurance for its officers and employees.

The term "political subdivision" is broad and comprehensive, may be used in more than one sense, and may include a governmental body of the State created for a single public purpose and authorized to exercise the sovereign power of the State only to a limited degree. See Reports of the Attorney General: 1980-1981 at 277; 1973-1974 at 217. A political subdivision is an entity created by law to aid in the administration of government, and, as the recipient of sovereignty, it is independent from other governmental bodies and may act within its discretion to exercise those powers conferred by law without seeking approval of a superior authority. See 1978-1979 Report of the Attorney General at 305.

Operation of a free public library system as authorized by statute is held to constitute a governmental function. See § 42.1-32.1; 62 C.J.S. Municipal Corporations § 679 (1949). Management and control of this function by statute in Virginia expressly is vested in the library board, whose members are empowered to "adopt such bylaws, rules and regulations for their own guidance and for the government of the free public library system as may be expedient" and who "shall have control of the expenditures of all moneys credited to the library fund." Section 42.1-35. This Office has recognized
that the library board, once established, has the policy-making power over the county library system, independent of any supervision by the county board of supervisors. See, e.g., 1975-1976 Report of the Attorney General at 80. I am of the opinion that, for purposes of § 15.1-506.1, the Fairfax County Library Board may be considered as the governing body of a "political or governmental subdivision" which may provide liability insurance or self-insurance for its officers and employees. ¹

4. Reston and McLean Community Centers. It is stated in the materials enclosed with your letter that these centers are operated as a function of the county sanitary districts created pursuant to §§ 15.1-787 and 15.1-791. The county board of supervisors is the governing body of each such district. See § 15.1-730. Section 15.1-791(b) provides that each district created under the provisions of § 15.1-787 "shall be a sanitary district with all the rights and powers conferred on sanitary districts by general law." See § 21-112.22 et seq. A prior Opinion of this Office held that, because the county governing body has management and control of the personnel function of a sanitary district under general law, district employees may properly be considered employees of the county. See 1978-1979 Report of the Attorney General at 119. Consistent with that holding, and with the express provisions of § 15.1-730, I am of the opinion that the community center officers and employees are officers and employees of the Fairfax County Board of Supervisors for purposes of § 15.1-506.1, and, accordingly, the board of supervisors may provide liability insurance or self-insurance for them.


See, also, Makielski, The Special District Problem in Virginia, 55 Va. L. Rev. 1182 (1969) for a discussion of park authorities and other independent governmental authorities.

Section 42.1-32.1 reads in part, "[i]t is hereby declared to be the policy of the Commonwealth, as part of its provision for public education, to promote the cooperation and networking of all public, academic, special and school libraries throughout the Commonwealth. It is the further intent of this article that none of its provisions shall be construed to interfere with the autonomy of the governing boards of institutions of higher education and the governing boards of public, special and school libraries." See, also, § 42.1-46, wherein it is stated that "[i]t is hereby declared to be the policy of the Commonwealth, as part of its provision for public education, to promote the establishment and development of public library service throughout its various political subdivisions."

But cf. Opinion contained in 1954-1955 Report of the Attorney General at 216 which held that, for social security purposes under Title 51, a county free library system is not a separate juristic entity so as to constitute it a political subdivision of the State as defined in § 51-111.2(l). The same entity may be considered a political subdivision for some purposes and not a political subdivision for other purposes. Compare, e.g., 1976-1977 Report of the Attorney General at 319 (Virginia Port Authority is not a political subdivision but instead is an executive agency of the State "within the narrow delimitations of § 2.1-41.2") with 1973-1974 Report of the Attorney General at 217 [Virginia Port Authority is a political subdivision for the purpose of the definitions in §§ 9-108 (now repealed—see § 9-169(2))].
COUNTY ZONING ORDINANCE OR COMPREHENSIVE PLAN REVIEW IN
ESTABLISHING SANITARY LANDFILL.

March 1, 1984

The Honorable V. R. Shackelford, III
County Attorney for Madison County

This is in reply to your inquiry in which you ask several questions concerning
Madison County's proposal to establish a sanitary landfill. You relate that the board of
supervisors has entered into a contract to purchase a tract of land in the county for use
as a landfill, which the county zoning ordinance lists as a permissible use in the zone
where the property is located, provided a special use permit is issued. You relate further
that the board of supervisors has adopted a comprehensive plan as required
by law. See § 15.1-446.1 of the Code of Virginia. The board of supervisors wishes to obtain all local
and State permits which may be required to establish and operate its proposed sanitary
landfill, and toward that end, you ask the following questions, which I will answer
seriatim:

"1. Does the Madison County Board of Supervisors have to apply for and obtain a
special use permit under its own zoning ordinance to operate a sanitary landfill for
the citizens of Madison County?"

This question was considered in a prior Opinion of this Office, wherein it was held
that a county is exempt from its own local zoning ordinance in its operation of a sanitary
landfill unless the ordinance was expressly made applicable to the county. See 1971-1972
Report of the Attorney General at 103. I concur in the conclusion stated in that
Opinion. Because you do not indicate that the local zoning ordinance itself requires the
county to submit to its provisions, your first question is answered in the negative.

"2. What State permits does the Madison County Board of Supervisors have to
obtain to operate a sanitary landfill for the county?"

The county must obtain a permit from the State Health Commissioner, pursuant to
§ 32.1-180, in order to operate a sanitary landfill. Depending upon the circumstances,
the county may also be required to obtain the approval of the State Water Control Board
pursuant to §§ 62.1-44.16 and 62.1-44.17.

"3. Is the proposed sanitary landfill a 'public area' within the meaning of § 15.1-456
of the Code of Virginia, 1950, as amended?"

Section 15.1-456 provides, in part, as follows:

"(a) Whenever the local commission shall have recommended a comprehensive plan
or part thereof for the county or municipality and such plan shall have been
approved and adopted by the governing body, it shall control the general or
approximate location, character and extent of each feature shown on the plan.
Thereafter, unless such feature is already shown on the adopted master plan or part
thereof or is deemed so under paragraph (d), no street, park or other public area,
public building or public structure, public utility facility or public service
corporation facility other than railroad facility, whether publicly or privately
owned, shall be constructed, established or authorized, unless and until the general
location or approximate location, character, and extent thereof has been submitted
to and approved by the local commission as being substantially in accord with the
adopted comprehensive plan or part thereof. In connection with any such
determination the commission may, and at the direction of the governing body
shall, hold a public hearing, after notice as required by § 15.1-431.
"(b) The commission shall communicate its findings to the governing body, indicating its approval or disapproval with written reasons therefor. The governing body may overrule the action of the commission by a vote of a majority of the membership thereof. Failure of the commission to act within sixty days of such submission, unless such time shall be extended by the governing body, shall be deemed approval. The owner or owners or their agents may appeal the decision of the local commission to the governing body within ten days after the decision of the commission. The appeal shall be by written petition to the governing body setting forth the reasons for the appeal. The appeal shall be heard and determined within sixty days from its filing. A majority vote of the governing body shall overrule the commission." (Emphasis added.)

In answer to your question, it is my opinion that property owned by a public body and devoted to the governmental purpose of operating a sanitary landfill for local citizens would be considered to be a public area within the meaning of § 15.1-456.4

4. If a sanitary landfill is a 'public area' within the meaning of § 15.1-456, does the Madison County Board of Supervisors have to comply with the provisions of § 15.1-456?

Section 15.1-456 and its predecessor have been the subject of several Opinions of this Office. An Opinion found in 1963-1964 Report of the Attorney General at 155 held that the predecessor of § 15.1-456 "requiring approval of the planning commission for locating and altering public facilities must be construed to apply to facilities operated by governmental instrumentalities of lesser or co-equal authority, such as other political subdivisions or subordinate agencies of the cities and counties." Several months later, this Office observed in another Opinion on the same subject that it is "highly doubtful that the requirement extends to improvements undertaken by the governing body of the county, since the governing body has the power to overrule the Planning Commission in the event of disapproval." 1963-1964 Report of the Attorney General at 154. Cf. 1976-1977 Report of the Attorney General at 193 (holding that § 15.1-456 is applicable to lesser instrumentalities of the governing body).

It is of significance that following the two Opinions issued in 1963 and 1964, the General Assembly has not amended the statute to subject improvements owned by governing bodies to review of their planning commissions. While not conclusive, this inaction by the General Assembly is indicative of its concurrence in the interpretation given the predecessor of § 15.1-456. See Andrews v. Shepherd, 201 Va. 412, 111 S.E.2d 279 (1959).

I concur in the long-standing interpretation accorded to § 15.1-456 and, therefore, am of the opinion that the board of supervisors is not obligated to submit the proposal for the landfill to the planning commissions. While it is obviously desirable that the board of supervisors establish its facilities in locations consistent with the provisions of its adopted comprehensive plan, in my opinion the board is not legally required to submit its proposals to the planning commission.

In light of the conclusion stated in the answer to your fourth question, your fifth question, which concerns appeal of the decision of the planning commission to the governing body pursuant to § 15.1-456, need not be answered.

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1 You state that, under the zoning ordinance, a special use permit is issued by the Madison County Planning Commission, and a decision of the planning commission may be appealed by aggrieved person to the board of supervisors.
Note, that the broad language of this 1971 Opinion, among others, has been limited by the Opinion contained in 1982-1983 Report of the Attorney General at 458 which states 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." (Emphasis in original.) This limitation does not affect the applicability of the conclusion of the Opinion in the 1971-1972 Report at 103, supra, to the present question.

Cf., 1971-1972 Report of the Attorney General at 294 (city council must abide by provisions of its ordinances until the same are repealed or amended).

See 1971-1972 Report of the Attorney General at 103, supra (the disposition of garbage and rubbish constitutes a governmental function); compare Opinion to the Honorable Wiley F. Mitchell, Jr., Member, Senate of Virginia, dated December 2, 1983 ("public places" as used in Art. VII, § 9 of the Constitution of Virginia (1971) and § 15.1-307 of the Code means places devoted to use by the public at large or by a municipality itself in carrying out its governmental functions).

COUNTIES. EMPLOYEES. NEGLIGENCE. INSURANCE. COUNTY NOT REQUIRED TO PAY FOR LOSSES DUE TO NEGLIGENT ACTS OF EMPLOYEES; NOT COVERED BY COUNTY LIABILITY INSURANCE POLICY.

December 22, 1983

The Honorable Thomas M. Jackson, Jr.
County Attorney for Carroll County

This is in reply to your request for my opinion concerning the responsibility of the Carroll County Board of Supervisors to pay for losses which occur to persons as a result of negligent acts of county employees. You relate that the county sheriff, upon transferring an inmate from the Carroll County jail to another jurisdiction, inadvertently released with the prisoner $1,448.00 in funds found on his person at the time of his arrest, in violation of an order freezing those funds which had been obtained by the prisoner's wife. The prisoner thereafter disposed of the money, resulting in the loss to his wife.

You relate further that, at the time of the above-described events, the county had a liability insurance policy pursuant to § 15.1-506.1 of the Code of Virginia, to cover negligent acts of its employees, but the policy had a $2,500.00 deductible provision. The board of supervisors takes the position that individual employees are responsible for any losses due to their negligence up to the $2,500.00 deductible limit under the policy. The sheriff feels that the county has an implied duty to pay any amount up to the deductible on behalf of its employees. You ask which of the above stated positions is the correct one. For purposes of answering your question I assume, without deciding, that the county may insure the sheriff under any policy it holds or any self-insurance program it establishes.

In the absence of a statute, a county is not liable under State law for negligent acts committed by its agents and employees, and the provision of liability insurance to cover losses from such acts does not constitute a waiver of this governmental immunity. Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957); 1972-1973 Report of the Attorney General at 36.
Section 15.1-506.1 provides in part as follows:

"The board of supervisors of any county...may provide liability insurance, or may provide self-insurance, for certain or all of its officers and employees...to cover the costs and expenses incident to liability, including those for settlement, suit or satisfaction of judgment, arising from the conduct of its officials [and] employees...in the discharge of their duties." (Emphasis added.)

When first enacted,1 the statute authorized only certain specified counties to provide policy insurance to cover the negligent acts committed or alleged to be committed by their employees in the discharge of their duties. The statute since has been amended repeatedly to, inter alia, authorize the affected counties to provide self-insurance,2 authorize any county to provide such insurance,3 and delete the reference to negligent acts and substitute therefor the present broader language referring to the "costs and expenses incident to liability...arising from the conduct of its officials [and] employees...in the discharge of their duties."

Prior Opinions of this Office which construe § 15.1-506.1 held that it is a grant of authority which a county otherwise does not have, and that if the situation presented in each case could not be brought within the words of the statute, the county could not provide the insurance for the persons under consideration. See, e.g., 1978-1979 Report of the Attorney General at 141 (employees of a planning district commission may not be insured as employees of the local governing bodies under § 15.1-506.1); 1975-1976 Report of the Attorney General at 303 (no statutory grant of authority to a school board to purchase liability insurance on behalf of a student teacher); 1969-1970 Report of the Attorney General at 84 (Surry County not authorized to expend public funds to carry liability insurance - not among the specific counties covered by § 15.1-506.1, prior to the 1972 amendments). Thus, while the county has every reason to be concerned over losses of its employees, it does not have the power to remedy these situations, except as may be authorized by § 15.1-506.1.5 The use of the word "may" in the statute indicates that exercise of the authority there conferred is entirely discretionary with the board of supervisors.6 You do not indicate that the board of supervisors by any of its acts has led its employees to believe they are fully covered under the insurance policy or that the county would assume financial responsibility for the deductible amount. Accordingly, in answer to your inquiry, as between the two positions stated, that of the board of supervisors is the correct one. The insured officers and employees covered by such a policy do not have a legal claim against the county because the policy is insufficient to fully protect them, whether due to the maximum or the threshold coverage.

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1 See Ch. 421, Acts of Assembly of 1966.
5 I note, in passing, that you do not indicate that the county has in fact established a self-insurance program to cover such losses.

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COUNTIES. POLICE OFFICERS. HANOVER COUNTY POLICE FORCE LEGALLY ESTABLISHED AS OF JULY 1, 1980; COUNTY NOT REQUIRED TO HOLD REFERENDUM PURSUANT TO § 15.1-131.6:1 IN ORDER TO HAVE VALID POLICE DEPARTMENT.
The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

This is in reply to your recent letter requesting my opinion whether Hanover County legally established its police department under Ch. 547, Acts of Assembly of 1978, and § 15.1-158.1 of the Code of Virginia, each of which was repealed by Ch. 333, Acts of Assembly of 1979, or whether under recently enacted § 15.1-131.6:1, the county is required to obtain voter approval in a referendum in order to have a valid police department. 1

Section 15.1-158.1, as amended by Ch. 547, provided as follows:

"(a) The governing bodies of the counties of Hanover, Henry, Montgomery, Smyth, Sussex and Wythe shall have the power to establish a department of police, to be known as the County Police Department.

(b) Such governing bodies shall have the power to make provisions for financing such police departments in the counties' levy and to do all things necessary to establish, organize and administer such departments.

(c) The chief of police of the counties of Hanover, Henry, Montgomery, Smyth, Sussex and Wythe shall be appointed by the governing bodies thereof and such appointee shall administer the police department. Notwithstanding the provisions of § 15.1-50 the sheriff of Hanover County may also serve as the chief of police of such county. The various chiefs of police shall have the right to hire and discharge their departments' personnel, including its police officers. The various chiefs of police and such police officers appointed pursuant to the provisions of this section shall have all powers conferred on police officers by general law."

Chapter 333, which became effective July 1, 1980, repealed both Ch. 547 and § 15.1-158.1. Chapter 333 also enacted § 15.1-142.2, which specifically provides that "[a]ny police force in existence on July 1, 1980, whose existence is authorized or was authorized by any provision of law, general or special, that is repealed by this act is hereby validated and shall continue." The determinative question, then, is whether the Hanover County Police Department was in existence on July 1, 1980, pursuant to action taken by the board of supervisors prior to that date under the authority of § 15.1-158.1.

Section 15.1-158.1 conferred upon the governing body the power and wide discretion to "do all things necessary to establish, organize and administer" a police department. It did not specify the manner in which that power was to be exercised and the board was free to choose any reasonable means of doing so, within the mode of legislative procedure prescribed by statute and in accordance with its own rules of conducting business. The form of its action in establishing and organizing a department is secondary to the substance. From the photocopied materials enclosed with your letter, it appears that the board of supervisors adopted a resolution on January 23, 1980, establishing the Hanover County Police Department, and it adopted another resolution on January 30, 1980, appointing the sheriff as temporary chief of police and directing the appropriation of funds to maintain and support the police department. Two police positions were established and filled prior to July 1, 1980, and the county has continuously thereafter operated and budgeted for a police department to the present.

I must presume that these legislative actions of the board are valid and that the county created a police department which was in existence on July 1, 1980, and is presently in existence. Accordingly, in answer to your inquiry, I am of the opinion that Hanover County has legally established its police department under § 15.1-158.1.
Section 15.1-131.6:1 provides, in part, that "[a]ny county which does not presently have a police force shall not establish one until the voters of such county have approved establishment of a police force by a majority vote in a referendum held for such purpose and the General Assembly enacts appropriate authorizing legislation. Also, any county which was previously authorized by the General Assembly to have a police force but has not as yet established one will be required to have its operation approved in a referendum conducted as provided for in paragraphs A and B below." This section became effective July 1, 1983.

You relate in your letter that the Hanover Association of Business questions whether the county had a duly organized police department, as required by law, as of July 1, 1979, and if not, whether the county must now comply with new § 15.1-131.6:1 in creating a department. As noted above, Ch. 333, Acts of Assembly of 1979 by its terms came into effect July 1, 1980, and police forces properly in existence on that date are validated and continued.


See § 15.1-540.


The documents also show that the county receives State funds for law enforcement expenditures for its department, pursuant to § 14.1-84.1 et. seq.


COUNTIES. POLICE POWER. REGULATION OF SEWAGE SLUDGE DISPOSAL. COUNTY MAY REGULATE DISPOSAL OF HUMAN SEWAGE SLUDGE ON COUNTY LAND.

May 25, 1984

The Honorable Frank L. Benser
County Attorney for Caroline County

This is in reply to your request for my opinion whether any provision of State law authorizes the Board of Supervisors of Caroline County to adopt ordinances which would regulate or prohibit the spreading of sludge from a sewage treatment plant on farm land in the county. In that regard, you ask that I review three separate proposed ordinances, the primary features of which may be summarized as follows:

a. The first ordinance would amend the county zoning ordinance to allow use of animal waste, human waste or industrial waste as fertilizer on land zoned for agriculture only by special use permit issued by the board of supervisors after a public hearing and a determination by the board that use of any such waste as proposed in the permit application would not constitute a hazard to the health, safety or general welfare of the county's inhabitants. The permit requirements would not apply to the use as fertilizer of animal wastes on agricultural land when such wastes are generated by animals raised on the same land parcel or contiguous parcels under the same ownership, possession or control, nor would they apply to such use of such wastes on any agricultural land parcel containing ten acres of land or less.

b. The second proposed ordinance declares the spreading, placement or disposal of human waste sludge or industrial sludge on any land in the county to constitute a hazard to the health, safety and general welfare of county inhabitants and a danger of pollution of county waters, and prohibits the application of such sludge, whether treated or untreated, to any land in the county. An exception is made for the disposal of sludge...
generated by any sewage treatment facility located in and serving the county or any portion thereof, provided that the facility is operating in accordance with a certificate issued by the State Water Control Board.

c. The third ordinance is similar to the first, in that application of sludge to county land is prohibited except by permit from the board of supervisors. It differs from the first proposed ordinance in that its provisions would not be administered under the zoning ordinance. It applies to all land in the county and not just to land zoned agricultural, and it exempts from its provisions the disposal of sludge generated by any sewage treatment facility located in and serving the county or any portion thereof, provided that the facility is operating in accordance with a certificate issued by the State Water Control Board.

I refer you first to § 15.1-510 of the Code of Virginia, which reads as follows:

"Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county."

Prior Opinions of this Office have cited the above-quoted general police power statute as sufficient authority for a county board of supervisors to regulate a broad range of activities which may reasonably be found to be inimical to the public health, safety or welfare in particular sets of circumstances. See, e.g., Reports of the Attorney General: 1981-1982 at 112 (county may regulate sale of handgun ammunition); 1980-1981 at 118 (county may regulate itinerant dealers in gems and precious metals); 1973-1974 at 96 and 1969-1970 at 72 (county may regulate private security patrol groups); 1972-1973 at 118 (county may adopt ordinance imposing stricter standards of financial disclosure on local public officials than those of the Virginia Conflict of Interests Act as it was then written); 1970-1971 at 3 (board of supervisors may adopt ordinance governing sale and use of pesticides); 1970-1971 at 36 (board of supervisors may enact ordinance to prohibit the shining of spotlights into dwelling houses); 1970-1971 at 282 (board of supervisors may adopt ordinance requiring construction of fence around drive-in theatre); 1969-1970 at 139 (county may regulate disposal of dead animals); 1968-1969 at 10 (board of supervisors may arrange for trapping of wild dogs); 1967-1968 at 63 (counties authorized to enact ordinances governing pollution of county waters from boat discharges); 1966-1967 at 11 (board of supervisors may authorize expenditure of funds to control rabid foxes and skunks); 1957-1958 at 59 (county authorized to enact ordinances requiring the examination and registration of plumbing contractors and electrical contractors).

Ordinances adopted under the broad police power authority of § 15.1-510 must not be inconsistent with State law. See text of § 15.1-510, quoted supra; § 1-13.17. The State and the county may have concurrent jurisdiction over the same subject matter, and the fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a county from legislating on the same subject, unless the State regulations are so comprehensive that the State may be considered to occupy the "entire field" of such regulation. Unless the provisions of a county ordinance and State statutes are contradictory in the sense that they cannot coexist, where, for example, the ordinance purports to authorize what the statutes prohibit, or prohibit what the statutes expressly authorize, they are not deemed inconsistent because of mere lack of uniformity in detail. King v. County of Arlington, 195 Va. 1084, 1087, 81 S.E.2d 587 (1954).
In this instance, State law confers responsibility to regulate sewage disposal jointly upon the State Board of Health and the State Water Control Board. See § 32.1-163 et seq. and § 62.1-44.2 et seq. Pursuant to § 32.1-164(B) regulations of the State Board of Health governing the disposal of sewage may include standards governing disposal of sewage on or in soils, standards governing the transportation of sewage, and a prohibition against the discharge of untreated sewage onto land or into waters of the Commonwealth. Section 32.1-164.2 requires the State Board of Health, upon receiving an application for land disposal of sewage or sewage sludges, to notify the local governing body where such disposal is to take place and give it opportunity to comment, before the application will be considered to be complete. Section 32.1-177 et seq. confers upon the State Board of Health the responsibility to supervise and control solid and hazardous waste management activities in the Commonwealth, including the issuance of permits for the disposal of such wastes. Similar and joint responsibilities are conferred upon the State Water Control Board to regulate disposal of sewage, industrial and other wastes, as it may affect the waters of the State. See State Water Control Law, § 62.1-44.2 et seq.

Despite the extent of the above legislation, I do not conclude that the State has occupied the entire field of regulation of the disposal of sewage sludges and other wastes upon lands in a county to the exclusion of local legislation. Compare King, supra, 195 Va. at 1089 (comprehensive "dog laws" do not have purpose or effect of withholding from localities the entire field of regulation). Only § 32.1-184.2 speaks directly to the subject, and that section does not in express terms or impliedly limit the authority of a county to legislate on the subject in the manner proposed here. Moreover, § 32.1-34 contemplates local legislation in protection of the public health and imposes the limitation only that any ordinance or regulation shall not be less stringent than any applicable State law or regulation. With regard to protection of State waters, § 15.1-510 specifically authorizes local regulations to prevent county water pollution, provided that administration of the same is in accord with the purpose of the State Water Control Law and general policies adopted by the State Water Control Board.1 I know of no policy or regulation of either the State Water Control Board or the Board of Health which conflicts with any of the proposed ordinances.

Taking all of the above into consideration, I am of the opinion that a county has the power under § 15.1-510 to adopt ordinances regulating or prohibiting the spreading of sewage sludges and other wastes on farm land in the county.

I refer you also to § 15.1-486, which authorizes a county board of supervisors to adopt a zoning ordinance classifying the territory under its jurisdiction into districts, and within each district to "regulate, restrict, permit, prohibit, and determine...[t]he use of land...for agricultural, business, industrial, residential, flood plain and other specific uses...." (Emphasis added.) A prior Opinion of this Office held the powers conferred upon a county board of supervisors in the zoning chapter to be sufficient authority for the county to reasonably regulate the deposit of industrial waste on any county land. See 1970-1971 Report of the Attorney General at 5.2

Whether done under the authority of § 15.1-510 or of the zoning laws, enactment of any of the ordinances proposed here would constitute an exercise of the police power. A local regulatory ordinance adopted as an exercise of the police power is presumed to be valid, but it must be reasonable and not arbitrary, it must be uniform in its operation, and it must bear a real and substantial relation to the public health, safety, morals or welfare. Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972); Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); Nat. Linen Service v. Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954). Whether any of the proposed ordinances here would pass these tests of validity will depend upon the circumstances existing in the county and relied upon by the board of supervisors in enacting it. See Reports of the Attorney General: 1974-1975 at 36; 1973-1974 at 96.3
1983-1984 REPORT OF THE ATTORNEY GENERAL

2See, also, § 15.1-14(5), which, by virtue of § 15.1-522, authorizes a county to "[p]revent injury or annoyance from anything dangerous, offensive or unhealthy and cause any nuisance to be abated..." A county may adopt a nuisance ordinance. See 1973-1974 Report of the Attorney General at 263. Insofar as any of the disposal activities intended to be regulated under the proposed ordinances are carried out and create a nuisance, the county may take appropriate action to compel abatement of the same. Compare 1971-1972 Report of the Attorney General at 52 (injunctive relief against sanitation district to abate distasteful odors from sewage treatment plant); 1970-1971 Report of the Attorney General at 5.

3I note that two of the proposed ordinances exempt from application of their respective prohibitions and regulations the disposal of sludge generated within the county. Although there may well be some set of facts which reasonably could support classifying sludge by its source, neither ordinance on its face demonstrates any reason for discriminating between persons proposing to apply "resident" versus "nonresident" sludge to county land and in that regard each may be of doubtful validity. See, generally, 5 McQuillin, Municipal Corporations § 19.16 (3d ed. 1981); see also, United Building Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, et al., 104 S.Ct. 1020 (1984); compare Carper, supra, 200 Va. at 662.

COUNTIES. WASTE DISPOSAL. FEES. COUNTY MAY CHARGE FEE TO COMMERCIAL HAULER FOR USE OF COUNTY LANDFILL TO DISPOSE OF RESIDENTIAL SOLID WASTE COLLECTED IN TOWN.

August 16, 1983

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

This is in reply to your request for my opinion whether the County of Hanover may charge a fee to a commercial hauler for use of the county landfill to dispose of solid waste collected by the hauler in the Town of Ashland. I assume that the hauler is not an agent of the town but is instead an independent contractor who contracts with the town and its residents for the pickup and disposal of residential solid waste from within the town.

Section 32.1-183 of the Code of Virginia makes each county responsible for implementation of a solid waste management plan. Sections 15.1-282 and 15.1-510 confer authority upon a county to establish and operate a system of collection and disposal of solid waste and to regulate the disposal of garbage and waste materials. See Reports of the Attorney General: 1980-1981 at 123; 1974-1975 at 25; 1967-1968 at 32. Sanitary landfills constitute facilities for that purpose. See §§ 32.1-177(12) and 32.1-177(15). With regard to charges for use of the landfill, the county may impose different rates on different user classifications, as long as all users in the same classification are treated equally and the classifications themselves are reasonable and supported by the evidence. See, e.g., 1976-1977 Report of the Attorney General at 219.

Commercial refuse collection and disposal firms, as members of a user classification, may be treated differently from county and town residents acting for themselves in disposing of solid waste in a county landfill, subject to the caveats about classifications expressed above. The fact that a firm is collecting town residential waste which otherwise could be disposed of without charge at the landfill does not place such firm in the town's position or in that of any of the town residents. The origin of the
waste in that regard is immaterial, and the relevant fact is that the firm is collecting and disposing of it by contract as a commercial enterprise. Accordingly, your question is answered in the affirmative.

1 Pursuant to § 32.1-183, a county "may charge a town or its residents, establishments and institutions" fees for disposal of solid wastes in its landfill only if: (1) the county levies a consumer utility tax; (2) the county's ordinance provides that revenues derived therefrom be used for solid waste disposal to the extent necessary; and (3) the town also levies a consumer utility tax. See Reports of the Attorney General: 1978-1979 at 65; 1974-1975 at 383. I am advised that neither the County of Hanover nor the Town of Ashland has levied such a tax.

2 See also, § 15.1-28.1, which provides, in part, as follows: "The governing body of any county, city or town in this State may, by ordinance, impose license taxes upon and otherwise regulate the services rendered by any business engaged in the pickup and disposal of garbage, trash or refuse, wherein service will be provided to the residents of any such county, city or town." (Emphasis added.)

COUNTIES. WATER. IMPOUNDMENT. NUISANCES. DAMS.

August 22, 1983

The Honorable Anthony P. Giorno
County Attorney for Patrick County

This is in reply to your request for my opinion concerning the authority of the Board of Supervisors of Patrick County to take action to protect public safety as it relates to certain dams in the county. The State Water Control Board has inspected the dams pursuant to the Dam Safety Act, Ch. 8.1, Title 62.1 of the Code of Virginia, and has found one dam, known as the King Dam, to be unsafe. The board issued a Phase I inspection report on another dam, known as the Williams Dam, in which the board recommends that the owner of the dam prepare an emergency action plan for filing with the county administrator and with the Patrick County Office of Emergency Services.

The State Water Control Board (the "Board") further has determined that each of the above dams falls outside the definition of "impounding structure" in the Dam Safety Act, § 62.1-115.1(3), and therefore it is not within the Board's enforcement jurisdiction. You ask (1) whether the Patrick County Board of Supervisors has authority to require abatement of any unsafe condition concerning the King Dam, and (2) whether the county board has authority to compel the owners of the Williams Dam to file an emergency action plan with the county.

You suggest that the conditions at the King Dam are sufficient to constitute it as a public nuisance at common law. A county is empowered to cause any nuisance to be abated. See §§ 15.1-14(5) and 15.1-522; 1973-1974 Report of the Attorney General at 263. What constitutes a public nuisance is a question of law for a court, but whether conditions exist sufficient to allow a court to declare a dam to be a public nuisance is a question of fact to be determined on a case-by-case basis. See Stickley v. Givens, 176 Va. 546, 560, 11 S.E.2d 631 (1940); Price v. Travis, 149 Va. 536, 546, 140 S.E. 644 (1927). A public nuisance may be abated by indictment and public prosecution. See White v. Town of Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939); Tisdale v. Commonwealth, 114 Va. 886, 77 S.E. 482 (1913); White v. King and M'Call, 32 Va. (5 Leigh) 726 (1835); Miller v. Trueheart, et al., 31 Va. (4 Leigh) 570 (1833). In addition, if a proper factual case is made showing a continuing or threatened public nuisance which is likely to produce
irreparable injury and the remedy of criminal prosecution and punishment would not be adequate under the circumstances, such nuisance may be restrained by injunction upon the application of the county to a court of equity. See Thomas v. City of Danville, 207 Va. 656, 152 S.E.2d 265 (1967); Ritholz v. Commonwealth, 184 Va. 339, 35 S.E.2d 210 (1945); Mears v. Colonial Beach, 166 Va. 278, 184 S.E. 175 (1936); see, generally, 14A M.J. Nuisances §§ 27-35 (1978 Repl. Vol.). Accordingly, assuming that dangerous conditions exist at the King Dam which constitute it as a public nuisance, and subject to the stipulations just stated, your first question is answered in the affirmative.

With regard to the Williams Dam, you state that it has not been found by the State Water Control Board to constitute a hazard to life or property, and it therefore cannot be considered a public nuisance. In that the dam falls outside the scope of the Dam Safety Act, the owner cannot be compelled to prepare and file an emergency action plan with the county under any authority conferred by that act. I am unaware of any other provision of law which empowers the county to make and enforce such a demand upon a dam owner, and, accordingly, your second question is answered in the negative.

1 The term "nuisance" includes anything that endangers life or health or obstructs the reasonable and comfortable use of property. Newport News v. Hertzler, 216 Va. 587, 592, 221 S.E.2d 146 (1976); Barnes v. Quarries, Inc., 204 Va. 414, 417, 132 S.E.2d 395 (1963); Bragg v. Ives, 149 Va. 482, 497, 140 S.E. 658 (1927). A public nuisance affects people generally rather than just one or a small number of individuals. White v. Town of Culpeper, 172 Va. 630, 636, 1 S.E.2d 269 (1939). See United States v. County Board of Arlington, 487 F.Supp. 137, 143 (E.D. Va. 1979): "A public nuisance has been defined as the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience or injury to the public generally."

2 While a determination of the State Water Control Board regarding the safety of the dam is of probative value, it is not conclusive for purposes of a nuisance suit. A court would make an independent finding based on evidence before it if such a suit were instituted.

3 Under the Dillon Rule of strict construction of the legislative powers of local governing bodies which prevails in Virginia, a county has only those powers granted expressly by statute, or which exist by necessary implication, and any doubt as to the existence of a power is to be resolved against the locality. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); 1 J. Dillon, Law of Municipal Corporations § 237 (5th ed. 1911).

4 Note that the county itself may prepare an emergency plan, pursuant to § 44-146.19(e).

COUNTIES, CITIES AND TOWNS. ADVISORY COMMITTEE. MEMBERS OF ADVISORY COMMITTEE SERVE AT DISCRETION OF INDIVIDUAL OR GROUP WHICH APPOINTS THEM, UNLESS OTHERWISE INDICATED BY LAW.

April 4, 1984

The Honorable John C. Buchanan
Member, Senate of Virginia

This is in response to your request for my opinion whether a governing body may set the term of office for members of a coal road improvement advisory committee established pursuant to § 58-266.1:2(B) of the Code of Virginia which provides, in pertinent part, as follows:
"Any county or city imposing the tax authorized hereunder shall establish a coal road improvement advisory committee, to be composed of three members, (1) a member of the governing body of such county or city, appointed by the governing body, (2) the resident engineer from the Department of Highways and Transportation, and (3) a citizen of such county or city connected with the coal industry, appointed by the chief judge of the circuit court...."

Even though there is a duty upon the county or city to establish a coal road improvement advisory committee, the three members serving on the committee are to be chosen by three different methods. No "term of office" is specified. It is reasonable to assume that because no term was specified and no method of setting a term was established, no set term was contemplated by the General Assembly. Inasmuch as the three members of the committee are chosen in different ways, it would be difficult to enforce a term established by the governing body on anyone except for the member chosen by the governing body.

In a prior opinion to the Honorable Joseph L. Howard, Jr., dated January 31, 1984, I stated that because nothing in the law specified a term of office for a county director of emergency services, § 24.1-79.2 would apply and the appointed officer could be removed from his office only by the person or authority who appointed him. I indicated that a board of supervisors empowered to appoint a county director of emergency services has the power to remove that officer.

The Howard Opinion can be applied by analogy to your inquiry. Unless the law creates a method in which a term of office is to be established, the member of an advisory committee sits at the pleasure of those who appoint him. This is consistent with the general rule followed in Virginia that the power to appoint an officer inherently carries with it the power to remove the officer unless a constitutional or statutory restraint exists. See McDougal v. Guigon, 68 Va. (27 Gratt.) 133 (1876).

It is my opinion that each of the three members serves at the pleasure of the individual or group which appoints him. Further, it is my opinion that the General Assembly did not contemplate the establishment of a set term.

COUNTIES, CITIES AND TOWNS. AGRICULTURAL AND FOREST DISTRICTS. ACREAGE LIMITED TO 3,500 ACRES BY LANDOWNER. TENANTS IN COMMON CONSIDERED ONE OWNER.

April 16, 1984

The Honorable A. Willard Lester
County Attorney for Wythe County

You have requested my interpretation of § 15.1-1511 of the Code of Virginia, a portion of the Agricultural and Forestal District Act (the "Act"), §§ 15.1-1506 through 15.1-1513. The pertinent provision of § 15.1-1511 reads as follows:

"A. Any owner or owners of land may submit an application to the local governing body for the creation of an agricultural, forestal, or an agricultural and forestal district within such locality. Provided, however, that no owner, whether he be a person, partnership, association, corporation or other legal entity, shall own in any form more than three thousand five hundred acres of land proposed to be included within the boundaries of all districts in the State and that no application for an individual district shall be comprised of less than five hundred acres."
Your specific question is whether the 3,500-acre limitation applies in a case in which a 9,000-acre tract is owned by nine people, five of whom own one-third, two own one-third and two own the remaining one-third. Real estate taxes are paid separately, one-third by each of the three interests. All owners have submitted an application for the creation of a forestal district comprising the 9,000 acres.

Despite the fact that nine people have an interest in the 9,000-acre parcel, their interests are undivided; hence, all have ownership interests in the whole, not in any separate identifiable acreage. See Smith v. Alderson, 116 Va. 986, 83 S.E. 373 (1914); Jarratt v. Johnson, 52 Va. (11 Gratt.) 327 (1854). Such owners are "tenants in common," defined as "[t]enants who hold the same land together by several and distinct titles, but by unity of possession, because none knows his own severalty...." Black's Law Dictionary 1315 (5th ed. 1979).

As applied to § 15.1-1511, each of the nine tenants in common owns an undivided fee simple interest in land in excess of 3,500 acres; hence, the application for a forestal district comprised of the entire 9,000 acres may not be approved by the governing body.

COUNTIES, CITIES AND TOWNS. ATTORNEYS. BOARDS OF SUPERVISORS. AGENCY. BOARD OF SUPERVISORS MAY EMPLOY COUNSEL TO DEFEND COUNTY ADMINISTRATOR AGAINST CRIMINAL CHARGES; MAY PAY COUNSEL FEES INCURRED BY ADMINISTRATOR IF ACT IN EMPLOYING COUNSEL RATIFIED UNDER AGENCY PRINCIPLES.

December 19, 1983

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

This is in reply to your request for my opinion, under § 2.1-118 of the Code of Virginia, whether the Accomack County Board of Supervisors is authorized by § 15.1-506.1, or any other statute, to pay attorney's fees incurred by the county administrator in defending himself in court against misdemeanor charges under the Virginia Conflict of Interests Act.1

You relate that the administrator was indicted on two counts of attempting on May 6, 1982, to purchase two surplus county vehicles at a sale made by him in his official capacity; two counts of purchasing said vehicles on May 25, 1982, at a sale made by him in his official capacity; and one count of using information gained by virtue of his employment as an officer of the county for his personal gain or benefit. He was not convicted on any of the above charges, each of which was either dismissed at trial, or nol-prossed on behalf of the Commonwealth. The board of supervisors has directed payment, from county funds, of the substantial legal expenses incurred by the administrator in defending against the charges.

Section 15.1-506.1 provides in pertinent part as follows:

"The board of supervisors of any county...may provide liability insurance, or may provide self-insurance, for certain or all of its officers and employees...to cover the costs and expenses incident to liability, including those for settlement, suit or satisfaction of judgment, arising from the conduct of its officials [and] employees...in the discharge of their duties."
When first enacted, the statute authorized the board of supervisors of certain specified counties to provide liability insurance coverage, placed with insurance companies, "for certain or all of its officers and employees in the administrative service of the county to cover negligent acts committed or alleged to be committed while discharging their duties." It has been repeatedly amended thereafter to authorize, inter alia, provision of self-insurance in the counties covered by the statute, to authorize provision of such policy insurance or self-insurance by any county, and to strike the language referring to negligent acts committed or alleged to be committed and substitute therefor the present language referring to coverage of "costs and expenses incident to liability, including those for settlement, suit or satisfaction of judgment, arising from the conduct..." of county officials and employees in the discharge of their duties.

I understand that the county has procured a policy of liability insurance, but that the insurer has declined to reimburse the fees incurred in this situation. You do not indicate that the county has, in fact, established and funded a self-insurance program, and, that being the case, reimbursement of the fees under consideration would not be covered by the self-insurance provisions of § 15.1-506.1.

I direct your attention to § 15.1-19.2, which provides as follows:

"Notwithstanding any other provision of law, the governing body of any county, city, town, or political subdivision may employ the city attorney, the town attorney, or the attorney for the Commonwealth, if there be no city attorney or town attorney, or other counsel approved by such governing body to defend it, or any member thereof, or any officer of such county, city, town, or political subdivision or employee thereof, or any trustee or member of any board or commission appointed by the governing body in any legal proceeding to which such governing body, or any member thereof, or any of the foregoing named persons may be a defendant, when such proceeding is instituted against it, or them by virtue of any actions in furtherance of their duties in serving such county, city, town or political subdivision as its governing body or as members thereof or the duties or service of any officer or employee of such county, city, town or political subdivision or any trustee or any member of any board or commission appointed by such governing body.

All costs and expenses of such proceedings so defended shall be charged against the treasury of the county, city, town, or political subdivision and shall be paid out of funds provided therefor by the governing body thereof. Further, in the event any settlement is agreed upon or judgment is rendered against any of the foregoing persons or governing body, the governing body may in its discretion, pay such settlement or judgment from public funds or other funds or in connection with all of the foregoing may expend public or other funds for insurance or to establish and maintain a self-insurance program to cover such risks or liability." (Emphasis added.)

Prior Opinions of this Office recognized that under this section a county may reimburse its employee for counsel fees incurred by him in defending himself against criminal charges brought as a result of his acts in performance of his duties. See, e.g., Reports of the Attorney General: 1973-1974 at 21; 1973-1974 at 275. It is to be noted that the statute contemplates employment of counsel for its employee by the governing body, but counsel fees incurred by the employee himself may be reimbursed if the county board of supervisors ratifies the employee's employment of counsel under agency principles. See, e.g., 1973-1974 Report of the Attorney General, supra. Based on this, I am of the opinion that a county board of supervisors is authorized, pursuant to § 15.1-19.2, to pay for legal expenses incurred by its employee in defending himself against criminal charges brought as a result of his acts in discharging his official duties. Whether, taking all of the board's acts into consideration, the board has in fact ratified the administrator's act in
employing counsel in this instance under the principles of agency, is a matter you must determine.

You ask also whether § 15.1-550 applies to the present situation, and if it does, whether the itemization and affidavit requirements of that section have been met. Section 15.1-550 provides in pertinent part as follows:

"No account shall be allowed by the board of supervisors unless the same shall be made out in separate items and the nature of each item specifically stated, and, when no specific fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be verified by affidavit, to be filed therewith. The attorney for the Commonwealth, or the county attorney in those counties which have created the office of county attorney, shall represent the county before the board, and shall advise the board of any claim which in his opinion is illegal or not before the board in proper form, and upon proper proof, or which for any other reason ought not to be allowed." (Emphasis added.)

The above quoted section specifically refers to an "account" or "claim" and in the absence of qualifying language, at a minimum must be taken to apply to any demand made upon the county which it is obligated to pay. In this case, should you determine that the board has effectively ratified the acts of its administrator in employing counsel, then the contract with the attorneys would become a county obligation relating to the time of its initial undertaking, and § 15.1-550 would apply to the accounts rendered by the attorneys.

Assuming that the requested payment of fees is an "account" or "claim" against the county, I am of the opinion that the requirements of § 15.1-550 have been met in this instance. I understand the facts of the present situation to be as follows: at its meeting of November 16, 1983, the board of supervisors passed a motion in open session authorizing reimbursement of the administrator's legal fees and directing that a claim be filed for the same against the county's liability insurance carrier. The attorneys' itemized bills were available at the meeting, and, although copies were not distributed to each board member, the total amount of the fees and expenses was related to the board. After that meeting, representatives of each of the law firms involved filed verified affidavits with the county, to accompany the bills on file. At its December meeting, the board voted against a motion to rescind its action of November 16. Pursuant to the board's action of November 16, warrants were issued for settlement of the bills, to be paid directly from the county to the law firms involved, but payment was stopped on the treasurer's checks which were sent, and the bills have not yet been paid. Thus, the posture of the case, in summary, is:

(1) The board of supervisors has authorized payment of the expenses in question, after being apprised of the total amount.

(2) The county has been presented, and has on file, the itemized billings of the attorneys, as well as affidavits verifying them.

(3) The bills as yet have not actually been paid, in that payments have not been delivered and accepted.

Thus, the affidavit requirement of § 15.1-550 has been fulfilled and, with regard to the itemization requirement, I have examined photocopies of the billings and find that they sufficiently identify the services and expenses in separate items, as well as the time devoted to performance of each service.
In summary, based upon the facts provided to me, I conclude (1) that reimbursement may not be made by the county under § 15.1-506.1 because the county did not have a plan or policy of self-insurance; (2) the county may make reimbursement under § 15.1-19.2 provided the board complies with the agency principles concerning ratification, a finding which you may make; and (3) the provisions of § 15.1-550 would apply if ratification is made and the provisions of § 15.1-550 would appear to have been satisfied. As the foregoing suggests, if the board does not proceed under § 15.1-19.2 and if you determine that the board has not complied with the ratification procedures, then the board is without authority to pay the fees.

1 Prior to July 1, 1983, prosecution was controlled by § 2.1-347 et seq., which was repealed by Ch. 410, Acts of Assembly of 1983. See now the Comprehensive Conflict of Interests Act, § 2.1-599 et seq.
6 There is no fixed legal definition of "self-insurance" of which I am aware. A prior opinion of this Office discussed this term and concluded that "it appears the General Assembly uses the term 'self-insurance' to describe arrangements to indemnify an identifiable class of persons independently connected with the self-insurer (for example, its employees) against loss or liability arising out of the independent connection (for example, the course of the employment). The arrangements also usually involve some sort of security, bond, reserve or trust fund (often with periodic supplements like premiums) to secure the payments due to the indemnified class." See 1979-1980 Report of the Attorney General at 129.
7 Black's Law Dictionary 1220 (rev. 5th ed. 1979) defines the term as follows: "The practice of setting aside a fund to meet losses instead of insuring against such through insurance. A common practice of business is to self-insure up to a certain amount, and then to cover any excess with insurance."
8 In light of this conclusion, I need not reach the question of whether, in its amendments to § 15.1-506.1, the General Assembly intended to extend the allowable coverage of the insurance therein authorized to indemnification of officers and employees charged with criminal acts.
9 In the latter opinion, it was held that a city had no specific statutory authority to reimburse such fees. At that time, the statute applied to towns only, but it has since been amended to include cities and counties. See Ch. 544, Acts of Assembly of 1976.
10 I also note that the General Assembly has not taken action to limit this Office's prior interpretation that the statute covered criminal proceedings.
11 Black's, supra, fn. 9, at 17, defines "account" as follows: "A detailed statement of the mutual demands in the nature of debit and credit between parties, arising out of contracts or some fiduciary relation." See, also, Black's at 224 for definitions of the term "claim," each implying the right of a claimant to make a demand.
13 I note, in passing, that the affidavit requirement in its present form is of ancient origin. See, e.g., Ch. 188, Acts of Assembly of 1870. I am advised by the Auditor of Public Accounts that, in practice, compliance with the requirement has long since fallen into widespread disuse around the Commonwealth.

COUNTIES, CITIES AND TOWNS. BOARDS OF SUPERVISORS. PUBLIC OFFICES. EMPLOYEES. BOARD OF SUPERVISORS OF COUNTY ORGANIZED UNDER COUNTY EXECUTIVE FORM OF GOVERNMENT MAY ADOPT SANCTIONS AGAINST ITS EMPLOYEES ENGAGING IN CERTAIN POLITICAL ACTIVITIES.
This is in reply to your request for my opinion whether a local government may adopt sanctions against its employees who engage in certain political activities. Your question concerns § 19-19 of the Prince William County Code, which makes it a Class 1 misdemeanor and prima facie cause for immediate dismissal from the county service for an employee in the county's competitive service to wilfully or knowingly violate any provision of § 19-18, which contains a number of prohibitions.

Although the General Assembly retains the power to restrict the political activity of local public officials and employees, and to authorize local governments to do so, it has not enacted any statute specifically to that effect of which I am aware. Section 15.1-598 of the Code of Virginia provides for appointments of officers and employees in the administrative service of a county organized under the county executive form of government on the basis of ability, training and experience, with certain limited exceptions. Section § 15.1-599 provides that any person appointed pursuant to § 15.1-598 may be suspended or removed from office or employment either by the board of supervisors or by the officer who made the appointment.

In adopting its personnel regulations under the authority conferred by the above two Code sections, a board of supervisors may determine that particular employee activities, including political activity, would interfere with the proper performance of work for the county. Compare 1975-1976 Report of the Attorney General at 35. Its action in doing so must be presumed to be valid, in the absence of contrary proof. See Ferguson v. Board of Supervisors, 133 Va. 561, 569, 113 S.E. 860 (1922). Section 19-18 of the Prince William County Code specifically protects the rights of its employees to express opinions and cast votes as private citizens, to take part in the management of a political party or organization, and to assist in the campaign of any candidate for public office. Moreover, under the ordinance an employee may not be discriminated against because of such activities. At the same time, the ordinance prohibits certain other activities described in footnote 1, above, which the board may well have determined could cause interference with proper employee work performance and the selection of personnel on the basis of ability, training and experience only. I am unable to conclude from the face of § 19-18 that the board acted unreasonably in adopting it or that any of its prohibitions are per se invalid.

With regard to the penalties contained in § 19-19, § 15.1-505 authorizes a county governing body to prescribe the punishment for violations of ordinances, within limits which are not exceeded here. Accordingly, in answer to your inquiry, I am of the opinion that the Prince William County Board of Supervisors does have authority to adopt the sanctions as are contained in § 19-19, for wilful or knowing violations of the prohibitions contained in § 19-18.

1Section 19-18(b) prohibits rewards to or discrimination against any applicant or employee because of political affiliation or permitted political activities; § 19-18(d) prohibits an appointing authority from considering political party endorsements or recommendations in making appointments, promotions or discharges; § 19-18(e) states that no employee in the competitive service shall be required to contribute anything to any political party, candidate or other political organization; § 19-18(f) prohibits employee solicitations of contributions or endorsements from other employees in the competitive service in connection with any political campaign or political organization;
§ 19-18(g) prohibits employee use of any county property for the benefit of any political organization or candidate for public office.

"Article II, § 5 of the Constitution of Virginia (1971) provides, in pertinent part, as follows: "[t]he only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

* * *

(c) Nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."

"Prince William County has adopted the county executive form of county organization and government pursuant to § 15.1-582 et seq.

"Note that a state statute employing language similar to that contained in § 19-18(f), to which you specifically referred in your letter, was upheld against constitutional attack in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Moreover, many of our greatest presidents, including Thomas Jefferson, have expressed concern over the political activities of some in the executive boards of government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). Indeed, in CSC v. Letter Carriers, 413 U.S. 548, 557 (1973), a companion case to Broadrick, the Supreme Court observed that it is "the judgment of history...that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." (Emphasis added.)

For purposes of this opinion, I will assume that the terms of the ordinance will be given their reasonable meaning and that they will not be given unreasonable meanings which might result in unreasonable applications. Cf. Broadrick, supra, 413 U.S. at 607.

COUNTIES, CITIES AND TOWNS. BUDGETS. TAXATION. LOCAL LEVIES. ANTICIPATED REVENUES FROM PROPOSED TAX LEVY TO BE INCLUDED IN COUNTY BUDGET; NO REQUIREMENT THAT PROPOSED TAX BE AUTHORIZED BY ORDINANCE BEFORE BUDGET APPROVAL.

June 7, 1984

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in reply to your request for my opinion whether it is legally permissible for a county board of supervisors to include in its annual budget anticipated revenues from a tax which it plans to levy but which it has not yet authorized in a taxing ordinance at the time the budget is approved.

County, city and town budgets are addressed in Ch. 4 of Title 15.1 of the Code of Virginia. Section 15.1-160 states, in part, as follows:

"The governing body shall prepare and approve a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing fiscal year, which shall begin for each county on the first day of July of each year or such other date as may be provided by law for the beginning of the fiscal year. The governing body shall
approve such budget no later than the date for the beginning of the fiscal year and shall fix a tax rate for the budget year at that time." (Emphasis added.)

The budget must be accompanied by "[a] statement of the contemplated revenue and disbursements, liabilities, reserves and surplus or deficit of the county, city or town as of the date of the preparation of the budget." Section 15.1-161(1). (Emphasis added.)

It is clear from the express language of the statutes, quoted and emphasized above, that the county budget is an information and fiscal planning document only and that it should contain a complete listing of expected revenues from whatever source. In order to achieve its informative and fiscal planning purpose it would be not only proper but necessary for a county budget to list the revenues it expects to receive during the ensuing fiscal year from a tax levy the board of supervisors intends to enact. There is no requirement that a proposed tax be authorized by ordinance before the budget is approved. Your inquiry is answered in the affirmative.

1Note, that as of July 1, 1980, the fiscal year of every county must begin on the first day of July and end on the thirtieth day of June. See § 15.1-159.8; Ch. 318, Acts of Assembly of 1979.


COUNTIES, CITIES AND TOWNS. CHARTER POWERS ACT. PRISONERS.

April 12, 1874

The Honorable M. Wayne Huggins
Sheriff for Fairfax County

This is in reply to your request for my opinion whether the County of Fairfax falls within the definition of "municipal corporation" contained in § 15.1-837 of the Code of Virginia and whether the county may exercise the authority in § 15.1-904 which states that a municipal corporation may require persons sentenced to confinement in a penal or correctional institution to work in such institution or elsewhere in municipal service.

For most purposes, the boards of supervisors are vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution and the Acts of the General Assembly passed in pursuance thereof. See § 15.1-522.

Both §§ 15.1-837 and 15.1-904, however, are contained in Ch. 18 of Title 15.1, which provides an integrated set of powers that the council of a city or town may exercise only when the General Assembly specifically confers the powers upon the city or town by charter. See §§ 15.1-837; 15.1-838; 1978-1979 Report of the Attorney General at 33. Neither of those Code sections applies to counties. See Board of Supervisors v. Corbett, 206 Va. 167, 142 S.E.2d 504 (1965); 1980-1981 Report of the Attorney General at 123. Accordingly, each of your inquiries is answered in the negative.

I draw your attention to the provisions of Ch. 3 of Title 53.1, relating to local correctional facilities, particularly to § 53.1-128, which authorizes a county, city or town governing body to establish prisoner work forces to work on public property or works. Additionally, § 53.1-129 authorizes a circuit court judge to allow persons serving sentences in the county or city jail voluntarily to work on state, county or city property
COUNTIES, CITIES AND TOWNS. COMMONWEALTH'S ATTORNEY. FULL-TIME REQUIREMENT. ESCHEATORS. FULL-TIME COMMONWEALTH'S ATTORNEY MAY NOT CONTINUE AS ESCHEATER IF ESCHEAT DUTIES INTERFERE WITH FULL ATTENTION TO DUTIES AS COMMONWEALTH'S ATTORNEY.

January 17, 1984

The Honorable Willard R. Finney
Member, House of Delegates

This is in reply to your request for my opinion whether the Commonwealth's attorney for Franklin County may continue as escheator for the county after February 1, 1984, at which time his position as Commonwealth's attorney becomes full time.

Section 15.1-50.1 of the Code of Virginia provides, in pertinent part, that "[i]n counties having a population of more than 35,000, Commonwealth's attorneys and all assistant attorneys for the Commonwealth shall devote full time to their duties, and shall not engage in the private practice of law." The statute imposes two separate requirements, that is, Commonwealth's attorneys and their assistants shall (1) devote full time to their duties and (2) not engage in the private practice of law. Compare 1982-1983 Report of the Attorney General at 108, and opinions therein cited.

The county escheator is appointed by and serves at the pleasure of the Governor and has statutorily prescribed public duties with respect to escheats of lands to the State. See § 55-168 et seq.

With regard to the full time devotion to duties requirement of § 15.1-50.1, the applicable standard has been stated as follows:

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

Prior Opinions of this Office have considered a number of situations involving Commonwealth's attorneys participation in other activities. The determination of whether such activities interfered with the requirement of full time devotion to duty turned on a factual analysis in each instance. See, e.g., 1979-1980 Report of the Attorney General at 91 (may not serve as assistant commissioner of accounts or master commissioner in a chancery suit, but may act as trustee under a deed of trust and personal representative for a decedent's estate). In my opinion, the Commonwealth's attorney may not continue as escheator, consistent with § 15.1-50.1, if the escheat duties interfere with his ability to give attention during the normal work day to his duties as Commonwealth's attorney.

11 Note that, according to the U.S. Census of 1980, Franklin County's population is 35,740.
COUNTIES, CITIES AND TOWNS. DIVISIONS AND CONSOLIDATIONS. VOTER PETITIONS. NO AUTHORITY FOR QUALIFIED VOTERS OF COUNTY TO PETITION FOR DIVISION OF COUNTY AND CONSOLIDATION INTO TWO EXISTING CITIES.

May 29, 1984

The Honorable J. Granger MacFarlane
Member, Senate of Virginia

This is in reply to your request for my opinion whether, pursuant to § 15.1-1132 of the Code of Virginia, the qualified voters of a county may petition for consolidation of the county with two cities situated within its perimeter, with the result being two surviving cities, each containing a part of the original county.

Chapter 26 of Title 15.1 sets forth provisions for the consolidation of local governmental units. Article 4 thereof, of which § 15.1-1132 is a part, contains provisions applicable to consolidation of certain counties, cities and towns. The governing bodies of eligible localities may voluntarily enter into a joint agreement for consolidation under Art. 4, which is submitted to the electorate for approval. See § 15.1-1131 et seq. If the governing bodies decline to enter into such an agreement for submission to the voters, those bodies may be required to do so on petition of five percent of the voters in their respective jurisdictions, pursuant to § 15.1-1132. If any of the governing bodies fail to perfect a consolidation agreement within one year from the time of filing of any such petition, "then the judge of the circuit court having jurisdiction in the county or town or the judge of the circuit court of the city shall appoint a committee of five representative citizens of the county, city or town to act for and in lieu of the governing body in perfecting the consolidation agreement and in petitioning for a referendum." Section 15.1-1132.

The consolidation alternatives available under Art. 4 do not include the division of a county and the consolidation of its area and government into two surviving cities. Article 5 of Ch. 26 does authorize just such a result upon compliance with the requirements and procedure therein contained. Although § 15.1-1154, a part of Art. 5, contains in subsection (7) a reference to "committees acting for and in lieu of the governing bodies under § 15.1-1132..." it is noteworthy that the General Assembly did not include in Art. 5 any provision comparable to § 15.1-1132 specifically providing for a petition of voters and creation of any such committees. Absent such a specific provision, the language just quoted from § 15.1-1154(7) has no meaning in harmony with the remainder of Art. 5 and appears to have been inserted there through inadvertence or mistake; in my opinion it should be treated as surplusage. See Looney v. Commonwealth, 145 Va. 825, 831, 133 S.E. 753 (1926). It is certainly insufficient authority, of itself, for voter petitions for consolidations under Art. 5. There being no specific authority in Art. 5 for voter petitions for consolidation of a county in the manner you suggest, your inquiry is answered in the negative.

1The consolidation alternatives available under Art. 4 are limited to those specified in § 15.1-1130.1, which provides that certain counties, cities and towns "may consolidate into a single county or city..." (Emphasis added.) See Reports of the Attorney General: 1982-1983 at 124 and 147; 1978-1979 at 70; 1974-1975 at 90; 1960-1961 at 74.

2Section 15.1-1149 provides as follows: "By complying with the requirements and procedure hereinafter specified in this article, any county containing within its boundaries two cities of the first class may be divided into two or more areas or parts and such areas or parts consolidated with two or more existing cities, or with an existing city or cities and an existing town in such county; any such town to thereafter become a city of the first class."
November 29, 1983

The Honorable Clinton Miller
Member, House of Delegates

This is in reply to your request for my opinion concerning the filling of a prospective vacancy in the Office of Mayor of the Town of Woodstock, Virginia. You relate that the present mayor has indicated he will resign that position in the near future, and that the town's charter is silent concerning any vacancy in the mayor's office. You ask, first, whether § 24.1-76 of the Code of Virginia applies in a situation where a town has no provision in its charter for filling a vacancy in the mayor's position.

Section 24.1-76 provides for the filling of a vacancy in a town office when "no other provision is made." It does not apply in situations where some other provision is made for filling a vacancy. See 1979-1980 Report of the Attorney General at 70. In that regard, because § 15.1-830 provides in part that "[a] vacancy in the office of mayor may be filled by the council from the electors of the town" (emphasis added), specific provision is made for filling a vacancy in the office of mayor of a town and thus § 24.1-76 does not apply.

You relate further that the town may seek an amendment to its charter to give the council authority to fill a vacancy in the mayor's position, and that at least one existing councilman has expressed his interest in being appointed to the expected vacancy. Your second question is, in the event the town has its charter amended to provide authority for council to fill a vacancy in the mayor's position, whether a councilman now serving would be eligible for appointment to the vacancy.

As indicated in my answer to your first question, council is authorized by § 15.1-830 to fill a vacancy in the office of the mayor. Whether filled pursuant to that section or a charter provision, present members of council will not be eligible to hold the office of mayor.

Article VII, § 6, of the Constitution of Virginia (1971) provides, in relevant part, as follows: "No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the council, by election or appointment...."

Section § 15.1-800 provides as follows:

"No member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment."

Prior Opinions of this Office held that the position of town mayor is an office for purposes of the above proscription. See, e.g., Reports of the Attorney General: 1976-1977 at 159; 1975-1976 at 219; 1966-1967 at 316. Accordingly, in answer to your second question, none of the present councilmen of the Town of Woodstock would be eligible for appointment to a vacancy in the mayor's office at any time during the councilman's term of office, or for a period of one year after his tenure in office, whichever period is the
more restrictive. A charter amendment could remove the one-year limitation, but it could not change the constitutional prohibition.

1Section 4a of the town's charter, enacted as Ch. 412, Acts of Assembly of 1922, as amended by Ch. 431, Acts of Assembly of 1960, Ch. 21, Acts of Assembly of 1962, and Ch. 40, Acts of Assembly of 1972, provides for the filling of any vacancy in the council but does not provide for the filling of a vacancy in the mayor's position, which is an elective office separate from the council.


COUNTIES, CITIES AND TOWNS. INDUSTRIAL DEVELOPMENT. LOANS. COUNTIES AND TOWNS MAY NOT MAKE DIRECT LOAN OF LOCAL FUNDS TO PRIVATE FIRMS FOR DEVELOPMENT; INDUSTRIAL DEVELOPMENT AUTHORITY MAY MAKE LOAN; COUNTIES MAY GRANT OR LOAN MONEY TO INDUSTRIAL DEVELOPMENT AUTHORITIES; TOWNS MAY USE FEDERAL FUNDS TO MAKE LOAN.

November 10, 1983

The Honorable Daniel W. Bird, Jr.
Member, Senate of Virginia

This is in reply to your request for my opinion whether proposed loans from the County of Pulaski and the Town of Pulaski to the Pulaski Furniture Corporation are constitutional and whether the town's loan would violate the town's charter. The furniture company has requested a loan of $200,000 from the town and a loan of $300,000 from the County of Pulaski, to help finance the acquisition, renovation and reopening of the facilities of another furniture corporation which has gone out of business.

My opinion also is requested whether the town may use funds from a grant under the Economic Stimulus Grant Program, supplemented by town funds, to make such a loan directly, or indirectly, through the Industrial Development Authority of the Town of Pulaski, with the town to pay interest on the grant money for a period of five years, as required under the grant program.

My opinion is requested whether, as another alternative, the town could appropriate such grant money, or town funds, to the Industrial Development Authority, which would in turn purchase a portion of the facilities in question and then lease them to Pulaski Furniture Corporation under a lease-purchase agreement with terms favorable to the corporation.

My opinion is also requested on the legality of the action taken by the Board of Supervisors of Pulaski County agreeing to appropriate a sum to the Pulaski County Industrial Development Authority for a loan to the corporation.

I first consider the constitutional prohibition against a loan to the corporation. Article X, § 10 of the Constitution of Virginia (1971) provides, in pertinent part, as follows:

"Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation.... This section shall not be construed to prohibit the General Assembly from establishing
A number of prior Opinions of this Office discussed the scope of the "credit clause" of Art. X, § 10, quoted above, as derived from decisions of the Supreme Court of Virginia. The clause prevents the use of State or local governmental funds or credit to foster and encourage construction and operation of private enterprises. The Court focuses its attention, however, on the underlying purpose of the public financial commitment in each case, holding that the performance of a proper governmental function for the public good is not necessarily precluded by Art. X, § 10 because it may incidentally benefit a private enterprise or assume the appearance of a proprietary venture. Conversely, an arrangement or transaction in which the real benefit inures to private interests and the public benefit is incidental would be precluded. What constitutes a public purpose and a proper governmental function is a matter of legislative declaration by the General Assembly. The questions of whether a particular transaction is executed in performance of a proper governmental function, and whether the resulting benefits inure primarily to the public and only incidentally to private interests, are factual, to be determined from the circumstances of each case. See Reports of the Attorney General: 1981-1982 at 87; 1979-1980 at 11 and 72; 1978-1979 at 51 and 53; 1977-1978 at 181; 1975-1976 at 25 and 167; 1974-1975 at 51 and 108; 1971-1972 at 2.

In addition to the above constitutional considerations, it is necessary also to consider whether any statute authorizes a town to use town funds for the purpose and in the ways suggested in your inquiry. It is familiar law in Virginia that a local unit of government may act only to the extent it has been expressly granted the power to do so, or the power can be implied necessarily from other powers expressly granted. Any doubt as to the existence of the power must be resolved against the entity. See, e.g., Reports of the Attorney General: 1980-1981 at 121; 1975-1976 at 25; 1974-1975 at 57 and 131; 1973-1974 at 275.

Applying the above to the circumstances described in the materials enclosed with your inquiry, I am of the opinion that a direct loan of county or town funds to the furniture company at the company's request to enable it to acquire the facilities it desires, would contravene the credit clause of Art. X, § 10 and the similar prohibition contained in the town's charter. Compare Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968). Moreover, although a number of Virginia statutes specifically authorize loans from localities to certain public and non-profit agencies, there is no statute of which I am aware that expressly or impliedly authorizes such localities to provide such financial assistance to a private, profit-making firm. Accordingly, I am of the opinion that such power does not exist. See Reports of the Attorney General: 1980-1981, supra; 1978-1979 at 102. See, also, 1975-1978 Report of the Attorney General, supra.

With regard to the Economic Stimulus Grant Program, administered through the State Department of Housing and Community Development, I am advised that funds supporting that program are available pursuant to the Emergency Job Appropriations Act, Pub. L. No. 98-8, 97 Stat. 13 (1983), and that it is administered through the Community Development Block Grant Program under Title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 et seq. A prior Opinion of this Office, found in 1979-1980 Report of the Attorney General at 72, acknowledges the public purpose of the Community Development Program and the fact that the General Assembly has ratified its purpose and objectives and authorized local governmental participation in its activities in § 15.1-29.7 of the Code, which provides, in part, as follows:

"Any county, city or town may participate in a program under Title I (Community Development) of the United States Housing and Community Development Act of
1974, as amended. Any such county, city or town may undertake the community development activities specified in Title I of that act, unless such activities are prohibited by the Constitution of Virginia."

That Opinion further held that a loan of Federal Community Development funds to a private profit-making developer for the purpose of acquiring and rehabilitating a hotel listed on the National Historic Register would not violate the credit clause of Art. X, § 10, because no local funds were involved and therefore no credit of the locality was being granted. This conclusion resulted from the statutory and regulatory scheme governing the use of Community Development funds, and the arrangements among the parties, by virtue of which the only public funds involved were federal funds which never lost their federal character. In line with that holding, I am of the opinion that Economic Stimulus Grant Program funds may be utilized to assist the financing here proposed, provided such proposal is an eligible activity under Title I of the Housing and Community Development Act of 1974 and the funds are administered so as to preserve their federal character. The use of local funds to supplement the grant money, or to pay the required loan interest on behalf of the private corporation, in my opinion, is indistinguishable from the making of a direct loan and would be of doubtful validity under Art. X, § 10, as discussed earlier in this opinion. It is to be noted, however, that the last sentence of Art. X, § 10, quoted above, allows such direct financial assistance to private enterprises from industrial development authorities created pursuant to the Industrial Development and Revenue Bond Act, § 15.1-1373 et seq.

With regard to the final question concerning the town's powers, posed above, there is no specific statutory authority for a town to lend or advance its own funds to an authority for industrial development. I draw your attention, however, to § 15.1-1388, which provides that "[a]ny municipality may acquire a facility site by gift, purchase or lease and may transfer any facility site to an authority by sale, lease or gift" and to § 15.1-1378(e), which authorizes an authority to enter into lease purchase arrangements on its facilities. It appears that those provisions of law would allow the town to achieve the end result contemplated in the query. With regard to the federal grant funds, they could be appropriated to the authority, consistent with the conditions mentioned in the discussion of use of those funds, above, provided that the program guidelines, and any intergovernmental agreement under which the funds are disbursed, allow such an arrangement.

I turn next to the question whether the Pulaski County Board of Supervisors may appropriate the sum of $300,000 to the Pulaski County Industrial Development Authority, for the purpose of making available an authority loan to Pulaski Furniture Corporation. The resolution appropriating the money specifies that it shall be used as a loan to the corporation for acquisition and development of the plant and facilities formerly owned by another corporation which has gone bankrupt. The resolution additionally specifies a number of covenants which are to be included in the loan agreement between the authority and the corporation and provides that the agreement shall be subject to ratification by the county board of supervisors.

Section 15.1-1376(a) relating to creation of industrial development authorities, reads as follows:

"The governing body of any municipality in this Commonwealth is hereby authorized to create by ordinance a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in this chapter. Any such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter, which ordinance of limitation may, from time to time, be amended. In the absence of any such limitation, an authority shall have all powers granted under this chapter." (Emphasis added.)
Section 15.1-511.1 provides as follows:

"The governing body of any county in this State may give, lend or advance in any manner that to it may seem proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law." (Emphasis added.)

Reading the above two sections together, I am of the opinion that the county may advance the funds to the authority as proposed, provided that the authority makes its independent legislative determination that the contemplated use of the funds furthers the public purposes of the Industrial Development and Revenue Bond Act, § 15.1-1373 et seq. See, e.g., Reports of the Attorney General: 1970-1971 at 399 and 1987-1988 at 25. As regards the conditions imposed in the resolution of the board of supervisors, prior Opinions of this Office held that, while a local governing body has no authority to dictate the terms of financial arrangements made by an authority, it may amend its ordinance creating the authority to effectively require advance governing body approval for each project or facility the authority proposes to finance, pursuant to the language of § 15.1-1376(a), quoted and emphasized above. See 1977-1978 Report of the Attorney General at 185 and 187. More particularly relevant to the proposal under consideration, in my opinion the board of supervisors may condition its advancement of funds to the authority in any way that it chooses, pursuant to the language of § 15.1-511.1 quoted and emphasized above.

In summary, your inquiries are answered as follows:

(1) A direct loan of county and town funds to the furniture company is constitutionally prohibited, and would also violate the town's charter.

(2) Economic Stimulus Grant Funds may be utilized if the project is eligible for use of federal funds, but local funds cannot be used to supplement such grant money.

(3) The town may utilize § 15.1-1388 to acquire a facility site and transfer it to an Industrial Development Authority.

(4) The county may advance funds to an authority, provided the authority determines the use furthers the public purposes of § 15.1-1373 et seq.

See, also, Section 5(13) of the town's charter which provides that "[t]he credit of the town shall not directly or indirectly, under any device or pretense whatsoever, be granted to or in aid of any person, firm, association or corporation." The present charter was enacted in Ch. 337, Acts of Assembly of 1948.

The conclusion was conditioned upon the city's having met the "special fund" requirement of § 15.1-29.7, which provides as follows: "[a]ny federal funds, or portion thereof, received by a county, city or town under a Title I program may be deposited in a special fund which shall be established separate and apart from any other funds, general or special; such funds shall be deemed to be federal funds and shall not be construed to be part of the revenues of such county, city or town."

See Mayor v. Industrial Dev. Auth., 221 Va 865, 275 S.E.2d 888 (1981). Prior Opinions of this Office also give this Act a broad construction, provided that an authority can find that a proposed project meets the public purposes of the Act, and held that an authority may grant a loan to assist a project. See, e.g., Reports of the Attorney General: 1980-1981 at 197; 1978-1979 at 140; 1975-1976 at 170.

A town is a municipality for purposes of the Act. See § 15.1-1374(b).

The authority was created pursuant to Ch. 33, Title 15.1 of the Code. Section 15.1-1374(b) includes counties in the definition of "municipality."
Prior Opinions of this Office held that this section, read in conjunction with § 15.1-1378(1), which authorizes authorities to accept contributions from political subdivisions, allows a county to lend or advance funds to its industrial development authority, but that this provision does not apply to a town. See Reports of the Attorney General: 1970-1971 at 399; 1967-1968 at 25.

Prior Opinions of this Office have held that the amount of any such advancement of funds is limited to that established in § 15.1-10.1, which formerly provided that a county may appropriate a sum not exceeding one percent (later two percent) of its annual revenues from all sources to promote "industrial development" of the county. See Reports of the Attorney General: 1980-1981 at 120; 1970-1971 at 85; 1969-1970 at 78. A subsequent amendment to § 15.1-10.1 substituted the words "economic development" for "industrial development," the effect of which is to remove the limitation constructively placed on the amounts a county may contribute to its industrial development authority under § 15.1-511.1. See Ch. 77, Acts of Assembly of 1981.

COUNTIES, CITIES AND TOWNS. INDUSTRIAL DEVELOPMENT. REVENUE BOND ACT.

January 11, 1984

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

This is in reply to your request for my opinion whether a mayor, vice-mayor or councilperson from the Town of Wytheville or the Town of Rural Retreat may serve as a director of the Industrial Development Authority of Wythe County, created by Wythe County pursuant to the Industrial Development and Revenue Bond Act. You refer, particularly, to the proscription in § 15.1-1377 of the Code of Virginia that "[n]o director shall be an officer or employee of the municipality" and to the definition of "municipality" contained in § 15.1-1374(b) as "any county or incorporated city or town in the Commonwealth with respect to which an authority may be organized and in which it is contemplated the authority will function." You relate that both Wytheville and Rural Retreat are incorporated towns in which it is contemplated the Wythe County Industrial Development Authority will function. Your question, therefore, is whether the two provisions quoted above, when read together, prohibit officers and employees of the two towns from serving as directors of the county industrial development authority.

Section 15.1-1376 provides as follows, with respect to creation of industrial development authorities:

"(a) The governing body of any municipality in this Commonwealth is hereby authorized to create by ordinance a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in this chapter. Any such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter, which ordinance of limitation may, from time to time, be amended. In the absence of any such limitation, an authority shall have all powers granted under this chapter.

(b) The name of the authority shall be the Industrial Development Authority of ____________________________ (the blank spaces to be filled in with the name of the municipality which created the authority, including the proper designation thereof as a county, city or town.)" (Emphasis added.)
Section 15.1-1377 provides, in part, as follows:

"The authority shall be governed by a board of directors in which all powers of the authority shall be vested and which board shall be composed of seven directors, appointed by the governing body of the municipality.... No director shall be an officer or employee of the municipality." (Emphasis added.)

Section 15.1-1378 lists the powers of an authority, among which is included, in subsection (j) "to exercise all powers expressly given the authority by the governing body of the municipality which established the authority...." (Emphasis added.) Section 15.1-1383 provides that "[t]he authority is hereby declared to be performing a public function in behalf of the municipality with respect to which the authority is created and to be a public instrumentality of such municipality." (Emphasis added.)

Taken in context with the two other above-quoted statutory provisions which clearly refer in particular to the municipality which creates an authority, I conclude that the above-quoted part of § 15.1-1377 is intended to prohibit officers and employees of the particular county, city or town creating the authority and appointing its members from being directors of the industrial development authority, and that the prohibition does not extend to officers and employees of other municipalities in which the authority may function. Nothing else in the Act leads me to conclude otherwise. Accordingly, in my opinion, § 15.1-1377 does not prohibit officers and employees of the Towns of Wytheville or Rural Retreat from serving as directors of the county industrial development authority, unless the authority is a joint creation of all the municipalities involved and the governing body of each participates in appointing the directors, pursuant to § 15.1-1387, which you do not indicate to be the case.

1 Use of the definite article "the" in the statute particularizes the subject referred to, and here must be taken to mean the creating municipality. See Black's Law Dictionary 1324 (rev. 5th ed. 1979). The indefinite term "any" could have been employed, or more explicit language, had the General Assembly intended to extend the prohibition of § 15.1-1377 to any or every municipality in which an authority may function.

An industrial development authority may acquire or construct facilities anywhere in the Commonwealth. See, e.g., 1971-1972 Report of the Attorney General at 223. See §§ 15.1-1382 and 15.1-1388, and the last paragraph of § 15.1-1378, which clearly contemplate an authority functioning beyond the boundaries of the creating municipality.

Section 15.1-1387 provides, in part, as follows: "Two or more municipalities, as herein defined, may jointly create an authority, in which case each of the directors of such authority shall be appointed by the governing body of the respective municipality which the director represents."

COUNTIES, CITIES AND TOWNS. INTERSTATE COMPACTS. POLICE. FIRE PROTECTION.

September 15, 1983

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

This is in reply to your letter requesting my opinion whether any provision of Virginia law allows the City of Virginia Beach to enter into a mutual aid agreement with Currituck County, North Carolina, whereby the two localities would provide fire, rescue and police services reciprocally on a "call for need" basis. You ask also whether, by
mutual agreement, police officers of Currituck County and of Virginia Beach could cross the state line to apprehend fugitives in the other jurisdiction in each case without the aid and assistance of the local authorities.

The first paragraph of § 15.1-131 of the Code of Virginia provides, in part, that policemen and other officers, agents and employees of any city, together with all necessary equipment, may lawfully go or be sent beyond the territorial limits of the city to any point within or without the Commonwealth to assist in enforcing laws related to controlled drugs and in meeting any emergency or need resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster. The fourth paragraph of § 15.1-131 also provides, in part, as follows:

"Subject to the approval of the Congress of the United States, the governing body of any county, city or town or a state-supported institution of higher learning, may in its discretion, enter into reciprocal agreements for such periods as they deem advisable with any county, city or town, within or without the Commonwealth, including the District of Columbia, in order to establish and carry into effect a plan to provide mutual aid through the furnishing of its police and other employees and agents together with all necessary equipment in the event of such need or emergency as provided herein."\(^1\)

Section 15.1-131 applies only to exceptional situations of immediate necessity and not to all situations routinely requiring police, fire, rescue and related services. Compare 1971-1972 Report of the Attorney General at 58. Assuming that a "call for need" arrangement implies that the agreement will be directed at emergencies as the statute requires, I am of the opinion that Virginia Beach is authorized to enter into a reciprocal aid agreement with Currituck County.\(^2\)

With regard to your second question, § 15.1-131 specifically provides that "[t]he principal law-enforcement officer in any city, county or town or of a state-supported institution of higher learning having a reciprocal agreement with a jurisdiction outside the Commonwealth for police mutual aid under the provisions hereof, shall be responsible for directing the activities of all policemen and other officers and agents coming into his jurisdiction under the reciprocal agreement...." (Emphasis added.) I am unaware of any other statutory authority for an agreement between localities which would allow officers from outside the State to apprehend fugitives in a Virginia locality without the participation of local law enforcement officials.\(^3\) Accordingly, your second question is answered in the negative.

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\(^1\) Separate authority for reciprocal agreements relating to fire protection aid is contained in § 27-2.


\(^3\) Note, also, that § 27-2 does not require Congressional approval of local interstate agreements for fire protection.

\(^4\) Note, that the power of arrest in Virginia is conferred by statute upon any peace officer of North Carolina who is in close pursuit of a person who has committed a felony in North Carolina. See § 19.2-79, which provides, in part, as follows: "Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this State in close pursuit, and continues within this State in such close pursuit, of a person in order to arrest him on the ground that he has committed a felony in such other state shall have the same authority to arrest and hold in custody such
person as members of a duly organized state, county or municipal peace unit of this State have to arrest and hold in custody a person on the ground that he has committed a felony in this State, if the state from which such person has fled extends similar privileges to any member of a duly organized state, county or municipal peace unit of this Commonwealth. (Emphasis added.) North Carolina extends similar privileges to Virginia peace officers. See N.C. Gen. Stat. § 15A-403 (1978 Repl. Vol.).

COUNTRIES, CITIES AND TOWNS. ORDINANCES.

February 7, 1984

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

This is in reply to your request for my opinion whether the Board of Supervisors of New Kent County has authority to adopt § 12-43(a) of the New Kent County Code. Section 12-43(a), with certain exceptions, prohibits any person having in his possession or under his control, or having in any vehicle of which he is in charge, any loaded shotgun, rifle or other firearm while he or such vehicle is upon any public street in the county or while either is unlawfully upon the land of another. Violation of § 12-43 is declared to be a misdemeanor, with punishment by fine not to exceed one hundred dollars.

The General Assembly has adopted two statutes which permit the governing bodies of counties to regulate the carrying of loaded firearms on public streets and the transporting of loaded shotguns or rifles in vehicles on public streets. Section 18.2-287 of the Code of Virginia provides:

"The governing body of any county is hereby empowered to adopt ordinances making it unlawful for any person to carry or have in his possession while on any part of a public highway within such county a loaded firearm when such person is not authorized to hunt on the private property on both sides of the highway along which he is standing or walking; and to provide a penalty for violation of such ordinance not to exceed a fine of one hundred dollars. The provisions of this section shall not apply to persons carrying loaded firearms in moving vehicles, nor to persons acting at the time in defense of persons or property."

While the foregoing provision does not relate to carrying loaded weapons in vehicles, § 18.2-287.1 does enable localities to adopt ordinances prohibiting carrying loaded shotguns or rifles in vehicles on public roads. In pertinent part, that section provides:

"The governing body of any county is hereby empowered to adopt ordinances making it unlawful for any person to transport, possess or carry a loaded shotgun or loaded rifle in any vehicle on any public street, road, or highway within such locality."

A comparison of § 12-43 of the New Kent County Code reveals two major substantive deviations from the provisions of the State enabling statutes. First, the ordinance prohibits carrying a loaded firearm on public streets but omits the limitation contained in § 18.2-287 that such is unlawful only when the person is not authorized to hunt on the private property on both sides of the highway along which he is standing or walking. Secondly, the ordinance prohibits the carrying of all firearms in vehicles, while § 18.2-287.1 is limited to shotguns and rifles and does not extend to prohibiting loaded pistols.

In summary, I am of the opinion that the General Assembly has clearly given the county authority to adopt certain ordinances regulating the carrying of loaded firearms,
but those ordinances must fall within the limits of the enabling provisions of the applicable State statutes.

1Among the exceptions is a provision exempting a person who is able to demonstrate that his possessing of the loaded firearm was required or reasonably necessary for his protection or protection of his family or property.

COUNTIES, CITIES AND TOWNS. ORDINANCES. ZONING. FLOOD PLAIN MANAGEMENT. TOWN NOT REQUIRED TO ENFORCE COUNTY FLOOD PLAIN MANAGEMENT ORDINANCE ON TOWN PROPERTY LOCATED IN COUNTY; COUNTY RETAINS ENFORCEMENT RESPONSIBILITY. LOCAL ORDINANCES EFFECTIVE ONLY WITHIN BOUNDARIES OF LOCALITY, UNLESS OTHERWISE PROVIDED BY STATUTE.

August 1, 1983

The Honorable Bruce E. Welch
County Attorney for Franklin County

This is in reply to your letter requesting my opinion whether Franklin County would be responsible for enforcing the county's flood plain management ordinance on property located in the county upon which the Town of Boones Mill proposes to construct and operate a sewage facility, or whether the town must assume the responsibility to administer flood plain management on its property located in the county.

Section 62.1-44.109 of the Code of Virginia, part of the Flood Damage Reduction Act, reads in part as follows:

"It is the policy of the Commonwealth and the purpose of this chapter to reduce flood damage through management of floodplain use by such means as floodplain zoning, and to assure that land uses in flood hazard or floodplain areas are appropriate. The responsibility and authority for zoning in the Commonwealth, including the adoption of floodplain zoning, rests with the local governing bodies as provided in Chapter 11 (§ 15.1-427 et seq.), Title 15.1 of the Code of Virginia. It is the intent and purpose of this chapter to guide development of the floodplains of the Commonwealth by providing state coordination and assistance to local political subdivisions in floodplain management, to encourage local governmental units to adopt, enforce and administer sound floodplain management ordinances...." (Emphasis added.)

Chapter 11 of Title 15.1 relates to planning, subdivision of land and zoning. Section 15.1-486 authorizes local governing bodies, in their zoning ordinances, to regulate "[t]he use of land, buildings, structures and other premises for...flood plain and other specific uses;" § 15.1-489 requires zoning ordinances to be designed to give reasonable consideration to the purpose of providing "safety from fire, flood and other dangers;" and § 15.1-490 lists among the matters to be considered in drawing and applying zoning ordinances and districts the "preservation of flood plains...."

The above statutes clearly contemplate primary use of zoning and other land use regulations at the local level in a floodplain management program, although floodplain management regulations may also include other related types of ordinances.

The general rule applicable to all local ordinances is that they are effective only within the boundaries of the locality unless a State statute specifically provide
otherwise. A town has no powers beyond its corporate limits except those which are clearly and unmistakably delegated to it by the General Assembly for such exercise, and its extraterritorial acts are ultra vires in the absence of an authorizing statute. See Kelley v. County of Brunswick, 200 Va. 45, 104 S.E.2d 7 (1958); Murray v. City of Roanoke, 192 Va. 321, 64 S.E.2d 804 (1951); Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937); Jordan, et al. v. Town of South Boston, 138 Va. 838, 122 S.E. 265 (1924).

There is nothing in the provisions of the Flood Damage Reduction Act which may be construed as a delegation of authority to a town to exercise powers beyond its borders in enacting and enforcing any of the constituent ordinances which, taken together, are characterized as "floodplain management regulations." See § 62.1-44.109 et seq. and particularly § 62.1-44.110(E). ¹

You note that § 15.1-142 provides that a town "shall have and may exercise full police power..." over any lands beyond its limits which it owns and on which it operates a sewage disposal plant or system, and that §§ 15.1-292, 15.1-855 and 15.1-876 authorize it to operate and regulate sewage treatment disposal systems within and without its limits. ² The town's exercise of powers conferred by the above Code sections does not conflict with the county's continuing enforcement of its own ordinances, and, without more, those sections cannot be read to oust the county from responsibility for administering its floodplain management program in any part of its territory. See City of Richmond v. County Board, 199 Va. 679, 101 S.E.2d 641 (1958); 1972-1973 Report of the Attorney General at 463.

More directly in response to your question, the town has the authority and may exercise its extraterritorial powers under the above cited statutory or charter provisions, but none of those statutory or charter provisions require the town to assume responsibility to administer and enforce a floodplain management program over its property in the county; the ultimate responsibility, in that event, would lie with the county.

¹See § 62.1-44.110(E) and § 15.1-466(d).
²Note that §§ 15.1-467 through 15.1-469 formerly provided for municipal subdivision regulation beyond the corporate limits of the municipality but have since been amended to restrict their application to municipalities in certain specified counties, not including Franklin County. See Ch. 251, Acts of Assembly of 1979; Ch. 47, Acts of Assembly of 1980.

Even in these instances in which a town's subdivision regulations are allowed to extend beyond town limits into adjacent areas of the county, the county nevertheless retains enforcement responsibility. See 1976-1977 Report of the Attorney General at 336.

³Note that §§ 15.1-855 and 15.1-876 are part of Ch. 18 of Title 15.1, which lists certain powers that a municipal corporation shall have and may exercise "when such powers are specifically conferred upon the municipal corporation." Section 4 of its charter confers upon the town the powers set forth in Ch. 18. The present charter was enacted in Ch. 383, Acts of Assembly of 1973.

Note, also, Section 18 of the charter, which provides "[a]ll ordinances of the town, so far as they are applicable, shall apply on, in, or to all land, buildings and structures owned by or leased or rented to the town and located outside of the town."

COUNTIES, CITIES AND TOWNS. PLANNING COMMISSIONS. COMPREHENSIVE PLAN. DUTY TO REVIEW PERIODICALLY.
You have asked whether the governing body of the county is obligated to provide funds for the development of an amended comprehensive plan to be prepared by the county planning commission pursuant to § 15.1-454 of the Code of Virginia if, after review of the existing plan, the county planning commission determines that it is advisable to amend the existing plan.

By virtue of § 15.1-446.1, every local planning commission was mandated to prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction. That section also provides that every governing body in the State was required to adopt a comprehensive plan by July 1, 1980.

Section 15.1-454 requires a local planning commission to review the comprehensive plan at least once every five years to determine whether it is advisable to amend the plan. Section 15.1-453 reads as follows:

"After the adoption of a comprehensive plan, all amendments to it shall be recommended, and approved and adopted, respectively, as required by § 15.1-431. If the governing body desires an amendment it may direct the local commission to prepare an amendment and submit it to public hearing within sixty days after formal written request by the governing body."

The planning process rests in the sound discretion of the governing body, except as modified by statute. See 1981-1982 Report of the Attorney General at 114. Although it is clear that the adoption of a comprehensive plan by July 1, 1980 was a mandatory duty of every governing body, there is no mandatory duty upon the governing body to amend that plan. Nevertheless, § 15.1-454 clearly contemplates a review of the plan at least once every five years by the planning commission. I, therefore, conclude that the board is obligated to provide funds in such amount as it deems sufficient for the planning commission to make its review.

COUNTRIES, CITIES AND TOWNS. PUBLIC FINANCE ACT. AUDIT. BOND ISSUES. CITY REQUIRED TO HAVE ANNUAL AUDIT, WHICH ACCOUNTS FOR EXPENDITURES ON PROJECTS APPROVED IN BOND REFERENDUM.

The Honorable William T. Parker
Member, Senate of Virginia

You have inquired as to the legal requirements the City of Chesapeake must meet regarding accounting to citizens on the use of funds in projects approved by the voters in a bond referendum.

There is no provision of law of which I am aware that imposes a specific requirement upon a city to separately account to its citizens for the funding and expenditures associated with projects approved in a bond referendum. Section 11.06 of the Charter of the City of Chesapeake provides as follows:

"The council shall cause to be made an independent audit of the city's finances at the end of each fiscal year by the Auditor of Public Accounts of the Commonwealth
or by a firm of independent certified public accountants to be selected by the council. "One copy of the report of such audit shall be always available for public inspection in the office of the city clerk during regular business hours." (Emphasis added.)

I am advised that the city contracts with an independent accounting firm to conduct its annual audit, the report of which regularly includes an accounting of all utility projects. The audit report is available for public inspection, in accordance with Section 11.06 of the charter, and the contract and associated documents concerning any individual project are available for public inspection pursuant to the Virginia Freedom of Information Act.

1Article VII, § 10(a) of the Constitution of Virginia (1971) sets forth certain limitations on indebtedness of cities and towns. See, generally, the Public Finance Act, §§ 15.1-170 to 15.1-227 of the Code, for statutory provisions governing local government bond issues for public improvements. See, also, Ch. 6 of Chesapeake's charter, which governs borrowing by the city.

2The charter was enacted in Ch. 717, Acts of Assembly of 1980.

3See § 15.1-167 of the Code for a similar provision in general law, which also directs that the audit shall be in accordance with specifications furnished by the Auditor of Public Accounts and establishes audit contract and report dates.

4See, also, Ch. 5 of the city's charter, relating preparation of the city's operating budget and capital improvement program, with required public notice and hearings on the information and expenditure plans contained therein.

5See § 2.1-340 et seq.

COUNTRIES, CITIES AND TOWNS. SOVEREIGN IMMUNITY. POLICE OFFICERS. COUNTY OR TOWN TORT LIABILITY FOR INJURY OR DAMAGES WHEN TOWN POLICE ANSWER CALLS IN COUNTY.

October 11, 1983

The Honorable Geoffrey W. Cole
Commonwealth's Attorney for Clarke County

This is in reply to your letter concerning the practice whereby police of the Town of Berryville answer police calls within Clarke County, beyond the extraterritorial jurisdictional limits of the Town as set forth in § 19.2-250 of the Code of Virginia. You ask my opinion on the following questions:

1. If a Deputy Sheriff of Clarke County, Virginia, requests, either in person, by radio, or through Central Alarm, the assistance of the Berryville Town Police in response to a call in Clarke County, Virginia, is the liability for any injury or damages which may occur borne by Clarke County, Virginia, or the Town of Berryville, Virginia?

2. If a Deputy Sheriff of Clarke County, Virginia, advises the Berryville Town Police, either in person, by radio or through Central Alarm, that he is indisposed and unable to answer a call in Clarke County, Virginia, and therefore requests that the call be answered by the Berryville Town Police, is the liability for any injury or damages which may occur borne by Clarke County, Virginia, or by the Town of Berryville, Virginia?
Section 15.1-131.5 provides as follows:

"In case of an emergency declared by the chief law-enforcement officer of a county, city or town, such officer may call upon the chief law-enforcement officer of towns within his county and the chief law-enforcement officer of an adjoining county or city, or towns in adjoining counties for assistance from him or his deputies or other police officers.... Such deputies or officers shall have full police powers in such county, city or town as are conferred upon them by law during the period of such emergency." (Emphasis added.)

If an emergency is declared as indicated in § 15.1-131.5 and the chief law enforcement officer of the county has called upon the chief law enforcement officer of the town for assistance, the town police officers would have full police powers in the county for the duration of the emergency. The emphasized language of the statute specifically requires that the emergency must first be declared by the chief law enforcement officer, who, unless otherwise designated by the locality, would be the sheriff of a county and the chief of police of a city or town. See 1974-1975 Report of the Attorney General at 55 and 387. If the chief law enforcement officer has not declared an emergency and requested assistance as specified, as may be inferred from your questions, then the town police would not have police powers in the county in the example you have given, and they would be acting on their own, as private citizens. See, e.g., Reports of the Attorney General: 1976-1977 at 202; 1973-1974 at 273.

You note in your letter that "emergency" is not defined in § 15.1-131.5, and you ask whether this section is limited to the type of emergency specified in § 15.1-131 or whether it may be more broadly construed to encompass violations of criminal laws. Section 15.1-131 relates to police officers going beyond the territorial limits of their jurisdiction when the necessity arises for the enforcement of drug laws "or during any emergency resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster...." The words of § 15.1-131 limit its application to exceptional situations of great and immediate necessity. The wording of § 15.1-131.5, on the other hand, does not so limit its application, and, in my opinion, the term "emergency" therein may be more broadly construed to encompass non-routine police services in enforcement of the criminal laws. Compare 1974-1975 Report of the Attorney General, supra (use of town police in county to assist in setting-up roadblocks after a robbery).

There is no legal definition of "emergency" which fits every purpose, and whether an emergency truly exists under this section would depend upon the factual circumstances.

Section 15.1-159.73 authorizes the town and the county to enter into a mutual aid agreement for joint police services, under which the town police officers would have the same police authority in the county as they do in the town. Assuming that the town police officers are acting in the county pursuant either to an agreement under § 15.1-159.7, or in an emergency under § 15.1-131.5, neither the county nor the town would be liable for any resulting injury or damages. In the absence of a statute, a county is not liable for tortious injuries resulting from the negligence of its officers, servants and employees. See Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957); Fry v. County of Albemarle, 86 Va. 195, 9 S.E. 1004 (1890). The same immunity applies to a city or town whose officer, servant or employee is acting in performance of a governmental function. See Freeman v. City of Norfolk, 221 Va. 57, 266 S.E.2d 885 (1980); Franklin v. Richlands, 161 Va. 156, 170 S.E. 718 (1933). Operation of a police force is recognized as a governmental function. See Hoggard v. Richmond, 172 Va. 145, 148, 200 S.E. 610 (1939).
I note that a county or municipality may be held liable under 42 U.S.C. § 1983 for the actions of its employees and agents in violation of that section where the acts complained of implement or execute an official policy, ordinance, regulation or custom of the governmental entity, such that the policy "causes" the employee to violate another's constitutional rights. Vicarious liability, however, may not be imposed on the entity solely on the basis of an employer-employee relationship with the tortfeasor. See Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978); Logan v. Shealy, 660 F.2d 1007, 1014-1015 (4th Cir. 1981), cert. denied, 445 U.S. 942 (1982); Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978). See also, Tolbert v. County of Nelson, 527 F.Supp. 826 (W.D. Va. 1981). Liability, if any, presumably would extend to the local government whose policy or custom is being carried out by the acts complained of.

1Section 19.2-250 reads as follows: "Notwithstanding any other provision of this article, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the State 1 mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town."

2Note that the chief law enforcement officer of the jurisdiction is given discretion to decide and declare that there is an emergency.

3Section 15.1-159.7 reads as follows: "The governing bodies of counties, cities and towns or any combination thereof whose boundaries are contiguous may by proper resolutions of such governing bodies enter in and become a party to contracts or mutual aid agreements for the mutual protection of all parties to such contracts or agreements by the use of their joint police forces, both regular and auxiliary, their equipment and materials all for their mutual protection, defense and the maintenance of peace and good order. Any police officer, regular or auxiliary while performing his duty under any such contract shall have the same authority in any county, city, or town as he has within the county, city, or town where he was appointed."

4See also, § 15.1-131.3, which reads as follows: "The governing body of any county, city or town may, in its discretion, enter into a reciprocal agreement with any other county, city or town, or combination thereof, for such periods and under such conditions as the contracting parties deem advisable, for the consolidation of police departments or divisions or departments thereof, or cooperation in the furnishing of police services. Such governing bodies also may enter into an agreement for the cooperation in the furnishing of police services with the Department of State Police. Subject to the conditions of the agreement, all policemen, officers, agents and other employees of such consolidated or cooperating police departments shall have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to such agreement, including the authority to make arrests in every such jurisdiction subscribing to the agreement."

COURTS. BROCHURE EXPLAINING RIGHTS AND OBLIGATIONS OF TENANTS MAY NOT ISSUE AS PART OF LAWFUL PROCESS.

March 12, 1984

The Honorable D. F. O'Flaherty, Chief Judge
Alexandria General District Court
You have asked whether the office of the clerk of a general district court may attach informational brochures regarding the rights and obligations of tenants to the summonses for unlawful detainer which it issues. If no such restriction exists, you have asked my opinion of the draft text of such a brochure.

With respect to your first question, I know of no legal authority which would allow the attachment of such a brochure as you describe to legal process issuing from the clerk's office of a general district court. The duties of clerks of court who issue legal processes, and of the officers who serve them, are specifically "prescribed by general law or special act." See Art. VII, § 4 of the Constitution of Virginia (1971). Section 16.1-69.40 of the Code of Virginia states that clerks of court have the power to "issue warrants, detention orders, and other processes, original, mesne and final...." Section 15.1-79 states that "[e]very officer to whom any order, warrant, or process may be lawfully directed, shall execute the same...." Neither section defines "process," and § 8.01-285(1) merely defines the term inclusively, stating: "The term 'process' shall be deemed to include notice." The term was defined in a more limited sense in an earlier forerunner, Ch. 170, § 5, Code of 1860 as: "The process to commence a suit shall be a writ commanding the officer to whom it is directed, to summon the defendant to answer the bill or action." See Barksdale v. Neal, 57 Va. (16 Gratt.) 314, 316 (1862). In this sense, the clear purpose of process is to apprise a party of the nature of the proceeding against him. Scott v. Scott, 142 Va. 31, 36, 128 S.E. 599, 600 (1925); Harvey v. Skipwith, 57 Va. (16 Gratt.) 410, 414 (1863). Without service of process, a court can obtain no jurisdiction over a party. Preston v. Legard, 160 Va. 364, 370, 168 S.E. 445, 447 (1933).

Clearly, the term "process" contemplates the procedures by which a legal action or a suit in equity commences, and through which courts acquire lawful jurisdiction over the parties. As such, authority to issue and serve process, as provided for by constitution and statute, must be strictly construed. See 3 C. Sands, Sutherland Statutory Construction § 67.04 (4th ed. 1974). Employing such strict construction with reference to your first question leads me to the opinion that, in the absence of express authority for the clerk's office of your court to include a brochure such as you describe in the issuance of process, such authority does not exist.

By way of comparison, the General Assembly has prescribed the form of the summons to be used in garnishment proceedings and has required that substantial information pertaining to garnishments be included on the form. Laudatory as it may be to advise tenants of their rights and obligations, until such time as the General Assembly so authorizes, I am of the opinion that the brochure in question may not be attached to the summonses for unlawful detainer.

Because the answer to your first inquiry is in the negative, it is not necessary to address the second.

COURTS. CIRCUIT COURTS. JURISDICTIONAL AMOUNT. DIFFERENT JURISDICTIONAL AMOUNT WHEN CASE ON APPEAL FROM GENERAL DISTRICT COURT.

June 8, 1984

The Honorable Fred W. Bateman, Chief Judge
Seventh Judicial Circuit of Virginia

You have asked whether § 17-123.1 of the Code of Virginia requires a circuit court to enter judgment for the defendant in any case which is on appeal from a general
district court pursuant to § 16.1-106, wherein the amount in controversy is more than $50.00 but less than $100.00. Your question involves the interplay of three statutes:

1. Section 17-123 establishes the jurisdiction of circuit courts. That section provides that circuit courts have original and general jurisdiction of all cases at law, "except cases at law to recover personal property or money not of greater value than $100.00...." It also provides that circuit courts have

"appellate jurisdiction of all cases, civil and criminal, in which an appeal, writ or error or supersedeas may, as provided by law, be taken to or allowed by such courts, or the judges thereof, from or to the judgment or proceedings of any inferior tribunal. They shall also have jurisdiction of all other matters, civil and criminal, made cognizable therein by law and when a motion to recover money is allowed in such tribunals, they may hear and determine the same, although it be to recover less than $100." (Emphasis added.)

2. Section 16.1-106 grants an appeal of right from decisions of courts not of record when "the matter in controversy is of greater value than fifty dollars....Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken."

3. Section 17-123.1 provides that where the amount due to the plaintiff is less than $100.00 the circuit court must enter judgment for the defendant, unless the amount in controversy was of greater value than $100, exclusive of interest.

It is a well established rule of statutory construction that where statutes are in apparent conflict, they should be construed, if possible, so that all may be given full force and effect. See Albemarle County v. Marshall Clerk, 215 Va. 756, 214 S.E.2d 146 (1975); McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623 (1957). See, also, 1978-1979 Report of the Attorney General at 85. A statute applicable to a special or particular situation is construed as an exception to a more general statute which is so comprehensive in its terms as to cover all cases within the purview of the language used. See Southern Railway Co. v. Commonwealth, 124 Va. 36, 97 S.E. 343 (1918); Reports of the Attorney General: 1872-1983 at 857; 1976-1977 at 102. Therefore, the statutes in question should be construed so as to give full force and effect to the right of appeal in cases wherein the amount in controversy exceeds $50.00 (as provided in § 16.1-106 and the last paragraph in § 17-123), as well as to the mandate to enter judgment for the defendant unless the amount in controversy exceeds $100.00 (as provided in § 17-123.1).

A reasonable interpretation of these statutes is to treat § 17-123.1 as remedial solely to the original and general jurisdiction of circuit courts, as created in the first clause of the second paragraph of § 17-123, and not to the appellate jurisdiction, as created in the last paragraph of § 17-123 and in § 16.1-106. The fact that these three statutes were considered by the same session of the General Assembly ($ 16.1-106 and § 17-123 in amended form, and § 17-123.1 as a newly added section) in Ch. 624, Acts of Assembly 1977, lends support to this interpretation.

I am, therefore, of the opinion that § 17-123.1 does not apply to cases on appeal to a circuit court from a general district court. Accordingly, your question is answered in the negative.
This is in reply to your inquiry whether, pursuant to § 16.1-126 of the Code of Virginia, a circuit court continues to have jurisdiction to try misdemeanor offenses where the charge is initiated by direct indictment or presentment, in light of the enactment of § 16.1-123.1 in Ch. 506, Acts of Assembly of 1984. In effect, you have asked whether the repeal of §§ 16.1-123 through 16.1-125 by Ch. 506 operates to implicitly repeal § 16.1-126.1

Section 16.1-123.1 specifies the jurisdiction of general district courts in criminal and traffic cases. Sections 16.1-123, 16.1-124 and 16.1-125, dealing with the same cases in the former county, municipal and traffic courts, are being repealed by Ch. 506. Section 16.1-126, relating to the jurisdiction of circuit courts in certain instances, was left intact.

In accord with rules of statutory construction, subsequent legislation is not presumed to effectuate a repeal of existing law in the absence of that expressed intent, unless a consistent body of laws cannot be maintained without the abrogation of a previous law. Only in the latter instance is a repeal of the previous legislation implied. 1A C. Sands, Sutherland Statutory Construction § 23.09 (1972). The fact that each statute relates to the same subject matter is not enough, by itself, to constitute an implied repeal. For a court to find an implied repeal, there must be a positive repugnancy between the two statutes. United States v. Brien, 617 F.2d 299 (1st Cir. 1980).

It is a well established rule of statutory construction that where statutes are in apparent conflict, they should be construed, if possible, so that all may be given full force and effect. See Albemarle County v. Marshall, Clerk, 215 Va. 756, 214 S.E.2d 146 (1975); McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623 (1957). See, also, 1978-1979 Report of the Attorney General at 85. A statute applicable to a special or particular situation is construed as an exception to a more general statute which is so comprehensive in its terms as to cover all cases within the purview of the language used. See Southern Railway Co. v. Commonwealth, 124 Va. 36, 97 S.E. 343 (1918); Reports of the Attorney General: 1982-1983 at 657; 1976-1977 at 102. Therefore, the statutes in question should be construed so as to give full force and effect to both if possible.

Following the foregoing rules of construction and noting the absence of any clear indication that the General Assembly intended to repeal § 16.1-126, I must conclude that a circuit court continues to have jurisdiction to try misdemeanor offenses where the charge is initiated by direct indictment or presentment.

1Section 16.1-126 reads as follows: "Notwithstanding the provisions of this chapter, the circuit court of any county, or the corporation court of any city having criminal jurisdiction, shall have jurisdiction to try any person for any misdemeanor for which a presentment or indictment is brought in or for which an information is filed; or such court may certify the presentment, indictment or information for trial to the court not of record which would otherwise have jurisdiction of the offense; in which event the
presentment, indictment or information shall be in lieu of any warrant, petition or other pleading which might otherwise be required by law."

**COURTS. WRIT OF FIERI FACIAS. USE OF COPY OF JUDGMENT AND ATTACHED MEMORANDA IN LIEU OF.**

September 2, 1983

The Honorable Ryland H. Brooks
Sheriff for Southampton County

You have requested my opinion whether a copy of a judgment, stamped "Writ of Fieri Facias" with the accompanying signature of the general district court judge who rendered the judgment, is of sufficient legal efficacy to use for levy upon and sale of property. The document was accompanied by a memorandum of the trial judge authorizing you to accept said document as a writ of fieri facias and commanding you "to cause to be made of the goods, chattels, and current money of defendant(s) in the sum(s) of money shown in the copy of the summons you have received which is marked 'writ of fieri facias,' subject to credits as shown on the summons."

Section 16.1-69.51 provides in pertinent part that "the Committee on District Courts, after consultation with the Executive Secretary of the Supreme Court, may determine the form and character of the records of the district courts. All dockets shall be uniform...." The Committee has adopted Form DC-467, most recently revised on July 1, 1983, for use as a writ of fieri facias. A copy of same is enclosed for your benefit. This Office has previously held that use of an approved form is not mandatory if a substituted form contains "all of the necessary information...." See 1981-1982 Report of the Attorney General at 63. Therefore, it is necessary to scrutinize the forms accompanying your request to determine whether they contain all of the information set forth in Form DC-467.1

The form adopted by the Committee on District Courts requires certain information, including indication of the status of homestead exemption, date and time the writ was received in the sheriff's office, fees received by the sheriff and his receipt numbers, and requirement of notification by sheriff to person entitled to receive monies obtained. None of this information is indicated on the document marked "writ of fieri facias" which you have provided. Form DC-467 also requires that credits be itemized on a list attached to the writ of fieri facias. The memorandum you received merely requires you to give credit "as shown on the summons." This gives rise to the possibility that the judgment debtor will not be given credit for post-judgment payments.

As the forms which you have received fail to provide all of the necessary information required by Form DC-467, I am of the opinion that they do not constitute a valid writ of fieri facias, and that levy and sale pursuant thereto would be inappropriate.

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1The memorandum accompanying the judgment was dated October 10, 1980, obviously a practice initiated prior to the adoption of Form DC-467.

**CRIMINAL LAW. INEBRIATES WHO CALL RESCUE SQUAD FOR TRANSPORTATION TO HOSPITAL DO NOT COMMIT OFFENSE UNDER § 18.2-414.1.**
August 15, 1983

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

You ask for an interpretation of § 18.2-414.1 of the Code of Virginia as it relates to the use of volunteer rescue squads by "drunks" for rides to the hospital. For purposes of my response, I assume that persons calling for the services of the rescue squad are simply inebriated and seeking transportation to the emergency rooms of hospitals when the nature of the case does not justify ambulance or rescue squad service.

Section 18.2-414.1 provides as follows:

"Any person or persons who unreasonably or unnecessarily obstruct a member or members of a rescue squad, whether governmental, private or volunteer, in the performance of their rescue mission or who shall fail or refuse to cease such obstruction or move on when requested to do so by a member of a rescue squad going to or at the site of a rescue mission, shall be guilty of a Class 4 misdemeanor." (Emphasis supplied.)

It appears that the obstruction contemplated by this provision of the Code is one which occurs as the rescue squad is going to or is at the site of a rescue mission. There is nothing in the language to suggest that unnecessary calls for service was intended to be included within its purview. It is well-settled that penal statutes must be strictly construed against the Commonwealth. Berry v. City of Chesapeake, 209 Va. 525, 165 S.E.2d 291 (1969). Such statutes cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit. Cox v. Commonwealth, 220 Va. 22, 255 S.E.2d 462 (1979).

Accordingly, it is my opinion that persons who call volunteer rescue squads for transportation to hospitals cannot be charged with an offense under this section. I point out, however, that individuals who place calls for ambulance service without just cause therefore, would be guilty of a Class 1 misdemeanor pursuant to § 18.2-212 of the Code of Virginia and § 22-1 of the Richmond City Code.

CRIMINAL LAW. NO FORFEITURE OF FIREARMS OR OTHER EVIDENCE UNLESS SPECIFICALLY PROVIDED FOR BY STATUTE.

February 6, 1984

The Honorable Harry G. Penley, Clerk
Circuit Court of Scott County

You have asked whether you may destroy several firearms and other unspecified items of evidence in your possession as clerk of court. The evidence relates to cases which have been concluded and the persons charged have either been convicted and released from confinement, acquitted or not prosecuted. The evidence has not been claimed and the rightful owners of the evidence are unknown.

With respect to firearms, the General Assembly has authorized their forfeiture in several instances. Under §§ 18.2-308 and 18.2-308.2 of the Code of Virginia, certain concealed weapons are automatically forfeited upon conviction of the owner. Under § 18.2-310, firearms used by persons in committing criminal offenses may be forfeited to the Commonwealth. In a prior Opinion, this office concluded that under the automatic forfeiture statutes, no court order is necessary and the weapons should be furnished to the police or destroyed. Because forfeiture is discretionary under § 18.2-310, however, a specific court order is necessary before the firearms acquired under that statute may be furnished to the police or destroyed. See 1982-1983 Report of the Attorney General at 753. Finally, the legislature has authorized the forfeiture of firearms upon conviction for certain hunting violations.\(^1\)

If a person convicted under one of the above-mentioned statutes was not the owner of the firearm, and the owner did not consent to or know of his violation of the law, the firearm should not be forfeited. See Reports of the Attorney General: 1973-1974 at 291; 1950-1951 at 136. Similarly, it is my opinion that there should be no forfeiture if the accused was acquitted or not prosecuted. Normally, where an accused has been acquitted or not prosecuted, or where an owner was unaware of an accused’s unlawful use of his weapon, the firearms should be returned to their rightful owners.

Turning to the other evidence to which you refer, you have not specified the nature of the evidence in your possession other than the firearms. Of course, if forfeiture of the evidence is authorized by statute, the appropriate statute should be followed in disposing of the property.\(^2\) If the Code does not provide for forfeiture of the evidence and the evidence is not contraband which cannot be possessed legally, the evidence should be returned to its owner.\(^3\)

In those instances in which the owner is unknown or cannot be located, there is no statutory authority for disposition, except for the possibility of treating such property as abandoned or lost. See 1973-1974 Report of the Attorney General, supra. You do not indicate that the property in your possession could logically be so categorized.

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\(^1\)Sections 29-144.3 and 29-162.2 provide that certain firearms used for spotlighting or illegally killing deer or elk may be forfeited in accordance with the provisions of Ch. 22 (§ 19.2-369 et seq.) of Title 19.2. Section 29-172 provides that guns used for the taking of wild birds, wild animals or fish in contravention of Title 29 shall be forfeited and destroyed by game wardens.

\(^2\)For example, "unless it is otherwise expressly provided by law" when the evidence enumerated in § 19.2-53 is seized pursuant to a search warrant, the evidence "may be burnt or otherwise destroyed" under the direction of the court when there is "no further need" for its use as evidence. See § 19.2-58.

\(^3\)In cases where the accused was acquitted or not prosecuted, unless the record indicates someone else has asserted ownership of the evidence or the accused has denied ownership of the evidence, in all likelihood the accused will be the owner of the evidence.
You have asked whether an arresting officer may issue a summons for a violation of § 18.2-266 of the Code of Virginia, which relates to driving under the influence of intoxicants ("DUI"), a Class 1 misdemeanor.

Section 19.2-74 provides, with certain exceptions noted below, that an arresting officer shall issue a summons to an individual arrested for a misdemeanor offense committed in the officer's presence, rather than taking the individual before a magistrate. The exceptions, for Class 1 misdemeanors, include:

(a) persons who refuse to sign the summons,
(b) persons believed by the officer to be likely to disregard the summons,
(c) persons believed by the officer to be likely to cause harm to themselves or others, and
(d) except as otherwise provided in Title 46.1, or § 18.2-266.

This last exception would seem to answer your question as to a violation of § 18.2-266, but for the fact that § 18.2-266 has no provision relating to arrest procedures. In fact, the only Code section which appears to provide arrest procedures specifically for DUI cases is the implied consent law, § 18.2-268. It is not clear whether the legislature intended the reference to § 18.2-268 to include the procedures provided in § 18.2-268. Section 18.2-268, however, provides the arresting officer in a DUI case the authority to demand a test to determine the alcohol content of the accused's blood, and provides that the officer shall take the accused before a magistrate if he refuses to take such a test. In my opinion, § 18.2-268 must be read in pari materia with § 19.2-74 since both deal with arrest procedures and appearances before a magistrate in certain types of misdemeanor cases. Accordingly, in interpreting §§ 19.2-74 and 18.2-268 together, it is my opinion that the requirements of the implied consent law must be met before the summons procedures in § 19.2-74 come into play, but that, otherwise, the summons procedures of § 19.2-74 are applicable to a DUI charge.

I reach that conclusion because even if the implied consent law is read as a limited exception to the provisions of § 19.2-74, it seems clear that the implied consent law does not preclude the issuance of a summons by the arresting officer where the accused does not refuse to take a test for blood alcohol. Accordingly, it is my opinion that an arresting officer does have authority to issue a summons for a violation of § 18.2-266 committed in his presence, provided that the accused has complied with the requirements of the implied consent law by taking the required tests. It must be understood, however, that the officer has discretion not to issue a summons if he believes that the accused is likely to cause harm to himself or others or is likely to disregard a summons.

I hasten to add, however, that in my opinion a DUI accused should not be issued a summons and released pursuant to § 19.2-74 unless he can be released to the custody of a responsible third party. In order to arrest the individual for DUI, the officer must have probable cause to believe that the individual is under the influence of alcohol or drugs. In my opinion, a person whom the officer believes is intoxicated to the extent prohibited by § 18.2-266 should also be considered likely to cause harm to himself or others, except in very limited situations such as those in which a third party will take responsibility for the intoxicated individual. While the arresting officer does not have the authority to detain an intoxicated individual until his intoxication has abated, it is my opinion that § 19.2-74 mandates that the officer take such an individual before a magistrate. The magistrate, of course, may release the arrestee, or he has the authority to hold such an individual, pursuant to § 19.2-120, until he no longer presents a danger to himself or others. See Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611 (1948).
CRIMINAL PROCEDURE. WHEN JUDGE REJECTS PLEA AGREEMENT FOR SPECIFIC DISPOSITION OF CHARGES AGAINST ACCUSED, HE MAY LATER CONSIDER CASE IF ACCUSED AGAIN ENTERS PLEA.

August 1, 1983

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

You have asked for my opinion on the application of Rule 3A:11 of the Rules of the Supreme Court of Virginia to the following factual situation:

An accused and the Commonwealth enter into a plea agreement whereby the Commonwealth agrees to move for the dismissal of certain charges against the accused or agrees that a specific sentence case is the appropriate disposition in the accused's case. The plea agreement is presented to the judge and he refuses to accept the agreement. The accused then withdraws his guilty plea and a plea of not guilty is entered on his behalf. The accused does not waive his right to a hearing before another judge, and the case is transferred to a second judge. Thereafter, the accused desires to plead guilty under the terms of the original plea agreement. The case is then transferred back to the original judge.

Your question is whether the foregoing practice is permissible, or whether the original judge is precluded from any further consideration of the case when the accused does not consent to that judge's considering the case further.

If the court rejects a plea agreement for a specific disposition or for the dismissal of certain charges, the accused has the right to withdraw his guilty plea. See Rule 3A:11(d)(4). If the accused withdraws his guilty plea, a plea of not guilty is entered on his behalf. See Rule 3A:11(b). The judge who rejected the plea thereafter takes no further part "in the trial of the case," unless "the right to a hearing by another judge is specifically waived..." by the accused. See Rule 3A:11(d)(5).

Viewed in context, it is my belief that Rule 3A:11(d)(5) is meant to prevent a judge from trying a case on the merits once he has rejected a plea agreement unless the accused has specifically waived his right to a trial on the merits by another judge. The obvious purpose of the rule is to ensure that the accused will not be forced to stand trial before a judge whose objectivity may be colored by his knowledge of the accused's desire to plead guilty.

The Rule should not be construed to prohibit the judge to whom the original plea was tendered from considering a subsequent plea bargain. Rule 3A:11(d)(5) simply prohibits the original judge from conducting the accused's trial without his consent. A guilty plea is a self-supplied conviction, Kibert v. Commonwealth, 216 Va. 660, 222 S.E.2d 790 (1976), and a hearing on a guilty plea is not the equivalent of a trial. In the factual situations posited by you, there is no trial of the case as contemplated in Rule 3A:11(d)(5), due to the defendant's reentering a plea of guilty after the case is transferred to the second judge. In such cases, there is no prohibition against a local judicial practice of the second judge, before whom the defendant has entered a plea of guilty, transferring the case back to the first judge for consideration and disposition.

Accordingly, I am of the opinion that, under the facts presented, it is permissible under Rule 3A:11 for a judge who has rejected a plea bargain agreement to reconsider the accused's case when the defendant later enters a guilty plea, whether the accused consents or not.
Rule 3A:11(d)(4) reads as follows: "If the agreement is of the type specified in subdivision (d)(1)(A) or (C) and if the court rejects the plea agreement, the court shall inform the parties of this fact, and advise the defendant personally in open court or, on a showing of good cause, in camera, that the court will not accept the plea agreement. Thereupon, neither party shall be bound by the plea agreement. The defendant shall have the right to withdraw his plea of guilty or plea of nolo contendere and the court shall advise [sic] the defendant that, if he does not withdraw his plea, the disposition of the case may be less favorable to him than that contemplated by the plea agreement; and the court shall further advise the defendant that, if he chooses to withdraw his plea of guilty or of nolo contendere, his case will be heard by another judge, unless the defendant waives the right to a hearing by another judge."

Rule 3A:11(d)(5) provides, in pertinent part: "In the event that a plea of guilty or a plea of nolo contendere is withdrawn in accordance with this Rule, the judge having received the plea shall take no further part in the trial of the case, unless the right to a hearing by another judge is specifically waived by the defendant."

DEAD BODIES. EXHUMATION. COSTS. HOW PAID. CRIMINAL SERVICE.

March 30, 1984

The Honorable Mark S. Gardner
Commonwealth's Attorney for Spotsylvania County

You have asked who is responsible for the payment of the costs of exhuming a body in connection with a criminal investigation. You state that, upon a petition by the Commonwealth's Attorney, under § 32.1-286 of the Code of Virginia, the circuit court ordered exhumation of the body and an examination by the Chief Medical Examiner's office. You enclose the court's order which recites that "all expenses incurred in the disinterment, transportation and reinterment shall be borne by the Commonwealth of Virginia."

Section 32.1-286(B) establishes the authority for a judge of the circuit court to order the exhumation of a body upon a showing of sufficient cause by an interested party. No specific provision is made for the costs of exhumation and reinterment under that statute. Section 32.1-288, which generally provides for the disposition of a body after an investigation by the Chief Medical Examiner, is directed to examinations which occur immediately after death. That statute, however, does not specifically address exhumation of bodies. Exhumation and reburial involve circumstances not contemplated by the statute. Thus, the provisions of § 32.1-288 do not apply to the circumstances of a court-ordered exhumation.

Inasmuch as the exhumation and related services are conducted in connection with a criminal investigation, § 19.2-332 provides a method by which the persons providing the service may be paid. This section provides, in pertinent part, as follows:

"Whenever in a criminal case an officer or other person renders any service required by law for which no specific compensation is provided, or whenever any other service has been rendered pursuant to the request or prior approval of the court, the court shall allow therefor such sum as it deems reasonable, including mileage at a rate provided by law, and such allowance shall be paid out of the state treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service."
Because the exhumation, transportation and reinterment of the body was a service rendered in connection with a criminal case for which no specific compensation is otherwise provided, with the prior approval of the circuit court and approval as to reasonableness, I am of the opinion that the costs involved should be paid from the criminal fund administered by the Supreme Court of Virginia.

DEEDS. PAPER SIZE. RULE 1:16 OF RULES OF SUPREME COURT DOES NOT REQUIRE DEEDS BE PRODUCED ON 8-1/2 X 11 INCH PAPER.

March 7, 1984

The Honorable Franklin P. Hall
Member, House of Delegates

This is in reply to your inquiry whether Rule 1:16 of the Rules of the Supreme Court of Virginia requires that deeds, deeds of trust and other documents submitted to the various offices of the circuit court clerks for recording, and not as a part of a pending law or chancery suit, be produced on pages 8-1/2 x 11 inches in size.

Rule 1:16 provides that "[a]ll pleadings, motions, briefs, depositions, requests for discovery and responses thereto, and all other documents filed in any clerk's office in any proceeding pursuant to these Rules shall be produced on pages 8-1/2 by 11 inches in size...." (Emphasis added.) The emphasized language of the Rule limits its application only to those papers filed in a proceeding pursuant to the Supreme Court Rules. The Supreme Court Rules do not include any provisions relating to the filing of deeds, deeds of trust or other documents simply submitted for recording. Therefore, it is my opinion that Rule 1:16 of the Rules of the Supreme Court relating to the size of paper to be utilized in certain proceedings does not apply to the recordation of deeds, deeds of trust or other documents which are not a part of a pending lawsuit or chancery suit.

You also inquire whether any rule, regulation or statute regulates the print size of deeds, deeds of trust or other documents submitted for recording. I am unaware of any statute, rule or regulation which governs the print size of such documents. There are, of course, a number of statutes which indicate the form of such documents or certain language, either capitalized or underscored, which must be included in certain documents. See, for example, §§ 55-48, 55-58, 55-58.2, 55-62 and 55-66.4:1. None of these statutes, however, includes a requirement or restriction as to the size of print.¹

¹Section 11-4 requires a minimum size print in contracts for the sale and future delivery of personal property under certain conditions. That section is not relevant to your inquiry.

DEEDS. RESTRICTIVE COVENANTS. RESTRICTIVE COVENANTS BASED UPON AGE NOT PER SE INVALID; COVENANTS MAY BE ALTERED OR EXTINGUISHED BY RECORDED AGREEMENT OF BENEFITED LOT OWNERS.

February 27, 1984

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County
This is in reply to your inquiry concerning certain restrictive covenants to be contained in a recorded deed of dedication relating to a proposed housing development in King George County. An individual has applied for a conditional use permit to establish a townhouse subdivision with private roads and recreational facilities, in an agricultural district in the county. The covenants will restrict occupancy in the subdivision to persons nineteen years of age and older and ownership of units to persons forty-two years of age and older. You ask, first, whether such restrictive covenants would be enforced by a Virginia court, upon proper application of a party who has standing to seek their enforcement, and second, whether the restrictive covenants could be altered or extinguished after the original deed has been recorded and after lots have been sold.

With regard to your first question, there is no statute in Virginia which prohibits housing discrimination based upon age. While the Supreme Court of Virginia has not yet decided a case involving restrictive covenants based upon age as suggested here, in recent years courts in other jurisdictions have upheld the facial validity of the same or comparable restrictions, in cases involving both state and private action, against attacks alleging unconstitutionality and invalid restraint upon the use or alienation of property. See Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974) (recorded declaration of restrictions privately drawn, prohibiting persons under 21 years of age from living in mobile home park); Ritchey v. Villa Nueva Condominium Association, 81 Cal. App.3d 688, 146 Cal. Rptr. 695 (1978) (condominium bylaw amendments affecting renting, selling and occupancy of individual units, including limitation on occupancy to persons 18 years of age or older); White Egret Condominium v. Franklin, 379 So.2d 346 (Fla, 1979) (condominium restriction prohibiting occupancy by children under 12 years of age); Pacheco v. Lincoln Palace Condominium, Inc., 410 So.2d 573 (Fla. App. 1982)(same); Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 364 A.2d 1016 (1976), cert. denied and appeal dismissed sub. nom. Feldman, et al. v. Weymouth Township, et al., 430 U.S. 977 (1977) (choice of age 52 as cutoff age for occupancy in mobile home park, under zoning ordinance); Campbell v. Barraud, 58 App. Div.2d 570, 394 N.Y.S.2d 909 (1977) (zoning ordinance provision limiting occupancy in zoning district to persons aged 55 years or older).

In the above cited decisions, it is variously stated that the standard of judicial review in a particular case is whether the restriction is reasonable under the circumstances and is reasonably applied. The Supreme Court of Virginia has subscribed to a standard of reasonableness in its decisions involving other limitations on the use or alienation of real property. See, e.g., Unit Owners Assoc. v. Gillman, 223 Va. 752, 768, 292 S.E.2d 378 (1982) (condominium restrictions); Lipps v. First American Serv. Corp., 223 Va. 131, 286 S.E.2d 215 (1982) (restraints on alienation); Loudoun Co. v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980)(zoning classification, denial of rezoning application); Friedberg v. Building Committee, 218 Va. 659, 239 S.E.2d 106 (1977) (restrictive covenant in residential subdivision); Hercules Co. v. Continental Can, 196 Va. 935, 86 S.E.2d 128 (1955) (covenant in deed restricting use of industrial property); compare Merriman v. Cover 104 Va. 428, 51 S.E. 817 (1905) (contract in restraint of trade valid if reasonable as between the parties and not injurious to the public).

While the cases mentioned above would seem to suggest that the proposed covenant under consideration is not per se invalid, I cannot confidently predict how a Virginia court would rule when presented with a challenge to a restrictive covenant based upon age, not knowing in advance the circumstances of a particular case and of the community wherein it may arise.

With regard to your second question, it is generally held and recognized in Virginia that, once lots have been sold in a development, a covenant as to the use of property whose benefit runs with the land to the individual lot owners may be amended or extinguished by written and recorded agreement of all the benefited owners. See S R. Powell, The Law of Real Property, ¶¶ 677, 679(1) (rev. ed. 1981); Duvall v. Ford
Accordingly, your second question is answered in the affirmative.

1 Compare the Virginia Fair Housing Law, § 36-86 et seq. of the Code of Virginia, which prohibits discriminatory practices with respect to residential housing on the basis of race, color, religion, national origin or sex.

2 It has been noted, in reviews of the above and other cases, that, of the techniques employed to limit housing occupancy on the basis of age, private restrictive covenants are least susceptible to successful constitutional challenge. See Doyle, Retirement Communities: The Nature and Enforceability of Residential Segregation by Age, 76 Mich. L.Rev. 64 (1977); Travallo, Suffer The Little Children - But Not in My Neighborhood: A Constitutional View of Age - Restrictive Housing, 40 Ohio St. L.J. 295 (1979).

3 In Riley, e.g., the court observed that the age restriction "fulfilled a legitimate need of older buyers who sought to retire in an area undisturbed by children," and "[t]here was no testimony as to any shortage of housing which would accommodate families with children ...." 526 P.2d at 752. Compare Molino v. Mayor and Council of Bor. of Glassboro, 116 N.J. Super, 193, 281 A.2d 401 (1971) (zoning ordinance having effect of keeping children out of entire municipality held invalid); White Egret Condominium, supra, 379 So.2d at 352 ("Although this restriction was reasonably related to a lawful objective, the appellant is estopped from selectively enforcing the age restriction").

4 Note, that the common grantor may also reserve to himself in the declaration of restrictions the right to unilaterally amend restrictive covenants or may provide the procedures by which the lot owners, or a specified percentage of them, may amend. 5 Powell, supra, ¶ 677; see Minner v. City of Lynneburg, 204 Va. 180, 129 S.E.2d 673 (1953).

5 Note, that property restrictions also may become unenforceable by way of abandonment, waiver, estoppel, acquiescence in violations, or change of conditions, among other means. See 5 Powell, supra, ¶ 679; Duvall, supra, 220 Va. at 45; Village Gate v. Hales, 219 Va. 321, 248 S.E.2d 903 (1978); Booker v. Old Dominion Land Co., 188 Va. 143, 49 S.E.2d 314 (1948).

DEEDS AND COVENANTS. CERTIFICATE OF SATISFACTION. CERTIFICATE OF PARTIAL SATISFACTION. DEEDS OF TRUST. INDEXING. CERTIFICATE OF PARTIAL SATISFACTION SHOULD BE INDEXED ONLY IN NAMES OF GRANTOR AND GRANTEES (TRUSTEES) OF DEED OF TRUST BEING PARTIALLY RELEASED.

December 1, 1983

The Honorable Virginia H. Stanley, Clerk
Circuit Court of Bedford County

You have asked my opinion on the proper indexing of a Certificate of Satisfaction. The copy enclosed with your letter is a Certificate of Partial Satisfaction, signed by the attorney-in-fact on behalf of several holders of a note secured by a deed of trust on a tract of land, to which reference is made, and describes a lot to which the Certificate of Partial Satisfaction is applicable. You ask specifically if you should index the certificate in the name of all holders of the note and their attorney-in-fact, as well as the grantor and maker of the note.

The certificate conforms substantially with the permissible form prescribed in § 55-66.4:1 of the Code of Virginia. It identifies the deed of trust grantor, trustees, maker of the note and noteholders. Section 55-66.6 provides in part, "[s]uch certificate shall be
indexed in the name of the grantors and grantees of the instrument being released." In view of this express legislative directive for indexing, I am of the opinion that there is no necessity to index a certificate in the names of the noteholders or maker of the note. Accordingly, you should index the Certificate of Partial Satisfaction only in the names of the grantor and grantees (trustees) of the deed of trust which is being partially released.

DEPARTMENT OF CRIMINAL JUSTICE SERVICES. DISTRIBUTION OF FUNDS TO REGIONAL TRAINING ACADEMIES.

June 19, 1984

The Honorable M. Wayne Huggins
Sheriff, County of Fairfax

This is in response to your request for my opinion relating to an appropriation by the General Assembly for the 1984-1986 biennium by which the Department of Criminal Justice Services (the "Department") has been authorized to spend for criminal justice training specified amounts to provide assistance for sixty percent of the total costs of regional training academies. Section 1-121, Ch. 755, Acts of Assembly of 1984. There is a requirement in the appropriation that the remaining forty percent be provided by "participating localities." The Department has interpreted this language as excluding from the forty percent requirement funds derived from sources such as colleges, universities, private companies, State agencies, and multi-state authorities such as that created pursuant to the Washington Metropolitan Area Transit Regulation Compact. Further, the Department has indicated that it intends to allocate the funds to each of the seven academies on the basis of the number of law-enforcement officers served by each academy, excluding from that number law-enforcement officers from entities which it does not define as a participating locality. You inquire whether the Department is correct in its interpretation of the language in the appropriation and whether the method of allocation of the funds is proper.

Words in a statute must be given their ordinary meaning unless it is apparent that the General Assembly intended that they should receive a broader or narrower construction. Spindel v. Jamison, 199 Va. 954, 103 S.E.2d 205 (1958); The Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944). The term "locality" in common parlance refers to a particular place or location. Webster's New Collegiate Dictionary (1979). In the context in which the word appears, it is clear that the General Assembly sought to require local units of government within the Commonwealth to match State funds appropriated by it. This being the case, it is evident that the General Assembly intended that the term "participating localities" include only cities, counties, and towns, or regional authorities created by them, and not other sources such as State agencies, educational institutions or multi-state entities. In my opinion, this interpretation is consistent with the intent of the appropriation and with an earlier Opinion of this Office in which the term "local jurisdiction" was interpreted to refer to local political subdivisions of the Commonwealth—cities, counties, and towns. See 1977-1978 Report of the Attorney General at 131. To interpret the appropriation otherwise would permit State funds to be matched with other State funds or with private funds, thus relieving local political jurisdictions of the responsibility which the General Assembly intended to place upon them. Accordingly, I concur in the Department's methods of distribution of funds to each academy and with its interpretation of the term, "locality."

DISPATCHERS. TRAINING. SECTION 9-170(7a). PERTAINS TO PART-TIME DISPATCHERS, BUT NOT TO SEPARATE, DISTINCT GROUPS OF DISPATCHERS
December 2, 1983

The Honorable Richard N. Harris, Director
Department of Criminal Justice Services

You have requested my opinion on the following questions relating to compulsory minimum training standards for dispatchers in accordance with § 9-170(7a) of the Code of Virginia.

1. Can the Department of Criminal Justice Services in its definition of dispatchers include part-time personnel, thereby requiring such personnel to meet the minimum training standards?

2. Does the authority of the Department to establish compulsory minimum training standards for dispatchers employed by or in local law enforcement agencies extend to those dispatchers employed by or in local communications centers, bureaus or departments which are separate and distinct from local law enforcement agencies?

3. Does the Department have the authority to include in the Rules a provision which would permit persons, employed by or in a local law enforcement agency on or after July 1, 1982 but prior to the effective date of the Rules, to forego the mandatory classroom hours and/or the on-the-job training upon meeting specified criteria set out in the Rules?

As a general rule, words in a statute should be given their usual, commonly understood meaning. The Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944). Section 9-170(7a) mandates that the Department of Criminal Justice Services "establish compulsory minimum training standards for all dispatchers employed by or in any local law-enforcement agency." (Emphasis added.) It is evident from this language that training standards are compulsory for part-time dispatchers employed by or in any local law enforcement agency. The General Assembly did not distinguish between part-time or full-time dispatchers in the requirements for training.

Dispatchers employed by or in local communications centers, bureaus or departments which are separate and distinct from local law enforcement agencies are not subject to the Department's compulsory minimum training standards. I am constrained to reach this conclusion because of the specific language of § 9-170(7a) restricting the training requirements to "all dispatchers employed by or in any local law-enforcement agency." (Emphasis added.) The aforementioned dispatchers are not employed by or in any local law enforcement agency. Accordingly, in the absence of specific legislative provisions authorizing training standards for this group, I conclude that these dispatchers are outside the purview of the Department's authority.

With respect to your third question, § 9-170(7a) provides that the compulsory minimum training standards shall apply to dispatchers hired on or after July 1, 1982. While § 9-173 permits the Director of the Department, with the approval of the Board, to exempt certain persons from complying with minimum training standards based upon their previous training and experience, dispatchers are not included in this exemption. Reading these provisions together, I am of the opinion that the Board is without authority to exempt dispatchers hired on or after July 1, 1982, from the compulsory minimum training standards. If an exemption for such dispatchers is desired, § 9-173 should be amended to so provide.
Section 9-170(7a) states as follows: "The Department, under the direction of the Board which shall be the policy making body for carrying out the duties and powers hereunder, shall have the power to establish compulsory minimum training standards for all dispatchers employed by or in any local law-enforcement agency. Such training standards shall apply only to dispatchers hired on or after July 1, 1982."

DIVORCE. SERVICE OF PROCESS MAY NOT BE MADE BY DELIVERY TO FAMILY MEMBER OR BY POSTING. EFFECTIVE ONLY BY PERSONAL SERVICE OR PUBLICATION.

August 22, 1983

The Honorable M. Wayne Huggins
Sheriff for the County of Fairfax

This is in response to your inquiry whether in divorce cases Supreme Court Rule 2:9(a) permits substituted service of process by any of the methods authorized by § 8.01-296 of the Code of Virginia.

Section 8.01-296 sets out the general methods of service of process to be used where "no particular mode of service is prescribed." (Emphasis added.) Under that section, substituted service of process may be made by delivery to a family member or posting at the defendant's usual place of abode or by publication.

The specific issue presented is whether the Supreme Court, in adopting Rule 2:9(a), prescribed a particular mode of service which supersedes the provisions of § 8.01-296. For the following reasons, it is my opinion that Rule 2:9(a) controls and service in divorce cases is limited to personal delivery on the defendant or substituted service by publication.

The Rule requires service upon the defendant but further provides that "[s]ubstituted service may be made in accordance with Code § 8.01-316 through 8.01-320." The cited provisions of the Code pertain only to service by publication. Because the Rule specifically authorizes substituted service by publication and fails to authorize substituted service upon a family member or by posting under § 8.01-296(2), there is a strong implication that service under § 8.01-292(2) is not permissible.

Such an interpretation is consistent with the generally stricter requirements for service of process in divorce cases. Unlike other cases, process, when served in divorce cases, must always be served by an officer. See §§ 8.01-293 and 20-99. Acceptance of service must be be before an officer authorized to administer oaths. Rule 2:9(a); § 8.01-327; § 20-99.1. Service may not be waived as in other cases. Rule 2:9(a).

I note also that there are sound policy reasons for requiring personal delivery. Determining a defendant's "usual place of abode" may be difficult at the time of an impending divorce. Delivery to a family member or posting on a door creates the possibility that a hostile family member may receive and dispose of process without informing the intended recipient of the information.

For the foregoing reasons, I am of the opinion that in divorce cases the only method of substituted service of process permitted under the Rule is service by publication.
Rule 2:9(a), Rules of the Supreme Court of Virginia, provides: "Upon the commencement of a suit for divorce or for annulling a marriage, process must be served upon the defendant whether the defendant be sui juris or a person under a disability. A sui juris defendant may accept service in any such suit by signing the proof of service before any officer authorized to administer oaths. Service of process may not be waived; but substituted service may be made in accordance with Code § 8.01-316 through 8.01-320."

In reaching this conclusion, I am aware of the provision in the Handbook of Standard Procedures and Model Orders in Certain Cases for Judges and Clerks of Courts of Record which indicates that substituted service upon a family member or by posting is permissible. While I acknowledge the importance of that authority, I believe the clear language of Rule 2:9(a) compels the result stated in this letter.

DOG LAWS. CITY MAY APPLY DOG LEASH ORDINANCE IN DESIGNATED PORTIONS RATHER THAN ENTIRE CITY.

December 14, 1983

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

You request my opinion regarding the adoption of a dog leash ordinance. Specifically, you ask if a dog leash ordinance adopted pursuant to § 29-213.18 of the Code of Virginia may be applied to only designated portions of a city, as opposed to the entire city.

Section 29-213.18 was originally enacted to permit cities having the power to adopt leash ordinances to request a referendum as to whether such leash ordinance was to become effective in the city. See Ch. 140, Acts of Assembly of 1960. The section now provides in pertinent part:

"The governing body of any city may adopt regulations or ordinances requiring that dogs within the confines of any such city be kept on leash or otherwise restrained and may, by resolution directed to the circuit court of such city request the judge of such court to order a referendum as to whether any such ordinance so adopted shall become effective in the city. * * *

The results of such referendum shall not be binding upon the governing body of any such city but may be used in ascertaining the sense of the voters." (Emphasis added.)

The foregoing section should be contrasted with § 29-213.17, which provides in pertinent part:

"The governing bodies of the counties, cities and towns of this State are hereby authorized, in their discretion, to prohibit the running at large of all or any category of dogs in all or any designated portion of such county, city or town during such months as they may designate, or such governing bodies may require that dogs be confined or restricted or penned up during such periods. For the purpose of this section, a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control." (Emphasis added.)
Section 29-213.17 thus allows cities (as well as counties and towns) to prohibit dogs from running at large in the whole locality or any portion thereof during designated months.

Section 29-213.18 provides that the governing body of any city may require that dogs be kept on leash or otherwise restrained at all times, whether on or off the property of the owner. The statute does not authorize the prohibition to be applicable only to designated portions of the city. The section grants an additional power to the governing bodies of cities -- to allow them to request an advisory referendum of the voters prior to exercising the power to require that dogs be leashed or otherwise restrained, a power not granted to the governing bodies of counties and towns.

The two statutes are not in conflict with each other. Although they both relate to the same subject -- dogs, they provide authority for regulating in different ways. The first is designed to regulate "running at large;" the second designed to regulate the control of dogs by leash. Both can be applied separate and apart from the other. The governing body of a city is thus free to adopt an ordinance pursuant to either statute. If it elects to adopt a leash law pursuant to § 29-213.18, however, it must apply to the entire city.

It is, therefore, my opinion that the City of Suffolk may adopt a running at large dog ordinance pursuant to § 29-213.17, which is applicable only in a designated part of the city, but if a leash ordinance is adopted pursuant to § 29-213.18, it must apply throughout the city.

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**Dog Laws. County May Contract With Private Individual To Maintain Animal Pound.**

March 26, 1984

The Honorable Harry J. Parrish  
Member, House of Delegates

You have asked whether a local government may contract with a private individual, private kennel, veterinarian kennel or other establishment to provide an animal pound and whether such a leased facility may serve as the official depository for stray or unwanted animals. Secondly, you have asked whether a local governing body may construct its animal pound on the private property of an individual, for example on the property of the local animal warden.

Section 29-213.19 of the Code of Virginia requires the governing body of each county or city to maintain an animal pound. A "pound" is defined in § 29-213.6(F) to mean a

"facility, conforming to the policy and purpose of § 3.1-796.40, operated by the State or any political subdivision or operated under a contract with any county, city or town or incorporated society for the prevention of cruelty to animals, for the purpose of impounding or harboring seized, stray, homeless, abandoned or unwanted animals."

A pound must meet guidelines issued by the Virginia Department of Agriculture and Consumer Services and must be accessible to the public at reasonable hours during the week. The governing body of the city or county is not required to own the facility, but may "cause [it] to be maintained" and "may contract for its establishment with a private group or in conjunction with one or more other local governing bodies." See § 29-213.19. The term "private group" is not defined by statute, but I am of the opinion that
the term "private group" may include a private individual, kennel or veterinarian
kennel. The privately operated pound must, however, conform to statutory requirements
and comply with the guidelines of the Virginia Department of Agriculture and Consumer
Services if it is to serve as the official depository for stray or unwanted animals.

If a county should build the pound on the property of a private individual including
the animal warden, by common law, the buildings and fixtures annexed to the freehold
(land) become part of the land and inure to the benefit of the person owning it. See
Hollingsworth v. Funkhouser, 85 Va. 448, 8 S.E. 592 (1888); 9B M.J. Improvements § 4.
Building the county pound on the property of a private party, including the county animal
warden, without a lease, may, in effect, be a gift to the private party. Counties have
the right to lease land for county buildings by virtue of § 15.1-262, and to make gifts to
do not, however, have the right to make gifts to private parties. I am, therefore, of the
opinion that your second question can be answered in the affirmative if the county and
the warden execute an appropriate lease.

Ordinarily a county employee may not have a contract, other than his contract of
employment, with the county which employs him. See § 2.1-607. There is an exception
for the sale, lease or exchange of real property. See § 2.1-608.

DOG LAWS. LAY PERSONS MAY NOT PERFORM SPAYING OR NEUTERING
OPERATIONS ON DOGS OR CATS.

April 9, 1984

The Honorable Geraldine R. Keyes
Acting County Attorney for Accomack County

You request my opinion whether the Society for the Prevention of Cruelty to
Animals (the "SPCA") is required to use a licensed veterinarian when it desires to neuter
or spay dogs and cats which have been given to the SPCA by their owners.

Section 54-786.2 of the Code of Virginia prohibits any person from practicing
veterinary medicine in this State unless he has a license to do so from the Board of
Veterinary Medicine. Section 54-786, in pertinent part, defines the practice of
veterinary medicine as follows:

"Any person shall be regarded as practicing veterinary medicine within the meaning
of this chapter who...performs a surgical, medical or dental procedure or renders
surgical, medical or dental aid to, for or upon an animal...."

Spaying is the removal of both the ovaries and the uterus of a female animal. Neutering
includes both spaying the female and castrating the male animal. For dogs and cats,
each of these procedures requires surgery under general anaesthesia and use of aseptic
techniques. I am of the view that the use of these procedures constitutes surgery as that
term is used in § 54-786.

Section 54-786 further provides:

"But nothing in this chapter [relating to veterinary medicine and surgery] shall
apply to any person performing procedures on his own animals, to any employee
performing procedures on the animals of his employer...."
As you have stated the facts, the dogs and cats are owned by the SPCA. Accordingly, the SPCA would not be prohibited from performing certain procedures not inconsistent with other laws.

Sections 54-524.66 and 54-524.67, however, provide that a pharmacist may dispense scheduled drugs only on the prescription of a veterinarian and that only a veterinarian or an assistant under his direction and supervision may administer these drugs. I am informed that there is no type of general anaesthesia which can be dispensed without a prescription. Since spaying or neutering of dogs or cats requires a general anaesthesia, the performance of such procedures without general anaesthesia would inflict inhumane injury and pain on the animal in violation of § 18.2-392. Similarly, the performance of these surgical procedures by a person not competent by training would inflict inhumane injury and pain upon the animal and constitute a violation of § 18.2-392.

Therefore, 'taking all provisions of the Code into account and considering the nature of the operation, I am of the opinion that no lay person, including employees of the SPCA, may perform spaying or neutering operations on dogs or cats.

1 Certain Schedule VI drugs are available without prescription if properly labeled. See 21 C.F.R. § 201.5 and 21 C.F.R. § 201.105.

DOG LAWS. SEX OF DOG MUST BE SHOWN ON RECEIPT AND METAL TAG WHICH COMPRISE DOG LICENSE.

May 8, 1984

The Honorable Ellis D. Meredith
Treasurer for Montgomery County

In your recent letter, you have asked my opinion on whether the sex of a dog must be shown on the dog's license. You advise that Montgomery County requires a $3.00 license fee on all dogs, regardless of the sex of the dog, and that the Montgomery County ordinance is silent as to the form of the license.

Section 29-213.10 of the Code of Virginia provides that the treasurer of a county or city in which the owner of the dog resides, after payment of the fee and presentation of a certificate of vaccination, is required to issue a license receipt and deliver a metal license tag to the owner. The receipt shall contain the name and address of the owner, the date of payment, the year issued, the serial number of the tag and the sex of the dog. Section 29-213.14 states that a dog license shall consist of two parts, a license receipt and a metal tag, and "[t]he tag shall be stamped or otherwise permanently marked to show the jurisdiction issuing the license, the sex of dog, the calendar year for which issued and bear a serial number."

Section 1-13.17 requires that all ordinances be consistent with the Constitution and laws of the United States and of the Commonwealth. Two bodies of law which pertain to the same subject matter are said to be in pari materia and, where possible, the two should be harmonized in order to give effect to both. See 1981-1982 Report of the Attorney General at 273. "If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance." King v. County of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587 (1954).
Inasmuch as State law requires that the receipt and metal tag show the sex of the dog and the Montgomery County ordinance is silent on this subject, the statute and ordinance can be harmonized. The requirements of State law must be observed. I am of the opinion, therefore, that the sex of a dog must be shown on both the license receipt and the metal tag.

DRUG CONTROL ACT. OPTOMETRISTS. VIRGINIA PHARMACISTS MAY NOT FILL PRESCRIPTIONS OF OUT-OF-STATE PHYSICIANS, DENTISTS, VETERINARIANS, OR OPTOMETRISTS NOT ALSO LICENSED IN VIRGINIA AND MAY FILL PRESCRIPTIONS OF OPTOMETRISTS ONLY WITH DIAGNOSTIC DRUGS.

May 30, 1984

The Honorable Daniel W. Bird, Jr.
Member, Senate of Virginia

In your recent letter, you have set forth the following information:

"Optometrists licensed in the States of West Virginia and North Carolina may, within the scope of their practices, prescribe and administer ophthalmic drugs which have a therapeutic effect. There have been several instances in which Virginia residents are seen by West Virginia and North Carolina optometrists who bring their prescriptions to a Virginia pharmacist for filling. The pharmacist has had a question as to whether he may dispense the drug prescribed by the optometrist. An inquiry has been made to the State Board of Pharmacy and the pharmacist has been advised that while there has not been a formal opinion issued by your office concerning this, the Board's administrator felt that the prescription could not be filled in Virginia as the use of ophthalmic therapeutic drugs is not within the scope of practice of Virginia optometrists."

Your letter mentions the inconvenience to Virginia citizens who are patients of optometrists of West Virginia and North Carolina if those patients must purchase their medication only from West Virginia and North Carolina pharmacies. You question the logic of such a requirement and then pose two questions: (1) whether a Virginia pharmacist may fill prescriptions written by physicians, veterinarians or dentists who are licensed to prescribe drugs in another state, but who are not licensed to practice their respective professions in Virginia; (2) whether a prescription of an optometrist who is licensed to prescribe therapeutic drugs in another state may be filled by a Virginia pharmacist, even though Virginia optometrists, while authorized to prescribe diagnostic drugs, may not be licensed to prescribe therapeutic drugs.

Your questions are controlled by the statutory provisions of the Virginia Drug Control Act, §§ 54-524.1 et seq. of the Code of Virginia. That law contains specific provisions regarding when a pharmacist may sell and dispense drugs. Section 54-524.87 states in pertinent part that "[a] pharmacist...may sell and dispense drugs...to any person pursuant to a prescription of a practitioner...." (Emphasis added.) Section 54-524.2(27) defines "practitioner" as "[a] physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, prescribe and administer...a controlled substance in the course of professional practice or research in this State." (Emphasis added.) Thus, in response to your first question, unless the out-of-state prescriber meets this definition and is licensed, registered or otherwise permitted to dispense such drugs in this state, I must conclude that his or her prescription may not be filled by a Virginia pharmacist.
In regard to your second question, the practice of optometry is broadly defined in § 54-368 but it contains no language which authorizes distribution, dispensing, prescription, or administration of therapeutic drugs. In 1983, the Virginia General Assembly expanded upon the permissible scope of the practice of optometry by enacting §§ 54-386.1 and 54-386.2. As a consequence thereof, an optometrist who is certified by the Virginia Board of Optometry pursuant to § 54-386.1 may now legally possess and administer certain enumerated diagnostic pharmaceutical agents for the express purpose of examining and determining the existence of abnormal or diseased conditions of the human eye and related structures.

Thus, while an optometrist is permitted by law to prescribe diagnostic drugs, there is no statutory authority for an optometrist licensed in Virginia to prescribe therapeutic drugs. Based upon the statutory definitions, I must, therefore, conclude that no optometrist, whether licensed to practice in Virginia and/or in a state which allows optometrists to prescribe therapeutic drugs, may prescribe such drugs in Virginia. Inasmuch as an optometrist may not prescribe such therapeutic drugs in Virginia, he is not included within the Virginia Drug Control Act's definition of a practitioner. See § 54-524.2(27). I am, therefore, of the opinion that the law, as currently written, provides that a pharmacist may not dispense such therapeutic drugs prescribed by an out-of-state optometrist even though the foreign state allows the optometrist to prescribe in that state such therapeutic drugs.

DRUG CONTROL ACT. PHYSICIANS. POTENTIAL LIABILITY FOR ACTIONS OF AGENT ACTING PURSUANT TO § 54-524.65(ii) DEPENDS ON FACTS OF INDIVIDUAL CASE.

January 24, 1984

The Honorable W. Onico Barker
Member, Senate of Virginia

This is in response to your inquiry regarding the potential liability of physicians for damages arising from the administration of medication to residents of a home for adults when the medication has been administered by an agent authorized by the physician pursuant to § 54-524.65(ii) of the Code of Virginia. That section provides in part:

"This section shall not prevent the administration of drugs by an agent authorized in writing by the physician to administer such drugs, in accordance with such physician's instructions pertaining to dosage, frequency and manner of administration, when the drugs administered would be normally self-administered by (i) a resident of a facility licensed or certified by the State Mental Health and Mental Retardation Board when the authorized agent administering the drugs has satisfactorily completed a training program for this purpose approved by the Board of Nursing or (ii) a resident of any home for adults which is licensed by the Department of Social Services."

From the copies of correspondence enclosed with your letter of December 27, 1983, it appears that some practitioners will not designate a person to administer drugs.

The statute permits an agent to administer drugs to a resident of a licensed home for adults when the drugs would normally be self-administered. That statute, however, contains no language which specifically identifies the person as an agent of the practitioner nor does it undertake to address the questions of liability or provide immunity to the physician.
The question of tort liability depends on the specific facts of a case. It is my opinion, however, that there is the potential for liability of a physician who authorizes the administration of medication under this statute. The person administering the medication is designated by the statute as an agent. The definition of the term "agent" in § 54-524.2(3a) is comparable to the definition of an agent in agency law. That body of law holds, generally, that a principal is liable for the action of his agent as long as the agent is acting within the scope of his employment. The courts would look to the specific facts of the situation to determine if the person administering drugs was the agent of the physician or someone else, and if the agent was within the scope of his employment.

You have also asked if a physician is shielded from liability in a similar situation if he acts under the auspices of the community services board. This arrangement would not change the potential for liability.

ELECTIONS. CANDIDATES. SCHOOLS. PUBLIC EMPLOYEES.

March 8, 1984

The Honorable John C. Brown
Member, House of Delegates

This is in reply to your request for my opinion whether the former superintendent of schools of the Bristol, Virginia, school system, is eligible to run as a candidate for Bristol City Council. You state in your letter that the individual was removed from office as superintendent and he is presently unemployed but that the decision to remove him included a provision to pay his salary through June.

Prior Opinions of this Office, in considering related questions, noted that there is no State statute which prevents public employees from being candidates for elective public office and that those persons may run, provided that their activities do not violate personnel regulations of the employing agency, or otherwise interfere with the person's ability to perform his regular duties in each instance. See, e.g., Reports of the Attorney General: 1982-1983 at 222; 1975-1976 at 35; 1972-1973 at 165, 167; 1971-1972 at 155, 158; 1970-1971 at 132; 1969-1970 at 117. In this instance, despite the continuation of salary, the person in question is no longer a public employee, and such personnel regulations which may exist governing the political activity of school board employees would not appear to apply. Thus, in my opinion, the present employment status of the person about whom you inquire, as you describe it, would not prevent him from running for the office of city councilman.

Section 8 of the Charter for the City of Bristol states that "[a]ny person qualified to vote in the city shall be eligible to the office of councilman." See Ch. 309, Acts of Assembly of 1920.
May 22, 1984

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your request for my opinion concerning the mailing of certain writings to voters by a candidate for election to the House of Delegates in the November, 1983, general election. You relate that the candidate lost in that election but subsequently sent to households within his election district several writings about actions of the 1984 General Assembly. You state that none of the writings contains an "authority line" as is required to be shown on certain mailings during a campaign. You ask whether such mailings violate any provision of State law.

The applicable section of the election laws is § 24.1-277 of the Code of Virginia, which reads as follows:

"(1) As used in this section 'writing' includes any written, printed or otherwise reproduced statement or advertisement of any class or description, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it nor writings authorized by the candidate on novelties including, but not limited to, pens, pencils and buttons to be attached to wearing apparel.

(2) It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any potential nominee or candidate, any candidate for nomination or any candidate for any office elective by the qualified voters or concerning any question or referendum to be submitted to the electors unless such writing plainly identifies the person responsible therefor and carries the statement 'authorized by...(name of candidate or other person or organization responsible therefor).' Where the writing is not caused by the candidate, his campaign committee, or a political party committee, the person causing the writing shall be identified by full name and address on the writing. It shall be unlawful for any person to cause any radio or television statement to appear unless the advertisement or statement contains information which plainly identifies the person or group responsible therefor.

(3) It shall be unlawful for any person to use a false or fictitious name or address on any such writing described in the preceding paragraph.

(4) Any person violating any provision of this section shall be deemed guilty of a misdemeanor. Violation of this section shall not, however, require or result in the voiding of any election." (Emphasis added.)

Section 24.1-1(2) defines "candidate" as "any person who seeks or campaigns for any office of the Commonwealth or of any of its governmental units in a primary, general, or special election by the people and shall include a person who seeks the nomination of a political party or who, by reason of receiving the nomination of a political party for election to any such office, is referred to as a 'nominee'...."

Section 24.1-277 requires writings which concern (1) any potential nominee or candidate for an elective office or (2) any referendum to be submitted to the electorate to contain a statement identifying the person or organization responsible for the writing. You have indicated that the writings were issued by an unsuccessful candidate in the 1983 election and that the substance of the writings in question deals with the actions of the 1984 General Assembly. In this regard, the writings therefore would not be governed by § 24.1-277.
You also indicated that the writer is identified and the mailings were made under a bulk mail permit assigned to the writer's 1983 election campaign committee, which remains active. I am inclined to view the identification of the writer as substantial compliance with the "authority" requirement of § 24.1-277, even if the mailings should be interpreted as a political mailing.

It may be found, however, that the writer has violated the terms of the bulk mailing permit assigned to his 1983 campaign committee. I suggest this is a matter for investigation by appropriate authorities.

You ask also for suggested Code changes to ensure that the public is not misled by writings which purport to be informational when in fact they are issued to promote a potential candidate, in the event I find that the writings under consideration here are not covered by existing law. As noted above, I find that the writings under consideration here are not covered by statute; but if they were covered by § 24.1-277, they substantially comply with the "authority" requirement of that statute, and, additionally, they clearly identify the writer. That being the case, I do not believe it likely that the public will be misled by the mailings as you describe them or that it is necessary to change the Code to more adequately address such a situation.

ELECTIONS. ELECTORAL BOARD. CHARTERS. STATUTES.

March 27, 1984

The Honorable Clarence L. Townes, Jr., Chairman
Richmond Electoral Board

The Honorable Michael P. Cummings, Jr., Secretary
Richmond Electoral Board

This is in reply to your request for my opinion concerning the legal effect of the omission of a candidate's address from his petition for candidacy for election to Richmond City Council, in light of the petition requirements contained in § 24.1-168 of the Code of Virginia and in § 3.02 of the Richmond City Charter. You relate that petitions of several candidates for election in the May 1984 councilmanic election do not contain the address of the candidate in each instance. Your question is whether you, as the electoral board, may forward the names of those persons to the State Board of Elections, as qualified candidates for the offices involved, pursuant to § 24.1-109.

Section 24.1-168 provides, in pertinent part, as follows:

"The name of any candidate for any office other than a party nominee nominated by such method as his political party has chosen for nominating candidates shall not be printed upon any official ballots provided for the election, unless he shall file along with his notice of candidacy a petition therefor, on a form prescribed by the State Board of Elections, signed by the number of qualified voters specified below after January 1 of the year in which the election is held and listing the residence address of each such qualified voter, each signature to which has been witnessed by a person who is himself a qualified voter for the office for which he is circulating the petition and, in the case of a statewide office, is a resident of the same congressional district as the voter whose signature is witnessed, and whose affidavit to that effect appears on each page of the petition." (Emphasis added.)

The statute requires that a candidate's petition contain the residence address of each qualified voter who signs the petition but does not specifically require that the
candidate's address be listed on it.\(^1\) Section 3.02 of the Charter for the City of Richmond\(^2\) provides for nomination of candidates for council as follows:

"No primary election shall be held for the nomination of candidates for the office of councilman, and candidates shall be nominated only by petition. There shall be printed on the ballots used in the election of councilmen in each election district the names of all candidates who have been nominated for election in such district by petition and the filing of a notice of candidacy as provided herein and no others. The requirements for nomination shall be:

(a) Any qualified voter of the city may be nominated for election as councilman for the district in which he resides by filing, not later than the time fixed for the closing of the polls on the first Tuesday in March, with the clerk of the Circuit Court of the City of Richmond, Division I, a petition signed by not less than one hundred twenty-five qualified voters of the district in which such candidate resides and for which he seeks election, each signature to which has been witnessed by a person whose affidavit to that effect is attached thereto, together with a notice of candidacy required by the general laws of the Commonwealth relating to elections.

(b) The petition shall state the name and street address of the residence of the person whose name is presented thereby as a candidate, and the street address of the residence of the persons signing the same." (Emphasis added.)

A charter provision which determines the qualifications of candidates for local office, such as the above quoted section, is special legislation for the organization and government of a city and it prevails over general law in the event of a conflict between the two. See, e.g., Pierce v. Dennis, 205 Va. 478, 486, 138 S.E.2d 6 (1964); Reports of the Attorney General: 1982-1983 at 52; 1975-1976 at 52; 1970-1971 at 137; 1967-1968 at 44. Thus, although § 24.1-168 does not expressly require a candidate's petition to state his address, the petition of a candidate for city council in the City of Richmond must so state, pursuant to § 3.02 of the city charter.

You suggest in your letter that § 3.02 of the charter may no longer be applicable due to the 1980 amendment to § 24.1-95,\(^3\) as a result of which that latter section now states that the provisions of Title 24.1 "shall apply to all elections held in this Commonwealth except as is otherwise provided by general law." There is no general law of which I am aware that alters or suspends the provisions of § 24.1-168 with respect to local elections\(^4\) and it therefore applies to councilmanic elections in Richmond, pursuant to § 24.1-95. That is not to say, however, that the provisions of § 24.1-168 supplant those provisions of § 3.02 of Richmond's charter which deal with the same subject. To hold otherwise would be to find an implied repeal of § 3.02(b), because nothing in the language either of § 24.1-95 or of § 24.1-168 expressly repeals or otherwise limits § 3.02(b) or any other statute.\(^5\) Repeals by implication are not favored, and there is a presumption against a legislative intent to repeal a statute, in the absence of express terms to that effect, or where a later statute does not amend the former. Albemarle County v. Marshall, Clerk, 215 Va. 756, 761, 214 S.E.2d 146 (1975). The conflict between the two statutes must be clear and the provisions of the two so inconsistent with each other that both cannot prevail, before the prior statute will be held to be repealed or inoperative. City of Richmond v. County Board, 199 Va. 679, 685, 101 S.E.2d 641 (1958). The presumption against an intent to modify or repeal a prior statute applies with particular force in the case of general legislation enacted subsequently to special, local legislation on the same subject. Hamilton v. Commonwealth, 143 Va. 572, 577, 130 S.E. 383 (1925); City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 194-195, 96 S.E. 635 (1918).
In instances such as the present one, where a general act and a special act on the same subject apply in the same locality at the same time, and are in apparent conflict, they should be so construed, if reasonably possible, to allow both to stand and to give force and effect to each. Scott v. Lichford, 164 Va. 419, 422-423, 180 S.E. 393 (1935); Kirkpatrick v. Bd. of Supervisors, 146 Va. 113, 125, 136 S.E. 186 (1926).

I find no conflict or inconsistency between the provisions of § 24.1-168 of the Code and § 3.02 of Richmond's charter, and, because they deal with the same subject matter, they are in pari materia and should be construed together. Sobie v. Herman, 175 Va. 489, 496, 9 S.E.2d 459 (1940). In so construing them I conclude that, while a candidate's petition filed in any locality, including Richmond, must list the residence address of each qualified voter who signs it, pursuant to § 24.1-168, the petition of a prospective candidate for city council in Richmond must also state the candidate's residence address, pursuant to § 3.02(b) of the city charter. With regard to Richmond candidates, the petition requirements are cumulative, not substitutionary.

In light of the above conclusion, I return to your question concerning the legal effect of the omission of a candidate's address from his petition for candidacy as it relates to the Richmond Electoral Board's duty to forward to the State Board of Elections the names of these persons who have properly qualified as candidates for election to city council. A prior Opinion of this Office considered an almost identical question, in that candidates' petitions filed pursuant to § 24.1-168 did not list the addresses of the persons signing them, as the statute requires. The Opinion stated the view that the purpose of such a requirement "is to insure that those signing the petitions are in fact qualified voters and the accuracy of the signatures may be checked by the addresses." The Opinion went on to hold that, although the addresses were not listed, the electoral board in its discretion could consider the petitions valid and cause the candidates' names to be printed on the ballots, because the board had, in fact, determined that the signatures were those of qualified voters. See 1971-1972 Report of the Attorney General at 179.\footnote{1}

The same reasoning may be applied here in regard to the omission of a candidate's address from his petition. If the electoral board has determined that a person does, in fact, reside in the election district in which he has been nominated for election to council by petition, and that he otherwise qualifies as a candidate for such office, it may consider that person's petition as valid and forward his name to the State Board of Elections as a qualified candidate, notwithstanding the omission of the candidate's address from the petition.

\footnote{1}{I am advised that the petition form prescribed by the State Board of Elections does contain a space in which the candidate's address is to be entered.}

\footnote{2}{The present charter was enacted in Ch. 116, Acts of Assembly of 1948. Section 3.02 of the charter was amended to its present language by Ch. 112, Acts of Assembly of 1975, Ch. 633, Acts of Assembly of 1978 and Ch. 513, Acts of Assembly of 1977.}

\footnote{3}{See Ch. 639, Acts of Assembly of 1980, which added the last three words to § 24.1-95.}

\footnote{4}{Compare, e.g., § 15.1-1054, relating to the scheduling of an election for members of a city or town council after the effective date of an annexation, which is a general law that modifies the election provisions of § 24.1-90 in that given situation.}

\footnote{5}{Compare, e.g., § 24.1-165, which states that "[n]otwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, the provisions of this section shall govern special elections." See, also, § 24.1-251, the first provision of the Fair Elections Practices Act, which states that "[n]otwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, the provisions of this section shall govern special elections."}

\footnote{6}{See, also, § 24.1-251, the first provision of the Fair Elections Practices Act, which states that "[n]otwithstanding any other provision of any law, or of the charter of any city or town, to the contrary, the provisions of this section shall govern special elections."}
ELECTIONS. ELECTORAL BOARD. COUNTIES.

August 15, 1983

The Honorable James D. Blake, Secretary
Spotsylvania County Electoral Board

This is in reply to your letter requesting my opinion concerning the purchasing practices of the Spotsylvania County Administrator as they relate to a proposed purchase of equipment for the county electoral board. You state that on May 15, 1983, you requested the county administrator's approval for purchase of a copying machine, funds for which were included in the 1982-1983 budget approved by the county board of supervisors, and that the administrator subsequently responded that it is his policy not to allow any purchases during the last ninety days of the budget year. You ask the following questions which I quote:

"1. Since these funds were included in the approved 1982-83 Electoral Board Budget and unexpended, is it necessary for the Electoral Board to acquire additional approval from either the County Administrator or the Board of Supervisors for this purchase?

2. Does the County Administrator's Office have the right to usurp the authority of either the Board of Supervisors or the County Electoral Board by his personal policies in regard to purchases made in the last ninety (90) days of a budget year?

3. Does the County Attorney's opinion have any bearing, since the funds for the purchase were already included in the 1982-83 budget and approved by the Board of supervisors?

4. Is the County Electoral Board restricted by and dependent upon either the County Administrator's office or the Board of Supervisors for its responsibility in carrying out the election laws of Virginia?"

I will answer your questions seriatim.

The "executive secretary" referred to in the above quoted section is synonymous with the "county administrator." See § 15.1-115. Section 15.1-117(12) provides, in part, as follows with regard to the county administrator's purchasing function:

"To act as purchasing agent for the county; to make all purchases for the county subject to such exception as may be allowed by the governing body.

***
All purchases and sales shall be made under such rules and regulations as the governing body may by ordinance or resolution establish."

The county centralized competitive purchasing ordinance is contained in Ch. 21 of the Spotsylvania County Code. Paragraph 1 thereof appoints and designates the county administrator as the county purchasing agent. Paragraph 3 provides that the county purchasing agent "shall purchase or contract for all supplies, materials, equipment, commodities and contractual services required by all departments...." Paragraph 5 provides, in part, as follows:

"Except as otherwise provided in this ordinance, any and all supplies, materials, equipment, commodities or contractual services needed by one or more departments shall be directly purchased or contracted for by the County Purchasing Agent in accordance with the rules and regulations adopted pursuant to this Section. The County Purchasing Agent shall, subject to the approval of the Board of Supervisors, adopt, promulgate, and from time to time amend, rules and regulations for the following purposes:

(a) Prescribing the manner in which supplies, materials and equipment shall be purchased, delivered, stored and distributed;

(b) Prescribing the dates for making requisitions and estimates, the future period which they are to cover, the form in which they shall be submitted, the manner of their authentication, and their revision by the County Purchasing Agent;

(f) Providing for such other matters as may be necessary to give effect to the foregoing rules and the provisions of this ordinance." (Emphasis added.)

1. A county budget is developed for "informative and fiscal planning purposes only," and its preparation and approval by the board of supervisors is not to be considered an appropriation. See §§ 15.1-160 and 15.1-162. No money can be paid out or become available for an expenditure contemplated in the budget unless and until the board of supervisors makes an appropriation for that purpose. See § 15.1-162. The provision of funds in the budget does not impose an obligation on the board to appropriate those sums during the year. See § 58-839.

In the present case, you do not specify whether the board of supervisors has made an appropriation for purchase of your copying machine. The fact that funds for the machine were included in the budget, of itself, is not sufficient. If the required appropriation has not been made, it will be necessary for you or the county administrator to request the same from the board of supervisors. If the funds have already been appropriated, they may be expended for purchase of the machine without additional action by the board of supervisors. The purchase, however, must still conform to the county's central purchasing policy and regulations of the county administrator as purchasing agent in implementing that policy. See answers to questions numbered two and four, below.

2. I take your second question to inquire as to whether the county administrator in this instance has acted beyond the scope of his authority as purchasing agent in disallowing purchase of your copying machine in the last ninety days of the fiscal year. Section 15.1-127 provides for centralized competitive county purchasing of office equipment by the executive secretary as follows:

"The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county....Such purchasing shall be done by the executive secretary under the
supervision of the governing body of the county and shall be accomplished in accordance with Chapter 7 ($11-35 et seq.) of Title 11 of this Code."

The above quoted statutory provisions and those of the local ordinance provide broad authority for the county administrator, subject to approval of the board of supervisors, to adopt such rules and regulations as he deems necessary to carry out his function effectively as county purchasing agent under a centralized competitive purchasing ordinance. I am not advised as to whether the administrator, as purchasing agent, properly has adopted and promulgated, with board approval, a purchasing rule or regulation governing the practice to which you object. Thus, any questions in that regard should be directed to the board of supervisors itself or to the county attorney, who are more conversant with requirements of the local ordinance and local public administrative practice. In any event, I note from the photocopied materials enclosed with your letter that the county administrator does not object to purchase of a copying machine for the county registrar's office, pursuant to your request, and that the county has solicited bids for such purchase.

3. With regard to your third question, I reiterate at the outset that the inclusion of an item in the county budget, of itself, neither authorizes nor requires an expenditure of funds for the item indicated. See answer to question number one. It is the county attorney's duty to advise the board of supervisors and all boards, departments, agencies, officials and employees of the county, including the electoral board and the general registrar. See § 15.1-9.1:1; 1982-1983 Report of the Attorney General at 225. His duties include the obligation to advise the board of supervisors of any claim before it which in his opinion is illegal or not before the board in proper form and upon proper proof, or which for any other reason ought not to be allowed. See § 15.1-550. Thus, under the circumstances, the opinion of the county attorney, as legal advisor to your board, the board of supervisors and the county administrator, would have great bearing on the issue. I believe the conclusions reached by the county attorney in his memorandum on this matter, a photocopy of which was included with your letter, are sound.

4. With regard to your fourth question, the responsibility for carrying out the election laws in the conduct of elections at the local level clearly is vested by statute in the electoral board. See, e.g., Art. II, § 8, of the Constitution of Virginia (1971); Chs. 3, 5, 6 and 7 of Title 24.1. Compare Reports of the Attorney General: 1981-1982 at 154; 1972-1973 at 62; 1967-1968 at 98. The election laws also provide, however, that the county shares with the State in paying expenses of and providing necessary supplies to the electoral board and registrar. See §§ 24.1-31, 24.1-43. Prior Opinions of this Office held that while constitutional officers are not subject to the control and jurisdiction of the local governing body in carrying out the responsibilities of their offices, they may be required to purchase supplies and equipment through the local central purchasing agent. See Reports of the Attorney General: 1981-1982 at 98; 1978-1979 at 56; 1975-1976 at 62; 1974-1975 at 406. I am of the opinion that the same principle applies to a local electoral board and general registrar. Accordingly, in answer to your question, while the county electoral board is not dependent upon and may not be restricted by the county administrator or board of supervisors in carrying out its responsibilities under the election laws, it may be required to comply with the county purchasing ordinance.

1 Compare Opinion found in 1972-1973 Report of the Attorney General at 325 (general registrar is to be an employee of the locality, subject to all its rules and regulations, insofar as they do not conflict with any duties or requirements imposed by State law).
ELECTIONS. OFFICERS OF ELECTION. CANDIDATES. PARENTS OF CANDIDATE MAY SERVE AS ELECTION OFFICIALS AT ELECTION IN WHICH CANDIDATE'S NAME APPEARS ON BALLOT.

February 13, 1984

The Honorable Virgil H. Haywood, Secretary
Chesapeake Electoral Board

This is in reply to your request for my opinion whether the mother of a candidate for election to city council may serve as an officer of election in the city at an election in which the son's name will appear on the ballot, and whether the candidate's father may serve at the same time as custodian of voting machines for the city. You relate that the son does not live with his parents and would not vote in the precinct in which his mother serves.

Sections 24.1-105 and 24.1-106 of the Code of Virginia provide for the appointment of local officers of election and prescribe their qualifications. Section 24.1-209 provides for the appointment of voting machine custodians. Nothing in those Code sections, nor in any other statute of which I am aware, prohibits a member of a candidate's family from serving either as an officer of election or custodian of voting machines in an election in which the candidate's name will be on the ballot. Accordingly, your question is answered in the affirmative.

While there is no prohibition, I draw your attention to § 24.1-105.1 which provides as follows:

"A candidate may require the removal of an officer of election for the election in which he is a candidate by a request in writing, filed at least seven days before the election with the electoral board appointing the officer, on the grounds that the officer is the spouse, parent, grandparent, sibling or child of an opposing candidate. The electoral board may appoint a substitute who shall hold office and serve for that election."

Prior Opinions of this office, in considering whether a candidate's spouse may serve either as an officer of election or member of an electoral board, pointed out in each instance that, while the spouse may serve in the election post, he or she cannot use that office in any manner to favor the candidate whose name is on the ballot, and the individuals involved should take all precautions necessary to ensure that their actions are beyond question and above reproach. See 1977-1978 Report of the Attorney General at 146; 1971-1972 Report of the Attorney General at 462. I concur in the views expressed in those opinions and believe them to be equally applicable here. I am advised also that the State Board of Elections takes the position, as a matter of policy, that electoral boards should appoint alternate officers for an election in a situation such as you suggest.

1The Comprehensive Conflict of Interests Act, §§ 2.1-599 to 2.1-634, does not apply to such situations. That act is concerned with financial interests which may conflict with official duties.

2Note that this section provides a means of removal of an "officer of election" for an opposing candidate but does not address custodians of voting machines. Section 24.1-209 formerly stated that such custodians "shall be considered as election officers" but was amended to delete this language. See Ch. 30, Acts of Assembly of 1973.

3In that regard, the persons involved here should be aware of the provisions on election offenses contained in Ch. 10 of Title 24.1, particularly including §§ 24.1-167,
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relating to assistance to voters in casting ballots, and 24.1-275, relating to voting machine offenses.

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ELECTIONS. OFFICERS OF ELECTION. ELECTION DISTRICTS. OFFICER OF ELECTION MUST BE QUALIFIED VOTER OF COUNTY OR CITY BUT NEED NOT BE QUALIFIED VOTER OF PRECINCT.

February 15, 1984

The Honorable Susan H. Fitz-Hugh
Secretary, State Board of Elections

This is in reply to your request for my opinion whether an officer of election may be appointed to serve in a precinct in which he is not a qualified voter if that precinct is in his election district. You ask also what the definition of "election district" is in this instance if the answer to the first question is in the affirmative.

Article II, § 8 of the Constitution of Virginia (1971) states, inter alia, that "[t]here shall be in each county and city an electoral board" and that "[e]ach electoral board shall appoint the officers and registrars of election for its county or city." Section 24.1-105 of the Code of Virginia provides, in pertinent part, as follows:

"It shall be the duty of the electoral board of each city and county, at their regular meeting in the first seven days of the month of February each year, to appoint, in conformity with the requirements of §§ 24.1-32 and 24.1-106, not less than three competent citizens, being qualified voters, whose terms of office shall begin on the first of March following their appointment, and continue for one year or until their successors are appointed. Officers of election so appointed shall serve for all elections held in their respective districts during their terms of office...."

Nothing in the above-quoted provisions, nor in any other statute or section of the Constitution of which I am aware, expressly requires that an officer of election serve only in the precinct where he is a qualified voter. Prior Opinions of this Office, in considering this question under the same or substantially equivalent provisions of law, consistently have held that persons appointed as officers of election must be qualified voters in the county or city where they are appointed but need not be qualified voters of the precinct. See, e.g., Reports of the Attorney General: 1971-1972 at 203; 1963-1964 at 123; 1946-1947 at 70; 1932-1933 at 61. Consistent with the long standing position of this office, it is my opinion that a person is eligible to serve as an officer of election in his county or city if he is a qualified voter therein and meets the other qualifications prescribed for such officers, but he need not be a qualified voter of the precinct in which he serves.

With regard to your second question, the term "election district" is defined very broadly in § 24.1-1(4)(a) and "may be a county, city, town, magisterial district of a county, ward of a city, or precinct or combination of any of these, as may be designated by proper authority or by law, and such other districts as provided for in § 15.1-571.1 or § 24.1-36." In effect, the term takes on meaning from the context in which it is found. In the context of your inquiry, the "district" in which an officer of an election may be appointed to serve, pursuant to § 24.1-105, must be taken to mean the county or city wherein the prospective appointee is a qualified voter.
1See, e.g. 1971-1972 Report of the Attorney General at 168 ("election district" as used in §§ 24.1-37 and 24.1-39 is not the same type of "election district" provided for in § 15.1-571.1; in §§ 24.1-37 and 24.1-39 "election district" and "precinct" are synonymous and describe an area for which the residents are assigned a particular voting place).

ELECTIONS. OFFICERS OF ELECTION. POLL WATCHERS—CONTROL OVER.
OFFICERS OF ELECTION MAY CONTROL ACTIVITIES OF POLL WATCHERS AT
POLLING PLACE; MAY EXCLUDE PERSON IF NECESSARY TO PRESERVE ORDER
DURING ELECTION.

May 14, 1984

The Honorable Douglas F. Fleet, Secretary
Tazewell County Electoral Board

This is in reply to your request for my opinion concerning the permissible activities
of poll watchers at the polls on election day. You ask that I elaborate on what a poll
watcher may do at a polling place, it being unclear in § 24.1-101 of the Code of Virginia
whether a poll watcher may talk to or direct the officers of election.

Section 24.1-101 provides, in part, as follows:

"One authorized representative of each political party or independent candidate in
a general election or one authorized representative of each candidate in a primary
or special election for each registration book or each division of registration book,
who is a qualified voter of the city or county within which the polling place lies
shall be permitted to remain in the room in which the election is being conducted so
long as he does not hinder or delay a qualified voter or give, tender, or exhibit any
ballot, ticket or other campaign material to any person, or solicit or in any manner
attempt to influence any person in casting his vote, and so long as he does not
hinder or delay any officer of election or otherwise impede the orderly conduct of
the elections provided, however, that such representatives shall be not more than
three from each such political party or independent candidate.

The officers of election may require any person who is found by a majority of the
said officers present to be in violation of this section to remain outside of the
prohibited area." (Emphasis added.)

The purpose of allowing party and candidate representatives to be present within the
forty-foot "prohibited area" at a polling place during the election is to give effect to the
Report of the Attorney General at 174." Nowhere in the statute is such a representative
given the authority to direct or comment upon the work of election officials, and, indeed,
a condition of his continued presence in the room is that "he does not hinder or delay any
officer of election or otherwise impede the orderly conduct of the elections provided, however, that such representatives shall be not more than
three from each such political party or independent candidate.

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On the other hand, §§ 24.1-101 through 24.1-104 specifically confer the authority
and duty upon the officers of election to preserve order at the polling place, to exclude
persons who violate the provisions of those sections and to cause the arrest and
confine ment of any person who hinders or tampers with voters or who conducts himself
"in a noisy, riotous, or tumultuous manner at or about the polls, so as to disturb the
election or insult or abuse an officer of election...." Section 24.1-104. This statutory
responsibility carries with it the discretion to control the activities of poll watchers and others at or about the polling place. See 1972-1973 Report of the Attorney General at 163 and 174.

In answer to your inquiry, it is my opinion that a poll watcher may observe the conduct of an election at a polling place and make known in orderly fashion any objection he may have to a person voting therein, pursuant to the provision for challenge contained in § 24.1-133. It is within the discretion of the officers of election to decide whether his manner in so doing, or any other conduct in which he engages, violates any provision of §§ 24.1-101 or 24.1-104, and to take such steps as may be necessary to have him removed.

1Section 24.1-126 provides, in part, as follows: "The officer by whom any ballot is to be delivered to a voter shall, prior to the delivery thereof to the qualified voter, make inquiry and then pronounce in an audible voice the full name and current residence address as stated by the person to whom the ballot is to be delivered, and if his name is found on the registration book, and if he be qualified to vote in the election and there be no objection made, the full name and address of the elector shall be checked on the registration book by one of the officers and such full name entered on the pollbook opposite the correct number and the voter thereupon delivered the ballot." (Emphasis added.)

2Section 24.1-133 provides that "[a]ny qualified voter may, and it shall be the duty of the officers of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."

The 1972 Opinion concerned the validity of a ruling of the State Board of Elections that § 24.1-101, as it was then written, did not prohibit each party or independent candidate from having a poll watcher within forty feet of a polling place. The Opinion states that the State Board's interpretation of the statute was correct and "would ensure that individuals are present who on sight would know that a putative voter is not whom he represents himself to be and who would interpose a challenge to prevent an unqualified person from receiving a ballot. Not only is a possible challenge of identity by qualified voters within the polling place a deterrent to such a practice, the regulation ensures some meaning to the requirement of announcing the names of electors by the officer of election." 1972-1973 Report of the Attorney General at 175. Thereafter § 24.1-101 was amended to include the language quoted in the text above, specifically allowing party and candidate representatives to be present at polling places and authorizing the officers of election to exclude any person found to be in violation of the section. See Ch. 30, Acts of Assembly of 1973.

ELECTIONS. REFERENDUM. COUNTIES. POLICE OFFICERS.

August 15, 1983

The Honorable John H. Tate, Jr.
County Attorney for Smyth County

This is in reply to your request for my opinion whether it would be proper to hold a referendum of the Smyth County voters in the November, 1984 election on the question of whether the county police force should be eliminated, pursuant to recently enacted § 15.1-131.6:1 of the Code of Virginia. You state that the county police force was organized prior to the effective date of § 15.1-131.6:1 and has been in existence for approximately two years.
Section 24.1-165 provides that "[n]o referendum shall be placed on the ballot, unless specifically authorized by statute..." This Office consistently has held that, absent specific statutory authority, a referendum may not be held to take the sense of the people on a local issue. See, e.g., Reports of the Attorney General 1978-1979 at 72 and 1976-1977 at 73. Section 15.1-131.6:1 provides authority for a referendum as follows:

"Any county which does not presently have a police force shall not establish one until the voters of such county have approved establishment of a police force by majority vote in a referendum held for such purpose and the General Assembly enacts appropriate authorizing legislation. Also, any county which was previously authorized by the General Assembly to have a police force but has not as yet established one will be required to have its operation approved in a referendum...." (Emphasis added.)

Section 15.1-131.6:1, by its express terms, applies only to a county which has not yet established a police force and requires approval of the voters of such county by majority vote in a referendum before county authorities in each instance can take subsequent steps to establish a police force. In my opinion, the statute does not supply the required specific authority for a referendum on the question of elimination of an existing county police force. Accordingly, your question is answered in the negative.

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ELECTIONS. REGISTRARS. VOTER REGISTRATION. PUBLIC PLACES.

September 26, 1983

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your request for my opinion whether the home of an assistant registrar within Prince William County, held open to the general public for the purpose of registering voters, may be considered a "public place" under the voter registration provisions of the election laws.

Section 24.1-46(1) of the Code of Virginia provides, in part, that it shall be the duty of the general registrar to "[m]aintain the public office provided by the local governing body and to establish and maintain such additional public offices for the registration of voters as are designated by the electoral board..." (Emphasis added.) Section 24.1-49, relating to the registrar's time and place of sitting on final registration day, permits the general registrar or the electoral board to "set other times and places in public places for registration." (Emphasis added.)

The terms "public offices" and "public places" for election law purposes have not been statutorily defined. A prior opinion of this Office holds that the place where a registrar sits must be open and accessible to the general public and "cannot be closed only to a special group or class of individuals." See 1971-1972 Report of the Attorney General at 190. More recently, I opined that the term "public places" as used in § 24.1-49 is not limited to government buildings or facilities, but should be broadly construed so as to promote ready access to the public for the registration of voters. See 1982-1983 Report of the Attorney General at 244.

It is instructive to note that the requirement that places of voter registration be public was first placed in the elections laws in the 1970 recodification of Title 24 into Title 24.1.2 It is said that the purpose of the requirement is to make registrars more accessible to the public and to encourage new voter registration; under the old system many registrars were unavailable because they kept their offices in their homes and had
no regular hours for registration. See Widener, A Survey of Election Law Reform in Virginia, 12 Wm. & Mary L. Rev. 333, 343-344 (1970). Clearly, the opportunities for discriminatory abuses are greater, and the permission given the public to go there without invitation and without restraint less evident, in a place of registration which usually, and for all other purposes, is a private home.

Taking all of the above into consideration, I am of the opinion that the home of an assistant registrar may not be considered a "public office" or "public place" for the registration of voters as contemplated in §§ 24.1-46(1) and 24.1-49.3.  

1 "Public place" is defined, generally, as follows: "A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public.... A place exposed to the public, and where the public gather together or pass to and fro." Black's Law Dictionary 1107 (rev. 5th ed. 1979).

2 The "public office" requirement in § 24.1-46(1), quoted above, was enacted in the 1970 recodification. See Ch. 462, Acts of Assembly of 1970. The "public place" language of § 24.1-49, also quoted above, was first enacted as "public buildings" in Ch. 515, Acts of Assembly of 1975, and afterwards was amended to its present state by Ch. 616, Acts of Assembly of 1976.

3 I am advised by the Secretary of the State Board of Elections that one of the assistant registrars of the county formerly issued business cards which stated that persons may register to vote in her home "by appointment." This is an indication that such a place is not, in fact, readily accessible to the public as required by law.

ELECTIONS. REGISTRATION. APPLICATION. NO PROHIBITION AGAINST DUPLICATION OF VOTER REGISTRATION APPLICATION FORM; REGISTRATION INFORMATION MUST BE ON OFFICIAL FORM COMPLETED IN PRESENCE OF REGISTRAR.

November 29, 1983

The Honorable Theodore V. Morrison, Jr.
Member, House of Delegates

This is in reply to your request for my opinion whether there is any prohibition against duplication in newspapers or other similar periodicals of a blank application to register to vote used by registrars in Virginia.

I am unaware of any prohibition in law against duplication of a voter registration application as you suggest. Lest there be misunderstanding as to the use of such facsimiles, however, I bring to your attention Art. II, § 2 of the Constitution of Virginia (1971), relating to registration of voters, which provides, in part, that "[e]xcept as otherwise provided in this Constitution, all applications to register shall be completed in person before the registrar and by or at the direction of the applicant and signed by the applicant, unless physically disabled." (Emphasis added.) Section 24.1-22 of the Code of Virginia directs the State Board of Elections to "prepare appropriate forms...for the registration...of voters which shall be used throughout the Commonwealth...." Section 24.1-27(1) directs the Board "[t]o prescribe and require the use of a standard form or forms for applications to vote throughout the Commonwealth." Section 24.1-46(2) makes it the duty of each general registrar to [p]rovide the appropriate forms for application to...
register...." Finally, § 24.1-48 provides that "[t]he application to register shall be only upon a form or forms prescribed by the State Board of Elections." (Emphasis added.)

While no law prevents duplication of blank voter registration applications in newspapers and other periodicals, I am of the opinion that a person registering to vote nevertheless must complete the application in person before the registrar, unless he fits into a category of persons allowed to register by absentee application pursuant to § 24.1-48, and the application itself must be on the form prescribed by the State Board of Elections and provided by the appropriate registrar. I am advised that the State Board of Elections requires the application information to be placed only upon an official form, in accordance with the express words of § 24.1-48, and that registrars may not accept the information on facsimiles of an official form.  

1 Article II, § 4 provides, in part, that: "[t]he General Assembly may provide for registration...by absentee application...for members of the Armed Forces of the United States in active service, persons residing temporarily outside of the United States by virtue of their employment, and their spouses and dependents residing with such persons, who are otherwise qualified to vote...." The General Assembly has so provided in § 24.1-48 of the Code of Virginia. See, also, § 24.1-49.1, relating to registration of an ill or disabled person at his home.

I am advised also that the Board requires any official form which will be reproduced for informational, educational or other unofficial purposes to be first stamped "void" or "sample."

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ELECTIONS. REGISTRATION. BOOKS. PURGES. NOTICE. STATE BOARD OF ELECTIONS HAS DISCRETION TO NOTIFY BY MAIL PERSONS WHOSE NAMES MAY BE PURGED FROM VOTER REGISTRATION RECORDS FOR FAILURE TO VOTE; NEW § 24.1-22.1 WILL REQUIRE SUCH NOTICE; VOTER TO RECEIVE NOTICE BEFORE AND AFTER PURGE.

April 9, 1984

The Honorable Gwendalyn F. Cody  
Member, House of Delegates

This is in reply to your inquiry concerning the election laws which govern the purging from voter registration books of the names of persons who have not voted during four consecutive calendar years. You relate that prior to the November 1983 election the State Board of Elections (the "Board") mailed 50,000 postcards to such persons, notifying them that their names would be purged if they did not vote in that election. You refer to § 24.1-59 of the Code of Virginia, which requires notice by mail to voters after their names are purged, and to Senate Bill 27, introduced in the 1984 Regular Session of the General Assembly, which would require the Board to notify voters whose names may be purged prior to each November general election. You ask my opinion on the following questions:

1. "Was the State Board of Elections authorized to send these notices two weeks to ten days before the November 1983 elections?"

2. "What effect would Senate Bill 27, if passed, have upon § 24.1-59? This section states that notice is after the voter's name is purged and Senate Bill 27 will allow notice before purging."
3. "Does this mean that the voter will get two notices; one before being purged and one after being purged?"

4. "Does Senate Bill 27 override the need for notice provided in § 24.1-59?"

The Board is established to provide overall supervision and coordination of election activities throughout the Commonwealth, to the end of obtaining uniformity in local election practices and proceedings and legality and purity in all elections. See, generally, § 24.1-19 et seq. The Board is given wide discretion in carrying out its administrative responsibilities to establish a central record-keeping system for voter registration, to provide for uniform registration procedures and records maintenance throughout the Commonwealth and to require periodic purges of the registration books and records in the localities, pursuant to law. See, e.g., §§ 24.1-20, 24.1-22, 24.1-23 et seq.¹ In my opinion, it was within the Board's discretion to mail the notices to which you refer, in an attempt to encourage voters to maintain their present registrations by voting in the November elections and thereby to minimize the public costs involved in purges and re-registrations to the extent possible. Nothing in the law prohibits the Board from so doing, nor does § 24.1-59 place any limitation on the Board's discretion in this regard. The purpose of that section is to impose a duty upon the local general registrar to notify each voter whose name is actually purged and not to prevent pre-purge notice. Accordingly, your first question is answered in the affirmative.

In answer to your second question, the provisions of Senate Bill 27 do not affect the notice requirement of § 24.1-59. As discussed above, § 24.1-59 directs a general registrar to send notice by mail to each voter whose name is purged for not having voted at least once during four consecutive calendar years; it does not limit or even address the duties and authority of the Board. Senate Bill 27, on the other hand, proposes to add a new § 24.1-22.1 to require the Board to notify in advance each registered voter whose name might be purged if he fails to vote in an upcoming November general election. Thus, it would impose upon the Board a duty to do that which it presently has the discretion to either do or not do.

In light of the above, it is clear that the voter, who does not vote after receiving the initial pre-purge notice, will receive two notices. Accordingly, your third question must be answered in the affirmative.

With regard to your fourth question, new § 24.1-22.1, as proposed in Senate Bill 27, would not override the need for the notice required by § 24.1-59.

This is in reply to your request that this Office respond to the following questions:

1. May the Secretary of the State Board of Elections seek private sector donations for voter registration purposes?

2. May the Commission to Increase Voter Registration in Virginia seek private sector donations for voter registration purposes?

With regard to question number one, it is generally held that grants of authority to a public officer are strictly construed, in that he has only those powers expressly conferred by statute or necessarily implied from such express powers. See 63 Am.Jur.2d Public Officers and Employees § 263 (1972); 67 C.J.S. Officers and Public Employees § 190 (1978); 15 M.J. Public Officers, § 46 (1979 Repl. Vol.). I have examined Code provisions specifying the powers and duties of the State Board of Elections and its Secretary with respect to voter registration and have found nothing therein which expressly or impliedly directs or authorizes the Secretary to seek private donations for voter registration purposes. I conclude that, under the elections laws, solicitation of private donations is not included among the powers or duties of the Secretary of the State Board of Elections.

I draw your attention, however, to the Appropriations Act for the 1982-1984 biennium, Ch. 684, Acts of Assembly of 1982, which provides, in § 4-1.05b.3, concerning unappropriated nongeneral fund revenue, as follows:

"(a) With the prior written approval of the Governor any state agency may expend, in addition to the appropriation herein made to it, any money, revenue or funds paid into the state treasury to its credit, in excess of such appropriations as proceeds of donations, gifts, federal grants, or other nongeneral fund revenues when later developments are believed to make such expenditure necessary. The Governor or his designee may issue policies in writing for approval procedures which allow state agencies under his direction to expend such additional nongeneral funds, but such agencies shall not expend in excess of ten percent above appropriated amounts of such nongeneral funds without the prior approval of the Governor. However, it shall be incumbent on each state agency to ensure that every reasonable estimate of receipts from donations, gifts or other nongeneral fund revenues are included in their budget estimates. Such expenditures from any gift, grant or donation shall be in accordance with the purpose for which it was made; however, expenditures for property, plant or equipment, irrespective of fund source, are subject to the provisions of §§ 4-4.01 and 4-5.05b. of this act.

(b) No expenditure shall be made from such funds until a revised budget request is submitted to and approved by the Governor. The request shall be prepared in such a manner as the Governor may prescribe." (Emphasis added.)

Section 4-2.01a. of the Appropriations Act provides, in part, as follows:

"1. No donations, gifts, grants or contracts whether or not entailing commitments as to the expenditure, or subsequent request for appropriation or expenditure, from the general fund shall be solicited or accepted by or on behalf of any state agency without the prior written approval of the Governor. Provided, however, that the Governor or his designee may issue policies in writing for approval procedures which:

(a) Allow state agencies to solicit and accept on the authority of the agency head nongeneral funds within the amounts appropriated to the agency for such funds...." (Emphasis added.)
I note that no appropriation has been made to the State Board of Elections from nongeneral fund sources for this biennium. Taking that circumstance into consideration, and reading the above quoted provisions together, I conclude that the Secretary of the State Board of Elections may solicit and expend private donations for voter registration purposes only with the prior written approval of the Governor, upon submission and approval of a revised budget request.

With regard to your second question, the Governor's Executive Order Number Thirty-Seven, which creates the Commission, prescribes its duties as follows:

"The Commission shall:

1. Examine the registration patterns of voters and the practices of registrars across the state.

2. Develop and make recommendations to increase the number of registered voters and participants from all segments of Virginia's population.

3. Report interim findings to the Governor not later than December 1, 1983 and make its final report to the Governor not later than December 1, 1984."

The Commission is charged with those duties specified in the Executive Order, and, although the Governor could have placed other or additional duties in his Order, he did not do so. Because the Order does not specify solicitation of private donations in the Governor's charge, nor is such a duty implied from those which are expressly listed, in my opinion such activity would be beyond the Commission's scope. Accordingly, although there is no law of which I am aware which would prohibit solicitation of private donations for voter registration purposes, members of the Commission who do so would be acting as private individuals.

1The position of Secretary, as a member of the State Board of Elections, meets the enunciated criteria for a "public office" as a position created by the Constitution or statutes, filled by election or appointment, with a designation or title, duties concerning the public assigned by law, and a fixed term of office. See § 24.1-18 et seq. of the Code of Virginia; 1977-1978 Report of the Attorney General at 322.

2See, e.g., § 24.1-19 (Board to so supervise and coordinate work of electoral boards and registrars as to obtain uniformity in their practices and proceedings); § 24.1-20 (Board to require periodic purging of registration books); § 24.1-22 (Board to prepare and distribute forms for voter registration for use throughout the Commonwealth); §§ 24.1-23 to 24.1-28 (establishment, operation and maintenance of central record-keeping system for voter registrations); § 24.1-35 (voter registration information to be submitted to the Board); § 24.1-48 (application to register to vote to be only upon a form prescribed by the Board); § 24.1-54 (county and city voter registration records to be maintained in books and systems approved by the Board).

3Note that the power and duty to actually register voters is given to the registrar in each county and city, pursuant to § 24.1-46 et seq. Section 24.1-46(1) specifically provides that "no registrar shall actively solicit any application for registration...."

4Note, however, that such solicitations may be governed by Virginia Code provisions relating to solicitation of contributions. See § 57-48 et seq.

ESTATES. SMALL ESTATE AFFIDAVIT PRESENTED BY SUCCESSOR TO THIRD PARTY DEBTOR.
You have asked several questions concerning the Virginia Small Estate Act (the "Act"), § 64.1-132.1 et seq. of the Code of Virginia.

First, you ask for the definition of "successor." Section 64.1-132.1 sets forth this definition.

"For the purposes of this article, the term 'successor' means a person, other than a creditor, who is entitled to property, other than real property, of a decedent under the will of the decedent or by intestate succession."

Second, you ask whether §§ 64.1-1 and 64.1-11 apply in determining who is a "successor." As stated in § 64.1-132.1, a successor may be one who is entitled to property by intestate succession. Section 64.1-11 contains the rules of distribution of personalty in intestate succession. Section 64.1-11 incorporates by reference the § 64.1-1 rules for descent of realty in intestate succession. Therefore, these sections necessarily must be consulted in order to determine who is a successor when a person dies intestate.

Third, you ask for an interpretation of the language set out in § 64.1-132.2 which requires presentation of an affidavit "made by or on behalf of the successor." One must examine the phrase in context. Section 64.1-132.2 states:

"[A]ny person indebted to the decedent...may make payment... to a person claiming to be the successor...upon being presented an affidavit made by or on behalf of the successor stating that:

1. The value of the entire personal probate estate, wherever located, does not exceed five thousand dollars;

2. At least sixty days have elapsed since the death of the decedent;

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

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

5. The claiming successor is entitled to payment or delivery of the property, and the basis upon which such entitlement is claimed." (Emphasis added.)

An affidavit is a written statement given under oath which is a declaration of what is known to the party making the statement. See Fayette Land Co. v. Louisville & N.R. Co., 93 Va. 274, 24 S.E. 1016 (1896). Any person with knowledge of all the above facts who is willing to swear thereto may present an affidavit to a third party who is indebted to the decedent or has possession of tangible personal property or evidence of intangible personal property of the decedent and demand that payment or delivery be made to the claiming successor. Whether the affidavit is presented by the claiming successor or on his behalf, payment or delivery is to be made to "a person claiming to be the successor...." Section 64.1-132.2.

Fourth, you ask whether an affidavit may be filed by a successor in the fourth category of heirs listed in § 64.1-1 if there are also successors in the third, second or
first categories. A debtor "is not required to...inquire into the truth of any statement in the affidavit." Section 64.1-132.3. Thus, if a successor in the fourth category is willing to state under oath the facts required in the affidavit, the debtor is under no obligation to question his entitlement. The debtor may pay or deliver the property to the claiming successor and will be "discharged and released to the same extent as if he dealt with a personal representative of the decedent." Section 64.1-132.3. This procedure was designed to encourage debtors to transfer property upon the request of successors in order to reduce the costs that would be incurred if normal procedures for the administration of decedents' estates were required. See Johnson, Wills, Trusts, and Estates, 68 Va. L. Rev. 521 (1982).

It is my opinion, therefore, that an affidavit may be presented by a successor in the fourth category of heirs if there are also successors in the third, second or first categories. Upon payment or delivery of the property to a claiming successor in the fourth category, the debtor is discharged.

Your fifth question asks whether the last sentence of § 64.1-132.3 permits presentation of an affidavit by anyone claiming to be an heir. In my answer to your third question, I stated that anyone willing to swear under oath to the required statements may present an affidavit. The last sentence of § 64.1-132.3 states that "[a]ny person to whom payment [or] delivery...has been made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right." This ensures that in the situation presented in your fourth question, the successor with the highest priority can, upon proof of his superior right, recover payment of property from the one who received it from the debtor.

Finally, you ask whether, when a testator leaves his residuary personal estate to his wife and two children in equal shares, an affidavit may be presented by the wife alone or one of the children alone. You indicated that the children were adults. Also, the affidavit would be presented in the name of the one presenting it as the claiming successor, and not on behalf of all three parties as the claiming successors. In my answer to your third question, I stated that an affidavit may be presented by anyone claiming to be a successor. Thus, it is my opinion that the wife alone or one of the children alone may present an affidavit to a third party and demand that payment or delivery be made to the claiming successor stated in the affidavit. After payment is received, any dispute among the successors as to entitlement must then be settled as provided by the last sentence of § 64.1-132.3 discussed in the answer to your fifth question.

1 An affidavit is "presented" (§ 64.1-132.2(A)) or "delivered" (§ 64.1-132.3) to the third party rather than "filed" in the clerk's records. See 1982-1983 Report of the Attorney General at 86.

2 If, however, the debtor chooses to question the truth of any statement in the affidavit, he may refuse to pay or deliver the property. The claiming successor may then bring a proceeding before a court to prove his rightful claim and compel the debtor to pay the money or deliver the property. Section 64.1-132.3.

ESCHEATS. LIEN ON REAL PROPERTY FOR UNPAID PROPERTY TAXES REMAINS LIEN ON PROPERTY IN HANDS OF PURCHASER AT ESCHATE SALE TO EXTENT NOT PAID FROM NET PROCEEDS OF SUCH SALE.
August 31, 1983

The Honorable Gordon E. Peters
Treasurer for the City of Roanoke

You have asked whether a lien on real property for unpaid property taxes remains a lien on the property in the hands of the purchaser at an escheat sale.

This Office has previously answered this question in the affirmative in an Opinion found in the 1967-1968 Report of the Attorney General at 112. For the reasons set forth below I concur with the holding in the earlier Opinion.

Section 58-1023 of the Code of Virginia states in part: "There shall be a lien upon all real estate for the taxes assessed and county, district, city and town levies assessed thereon, prior to any other lien or encumbrance thereon." Section 58-762 also addresses the subject of liens for unpaid property taxes as follows:

"There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance thereon. The lien shall continue to be such prior lien until actual payment shall have been made to the proper officer of the taxing authority."

After a twenty-year period of delinquency, however, such liens are deemed to have expired and are to be cancelled. Section 58-767.

Upon a finding in accordance with statutory procedures that land has escheated, "[t]he state, of course, takes the land subject to any liens created by the owner, and also to any valid debt contracted by him." Sands v. Lynham, 68 Va. (27 Gratt.) 291 (1876). Thus, if a lien for unpaid property taxes existed before the property escheated to the Commonwealth, that lien remains with the land when it is held by the Commonwealth.

The Commonwealth can give no better title to escheated lands than that which it possesses. Without specific statutory authority providing otherwise, it follows that the purchaser at an escheat sale takes title subject to the property tax lien. Title is passed by a grant, without warranty, from the Governor under § 55-186.1.

Section 55-200(B) establishes the right of localities with a property tax lien to have that lien paid out of the proceeds, after various other expenses are paid, to the extent of the funds generated by the escheat sale. This section, however, does not provide that the lien be extinguished where it is not fully satisfied out of the net proceeds of sale. I am not aware of any other Code section which would operate to extinguish the lien.

It is, therefore, my opinion that a lien on real property for unpaid property taxes remains a lien on the property in the hands of the purchaser at an escheat sale to the extent that the tax debt has not been paid from the net proceeds of the sale pursuant to § 55-200(B). This result is subject to the limitation that any lien for real estate taxes delinquent for twenty years or more would be deemed to have expired in accordance with § 58-767.

1Compare with statutes dealing with the sale of land for delinquent taxes under § 58-1117.3. This section states that the character of the title passed shall be governed by the general rules applicable to purchases at judicial sales. Section 8.01-98, contained in Ch. 3, Actions, Art. 11, General Provisions for Judicial Sales, under Title 8.01, specifically sets out circumstances under which the lien may be marked satisfied in the landbooks even though it has not been paid in full.
EVIDENCE. DESTRUCTION IN CRIMINAL CASES.

July 27, 1983

The Honorable Fred W. Bateman, Chief Judge
Seventh Judicial Circuit

This is in reply to your request for my opinion whether evidence and exhibits in completed criminal cases may be destroyed.

Section 17-47.4 of the Code of Virginia provides for the destruction of documentary evidence in criminal cases which have been ended for a period of three years or longer:

"The clerk of a circuit court may cause any or all ended records, papers, or documents pertaining to law, chancery, and criminal cases which have been ended for a period of three years or longer to be destroyed if such records, papers, or documents no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been microfilmed. Such microfilm and microphotographic process and equipment shall meet state archival standards and such microfilm shall be placed in conveniently accessible files and provisions made for examining and using same. The clerk shall further provide security negative microfilm copies of such ended cases for storage in the Archives and Records Division of the Virginia State Library." (Emphasis added.)

Section 18.2-253 provides for the disposal of seized controlled substances after all rights of appeal have been exhausted, and § 18.2-310 provides for the forfeiture and disposition of weapons used in the commission of criminal offenses after conviction.

With respect to other real evidence, I am unaware of any statutory provision or Rule of Court which authorizes destruction.

I recognize storage of physical evidence places a burden on the courts, but our criminal justice system requires that evidence be reasonably preserved to allow the Commonwealth to retry a defendant, should a new trial be granted. If such evidence is to be destroyed, it should be pursuant to clear legislative authorization.

EXECUTORS AND ADMINISTRATORS. "PERSONAL REPRESENTATIVE" FOR PURPOSES OF § 64.1-57.1 DOES NOT INCLUDE ADMINISTRATORS OF INTESTATE ESTATE.

April 18, 1984

The Honorable Gerald A. Gibson, Clerk
Circuit Court for the City of Danville

You have asked for an interpretation of the meaning of the words "personal representative" as used in § 64.1-57.1 of the Code of Virginia. More specifically, you have asked whether the words "personal representative" as used in this statutory section apply to an administrator of an intestate estate or are limited to personal representatives of a decedent who died testate.
The ordinary meaning of the words "personal representative" encompasses executors nominated by the decedent in a will and administrators, whether or not there be a will. See Brent v. Washington's adm'r., 59 Va. (18 Gratt.) 526, 529 (1868) and § 1-13.21 of the Code. The primary sense of these words, however, may be limited or altered where an intention is clearly indicated by the context in which the words are used to employ the words in a different sense. Brent v. Washington's, adm'r., supra, at 530. The analysis of § 64.1-57.1 set forth below demonstrates clearly that the words, "personal representative," as used in this section, are limited to personal representatives of a decedent who died testate.

In relevant part, § 64.1-57.1 provides:

"Upon motion of a personal representative to the circuit court in which he is qualified, such circuit court may grant to the...personal representatives...all or a part of such powers as may be incorporated by reference pursuant to § 64.1-57.

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The court may, in granting or withholding such powers, take into consideration whether the personal representative was nominated by the decedent or by the beneficiaries....

***

In no case shall any power or powers be granted hereunder by any court, if the grant of such power as [or] powers would be contrary to the intention of the testator or implied from or as expressed in the will or would otherwise be inconsistent with the disposition therein made."

The last paragraph of § 64.1-57.1 quoted above sets forth parameters within which the courts may grant the power or powers thereunder. The grant of power(s) must be consistent with the intention of the testator as expressed or implied in the will. The language of this paragraph evidences a clear legislative intention to limit the application of § 64.1-57.1 to situations where a will exists.

Following the well-established rule of statutory construction that a statute will be construed as a whole so as to avoid incongruous results, the references to "personal representative" throughout § 64.1-57.1 must be read in light of the limitations of the last paragraph. In particular, the phrase "a personal representative...nominated by...the beneficiaries," appearing in the third paragraph of this section, would then necessarily be limited to those persons denominated by will to take property and who, pursuant to § 64.1-116, may nominate a designee to serve as administrator with will annexed.

This narrower reading of § 64.1-57.1 is supported when the placement of the statute within Title 64.1 is considered. Section 64.1-57.1 appears in Ch. 3, Art. 1 of this title. The chapter is entitled "Wills"; emphasis is on matters pertaining to wills (e.g., Art. 1 -- requisites and execution of wills; Art. 2 -- revocation; Art. 3 -- construction and effect).

Based on the foregoing, it is my opinion that the words "personal representative" as used in § 64.1-57.1 are limited to personal representatives of a decedent who dies testate, i.e., an executor nominated by will or an administrator with will annexed designated pursuant to § 64.1-116.

September 27, 1983

The Honorable Jesse D. Clift, Clerk
Circuit Court of the City of Martinsville

You have asked under what circumstances the Commonwealth is exempt from paying fees pursuant to § 14.1-87 of the Code of Virginia.

Section 14.1-87 provides in pertinent part: "[n]o clerk...shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute." (Emphasis added.) The language of this section clearly states that the Commonwealth shall not be liable for fees for services in cases brought by the Commonwealth. This is the general rule. Exceptions to this rule may be made only by legislative action which specifically indicates that the Commonwealth is required to pay a fee. For example, § 14.1-112 sets out the fees to be charged by clerks of circuit courts generally. There is nothing in that section which authorizes the collection of a fee from the Commonwealth. Therefore, in the absence of specific statutory authorization, the clerks are not authorized to collect a fee in cases of the Commonwealth. This has been the consistent view of this Office in interpreting § 14.1-87. See 1978-1979 Report of the Attorney General at 100; 1974-1975 Report of the Attorney General at 72.

August 2, 1983

The Honorable Charles W. Jackson
Sheriff for Westmoreland County

This is in reply to your request for an opinion regarding the decision of the Consolidated Laboratory Services Advisory Board to charge a service fee to law enforcement agencies for the development of film, using equipment purchased through a grant from the Law Enforcement Assistance Administration. You inquire whether a State agency may charge a user or service fee to law enforcement agencies for the use of equipment purchased under a federal grant.

While it is possible for federal agencies to impose conditions, such as prohibiting user or service fees, upon the use of instruments purchased through federal funding, each grant must be individually considered to determine if such conditions exist. In addition, federal law itself may impose such conditions. With respect to the specific grant for the photo processing equipment, the grant is silent as to user fees. The original grant, however, did provide for operational expenses for the first year. I find no provision of federal law which imposes any conditions or restrictions upon this grant which would prohibit the charging of such fees.

You also ask whether the State agency has authority to collect user or service fees from law enforcement agencies. The Department of General Services, under which the Division of Consolidated Laboratory Services operates, is authorized by § 2.1-242(5) of the Code of Virginia to establish fees which may be collected from users of services rendered by the Department where general fund appropriations are not applicable to the
service. I am advised that the service charge concerning this photo processing equipment is to become effective July 1, 1984, and then, only if the General Assembly fails to appropriate funds from the general fund to continue operation of the photo processing equipment together with related expenses.

I, therefore, am of the opinion that, subject to the foregoing condition, a user or service fee may be charged to law enforcement agencies by the Division of Consolidated Laboratory Services, even though the equipment itself was purchased under a grant from the Law Enforcement Assistance Administration.

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Section 2.1-424 provides in part: "The Department [of General Services] shall have the following general powers, all of which, with the approval of the Director of the Department, may be exercised by a division of the Department with respect to matters assigned to that division:

* * *

5. Establish fee schedules which may be collectible from users when general fund appropriations are not applicable to the services rendered...."

FEES. OFFICER SERVING NOTICE OF DOCKETED APPEAL UNDER § 16.1-112 ENTITLED TO FEE UNDER § 14.1-105(1).

September 26, 1983

The Honorable Fred E. Martin, Jr., Judge
Norfolk General District Court

This is in response to your inquiry whether the $5.00 fee authorized to serving officers by § 14.1-105(1) of the Code of Virginia may be charged for service under § 16.1-112 of a notice that an appeal has been docketed in the circuit court by the circuit court clerk.

Under § 16.1-112, a party appealing from a judgment of a general district court must file an appeal bond, the circuit court writ tax, and other costs with the clerk of the general district court. The clerk is required to promptly transmit them, along with all pleadings, exhibits and other papers in the case, to the clerk of the circuit court. Upon receipt of these materials the case is docketed in the circuit court.

The second paragraph of § 16.1-112 further provides: "When such case has been docketed, the clerk of such [circuit] court shall by writing to be served...notify the appellee or his attorney that such an appeal has been docketed in his office...." Your inquiry is whether the $5.00 fee provided in § 14.1-105(1) may be charged for service of this notice, and specifically whether it is prohibited by the last sentence of § 14.1-105, which provides that "[s]uch fees shall be allowable only for services provided by such officers in the circuit courts."

In my opinion, officers serving the notices required by § 16.1-112 are providing services "in the circuit court," and are, therefore, not prohibited from collecting a fee under the last sentence of § 14.1-105. The service of such a notice is made in fulfillment of a responsibility of the circuit court clerk, and is made after the case has been removed from the general district court and docketed in circuit court.

This conclusion is not affected by the doctrine that the jurisdiction of the circuit court in such appealed cases is derivative and is limited to that of the court in which the
matter was originally instituted. See Addison v. Salyer, 185 Va. 644, 40 S.E.2d 260 (1946). The question presented here is not one of jurisdiction, but one of legislative intent regarding the allowance of fees to officers serving papers.

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Section 14.1-105(1) provides, in pertinent part: "The fees shall be as follows: (1) For service...[of an] order, notice, summons or any other civil process...the sum of five dollars."

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FEES. SECTION 14.1-94 REQUIRES RECOVERY OF ACTUAL EXPENSES INCURRED IN ADVERTISING SALE PURSUANT TO WRIT OF FIERI FACIAS.

September 28, 1983

The Honorable John R. Newhart
Sheriff of the City of Chesapeake

You have asked whether § 14.1-94 of the Code of Virginia requires recovery of the actual costs incurred in advertising a sale by a sheriff pursuant to a levy under a writ of fieri facias, or if there is a set fee or a formula on which the sheriff may recover such expense.

Section 14.1-94 provides as follows:

"In any case in which such officer makes a levy and advertises property for sale and by reason of a settlement between the parties to the claim or suit the officer is not permitted to sell under such levy, such officer shall not be entitled to any commissions, but shall in addition to his fees for making the levy and return and the fee provided by § 14.1-95, be entitled to recover from the party for whom the services were performed the expenses incurred by such officer in and about the advertisement of the proposed sale of the property."

The statute expressly provides that the sheriff is entitled to recover from the party for whom the services were performed the expenses incurred by such officer in and about the advertisement of the proposed sale of the property. The language of this statute indicates that reimbursement for advertising is to be based on "expenses incurred" in the particular advertisement rather than a minimum, maximum or average expense. Determination of the amount incurred would be made by the officer incurring the advertising expense.

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FEES. SERVICE OF SUBPOENA IN CRIMINAL CASE. FEES SET BY § 14.1-111.

August 11, 1983

The Honorable Harry O. Tinsley
Sheriff of Madison County

This is in regard to your recent letter requesting my opinion regarding the applicable fee for service of a subpoena on behalf of a defendant in a criminal case. You ask whether the fee would be determined by §§ 14.1-105 or 14.1-111 of the Code of Virginia.
Section 14.1-105 deals with process and service fees generally. Subsection (1) of that section refers to civil process. Section 14.1-111 specifically applies to the fees and allowances authorized for sheriffs in criminal cases in the circuit court. Under the clear language of the statutes, the fee to be charged by your office for serving a subpoena in behalf of the defendant in a criminal case is governed by § 14.1-111.

FEES. SHERIFFS MAY NOT COLLECT FEES FOR SERVICES COVERED BY § 14.1-105, WHEN SERVICES RENDERED IN GENERAL DISTRICT COURTS, WHETHER IN THEIR JURISDICTION OR NOT.

September 8, 1983

The Honorable Lynn C. Armentrout
Sheriff of Warren County

You have asked whether sheriffs are to collect and report fees for serving various papers. Your inquiry concerned two general types of papers served by sheriffs' departments: papers in general district court civil proceedings and notices required to be served before legal action can be initiated.

You specifically mentioned summonses, levies, and notices of liens of fieri facias in the general district courts. Section 14.1-105 of the Code of Virginia deals with fees for sheriffs' services generally. Paragraph (1) of the section provides the fee for serving most civil process, including summonses and notices. Paragraph (8) provides the fee for levying on property. The last sentence of the section, however, provides: "Such fees shall be allowable only for services provided by such officers in the circuit courts." Accordingly, I am of the opinion that sheriffs may not collect fees for these services in general district courts, whether in their jurisdiction or not.

Earlier opinions of prior Attorneys General likewise have ruled that sheriffs are not to collect fees for services covered by § 14.1-105 when those services are rendered in general district courts. See, e.g., 1975-1976 Report of the Attorney General at 322. In an Opinion to the Honorable A. S. White, Sheriff of York County, dated July 26, 1983, I concluded that the fee specified in § 14.1-105 for service of a notice of lien of fieri facias is not applicable to service of such a notice based upon a judgment of a general district court. I adhere to these earlier opinions in concluding that sheriffs may not collect fees for the services you mentioned in the general district courts.

With respect to notices required to be served before some legal action can be initiated, § 14.1-69 requires sheriffs to "continue to collect all fees and mileage allowances provided by law for the services of such officer...." The limitation of that section to the collection of fees "provided by law" impliedly prohibits the collection of fees not expressly provided for in the Code. Furthermore, § 14.1-170 prohibits an officer from making out a fee bill for more than is allowed for any service; thus, billing for a service for which no fee is allowed by the Code is prohibited. Section 14.1-126 allows judges and clerks to assess as costs those charges for their services for which no fees are provided. The absence of a similar provision allowing sheriffs to assess charges for services for which no fee is provided implies that sheriffs may not collect fees other than those provided in the Code. Accordingly, I am of the opinion that sheriffs may not collect fees for their services other than those fees specifically provided for by law. Other services which sheriffs perform are not subject to fees.

Finally, you specifically mentioned notices to pay or quit premises, notices of overdrafts, and notices not to trespass. Section 55-248.31:1 provides a two dollar fee for service of a pay or quit notice. I am of the opinion that § 14.1-170 limits the fee to that
amount. Sheriffs are required to serve these notices if requested. See 1978-1979 Report of the Attorney General at 239. Section 18.2-183 deals with the type of notice of overdraft to which you refer. That section specifies notice by certified or registered mail but does not require service by a sheriff. No provision of the Code requires a sheriff or sheriff's deputy to serve notices of overdrafts. Moreover, there is no fee provided by law for that service. I, therefore, conclude that sheriffs may not collect a fee for serving notices of overdrafts. Likewise, no statute provides a fee for serving notices not to trespass; hence, I am of the opinion that sheriffs may not collect a fee for this service.

FIDUCIARIES. COMMISSIONS EARNED BY CURATOR OF ESTATE MAY NOT BE DUPLICATED WHEN ALSO SERVING AS EXECUTOR.

December 1, 1983

The Honorable Willard J. Moody
Member, Senate of Virginia

You have asked whether a fiduciary appointed as curator of an estate, who is subsequently appointed as administrator of the estate upon completion of his duties as curator, is entitled to a commission both as curator and as administrator.

The duties of a curator are provided for in § 64.1-93 of the Code of Virginia and they are essentially the same as those of an executor or administrator. As this section notes, the curator may be appointed during a will contest, during the infancy of an executor, in the absence of an executor or until administration of the estate is granted. The curator is responsible for preserving the estate during the pendency of any of these contingencies. The duties of the curator are concluded upon the qualification of an executor or administrator, at which time the curator accounts for and pays and delivers to the executor or administrator the estate for which he has been responsible. This transfer of responsibility from one fiduciary to another resembles in some respects the transfer of responsibility from an executor or administrator to a trustee.

Although your letter asks the very general question whether the individual "is entitled to a commission," I must assume that the question is limited to the commission otherwise payable to a fiduciary under § 26-30 on property coming into the hands of the fiduciary as opposed to the fiduciary's commission based on income to the estate or property distributed or sold. This is necessarily so because the commission which may be allowed on any of these latter occasions will be a double commission on property received by the individual in his dual capacities as curator and administrator. The Supreme Court of Virginia has, however, ruled on a very similar question when the same person serves as both executor and trustee. In the case of Thom v. Thom, 95 Va. 413, 28 S.E. 583 (1897), the Court ruled that the trustee was not entitled to a commission of five percent upon the entire estate passing into his hands in addition to the five percent allowed to him as executor. Id. at 417. I fail to see any distinction between the circumstances of a curator who becomes administrator and those of an executor who becomes a trustee. Indeed, I believe the distinctions of a curator-administrator are even less compelling. Therefore, it is my opinion that a fiduciary may not be allowed a second commission upon the entire estate passing into his hands as administrator when a like commission has been awarded to him as curator of the same estate.
Your predecessor requested an official opinion concerning the proper interpretation of the 1983 amendment to § 26-59 of the Code of Virginia. Because this now pertains to your official responsibilities, I am taking the liberty of addressing the response to you.

Paragraph (A) of § 26-59 provides that a natural person not a resident of the Commonwealth shall not be appointed as a personal representative of any decedent unless a person resident of, or a corporation authorized to do business in, the Commonwealth is appointed co-fiduciary. Paragraph B, which was added in 1983, Ch. 467, Acts of Assembly of 1983, provides exceptions to the above and lists certain specific persons who, as nonresidents, can serve without resident cofiduciaries being appointed. The amendment further provides in pertinent part:

"Notwithstanding § 64.1-116, where any nonresident qualifies pursuant to this paragraph, bond with surety shall be required in every case as prescribed in § 64.1-120 et seq., unless a resident personal representative qualifies at the same time."

Section 26-59(B). The 1983 amendment did not specifically amend § 26-4 or § 64.1-121.

Specifically, you ask whether the 1983 amendment means (1) that bond with surety must be given by a non-resident fiduciary even in the case previously excepted by § 64.1-121; (2) that as long as a resident fiduciary co-qualities with a nonresident person listed in paragraph (B) of § 26-59, bond with surety does not have to be given; and (3) that § 26-4 excepting the need for surety has been superseded.

With respect to your first inquiry, the amendment specifically requires bond with surety in every case "as prescribed in § 64.1-120 et seq." (Emphasis added.) By its terms, the amendment includes § 64.1-121, which provides exceptions by stating that no bond is required if the will specifically waives security of an executor nominated therein or where the personal representative is the sole distributee or beneficiary of the estate, or the personal representatives, if there be not more than three, are the sole distributees or beneficiaries. Thus, no bond is prescribed in these instances. Further, repeal or amendment by indirection is not favored. Ex Parte Settle, 114 Va. 715, 77 S.E. 496 (1913); 1A Sands, Sutherland Statutory Construction § 22.13 (1972). Accordingly, I am of the opinion that if any nonresident person described in paragraph (B) of § 26-59 also is named executor in the will or is the sole distributee or beneficiary of the estate or one of the sole distributees or beneficiaries (if no more than three in number) the appointment of a cofiduciary is not required nor is surety on the bond required. See footnote 2 supra.

With respect to your second inquiry, I am of the opinion that by its very language, the 1983 amendment did, in fact, broaden the waiver of surety where a resident personal representative qualifies and at the same time the nonresident personal representative is: (1) a parent of the decedent, (2) a child or other descendent of the decedent, (3) the surviving spouse of the decedent, (4) a person or persons otherwise eligible to file a statement in lieu of an accounting pursuant to § 26-20.1,4 or (5) any combination of the foregoing.

Before the amendment, no nonresident could qualify as a fiduciary unless a resident also qualified as a cofiduciary. The qualification of a resident cofiduciary automatically
required surety unless the will waived security naming the resident cofiduciary as executor, or the resident cofiduciary was one of not more than three distributees or beneficiaries (§ 64.1-121), the estate did not exceed $5,000.00, or the resident cofiduciary was a bank or trust company exempted by § 6.1-18 (§ 26-4). After the amendment, not only can those persons listed in the amendment qualify as fiduciaries without the requirement of a resident cofiduciary, but they enjoy the same benefits as resident fiduciaries. Namely, they are entitled to all those exemptions heretofore listed. Moreover, no security is required of these non-residents if a resident cofiduciary qualifies at the same time.

With respect to your third inquiry, as noted earlier, repeal or amendment by implication is not preferred. See Sutherland Statutory Construction, supra (§ 26-4 can likewise be given full effect). Accordingly, I am of the opinion that § 26-4 was not affected by the 1983 amendment to § 26-59. Thus, under § 26-4 no surety is required if the estate is less than $5,000, or if the personal representative jointly serves with a bank or trust company exempted from surety pursuant to § 6.1-18. See footnote 2 supra.

1No surety is required if the amount coming into the hands of the personal representative does not exceed $5,000 or if there is a cofiduciary which is a bank or trust company exempted under § 6.1-18. See § 26-4.

No surety or bond is required where a personal representative or representatives of an estate, if there are no more than three, is the sole distributee or distributees or sole beneficiary or beneficiaries, as the case may be, or if the will specifically waives security of an executor nominated therein. See § 64.1-121.

2Section 26-3 gives to the court the authority to order surety or increase bond upon the application of any party interested if the circumstances warrant. This does not mean that a later statute cannot by its terms effectively make an existing statute inoperative. When two statutes address the same subject they must be read in pari materia if at all possible. In this instance, § 64.1-121 can be given effect with § 26-59 as amended.

4Section 26-20.1 already allows any resident personal representative appointed pursuant to § 26-59 to administer the estate before delivering the estate to himself, together with the nonresident personal representative to file a statement that all known charges have been paid in lieu of a formal accounting when the personal representative is also the sole distributee or there are not more than three personal representatives or distributees.

GAMBLING. CONSIDERATION. NO CONSIDERATION PASSES FROM MERE PRESENCE AT EXHIBIT OFFERING FREE PARTICIPATION IN LOTTERY, WHEN EXHIBITOR IS ONE OF MANY WHICH SUBLEASES SPACE IN AREA TO WHICH NOMINAL ENTRANCE FEE IS CHARGED TO OFFSET COST OF PRESENTING ENTIRE SHOW.

August 23, 1983

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

You have asked whether the Columbia Mortgage Association Corporation, an exhibitor at the Home Builder's Association of Richmond's annual show, may offer by lottery a below market rate mortgage without violating Virginia's gambling law.

In determining whether an activity constitutes illegal gambling as defined in § 18.2-325 of the Code of Virginia, this Office normally looks to see if the elements of prize,

You state that entrance to the entire show requires a nominal fee, but the mortgage corporation exhibit at which the drawing takes place is only one of many exhibits at the show. The mortgage corporation subleases space from the Home Builder's Association, and there is no charge to consumer visitors for entering the drawing.

My opinion concurs with yours that the proposed lottery lacks the element of consideration, because there is no form of payment made by consumers to the mortgage corporation in exchange for the chance to qualify for the mortgage. It is, therefore, my opinion that the proposed lottery does not constitute illegal gambling.

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1. The entrance fee to the entire show is expected to be $2.00 or $2.50, of which the Association will apply 80% to the rental of the exhibit site, and 20% to build consumer exhibits. None of the fees go to the mortgage corporation.

2. Section 18.2-332 of the Code of Virginia provides that: "no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith."

GAME AND INLAND FISHERIES. DAMAGE STAMPS PROGRAM. LOCALITIES MAY NOT APPROPRIATE MONEYS FOR FIRE PREVENTION AND RESCUE SQUADS BASED SOLELY ON PRIOR YEAR'S REVENUES. ALTERNATIVES DISCUSSED.

April 5, 1984

The Honorable John H. Tate, Jr.
County Attorney for Smyth County

You have asked whether a board of supervisors, in appropriating money from its damage stamp fund for rescue squads and fire fighting units in accordance with § 29-92.4 of the Code of Virginia, can base that appropriation on payments made into the fund during the immediately preceding calendar year.

The Damage Stamp Laws, § 29-92.1 et seq. permit the establishment of local funds for the primary purpose of compensating those injured by big game and by those who hunt big game. Localities are authorized to use portions of such funds for local fire prevention and rescue squads, as well as for administrative expenses. See Opinion to the Honorable Dudley J. Emick, Jr., dated January 13, 1984.

Under the framework established by the General Assembly, damage stamp ordinances are actually effective between May 1 and the following April 30 of each year, depending upon measurement of the amount remaining in the local fund against a statutory formula. See § 29-92.2. This annual period has historically been used to enable the Virginia Commission of Game and Inland Fisheries to prepare summaries of hunting laws for dissemination with hunting licenses.
On the other hand, § 29-92.4(A)(2) allows a locality to pay costs and administrative expenses of the damage stamp program, not to exceed ten percent of amounts paid into the fund during any one fiscal year. Section 29-92.4(A)(4) further provides:

"In the discretion of the local governing body, support of a county volunteer fire prevention and suppression program when such program includes fire fighting on big game hunting lands open to the public and support of local volunteer rescue squads whose services are available to hunters in distress, provided that the money appropriated from the special damage stamp fund for these purposes shall not exceed, in the aggregate, in any calendar year, an amount equal to forty percent of the amount paid into the special damage stamp fund during that year." (Emphasis added.)

Because of lack of consistency among these statutory provisions, Smyth County proposes to use receipts from the last complete calendar year (1983) as the base upon which to calculate its appropriation to rescue squads and fire fighting units for 1984.

It is my opinion that the suggestion simply to use 1983 revenues to calculate the 1984 appropriation is in conflict with the plain language of § 29-92.4(A)(4) cited above. Appropriations for 1984 cannot exceed forty percent (40%) of the amount paid into the fund during 1984. A locality may not know until May 1, 1984 whether it qualifies to sell stamps during the remainder of the year. Because most receipts occur during the later months of the year, it is probable this may cause difficulties in budgeting for localities. It must be presumed, however, that the General Assembly by its choice of language intended that appropriations of this type be placed on a "pay-as-you-go" basis to avoid depleting funds available for the primary purpose of payment of damage claims.

Consideration of two alternatives might be useful. An appropriation can be made on or about July 1 (the commencement of the State and local fiscal year) after it has been determined on May 1 that the locality may sell stamps for that hunting season, provided the ordinance does one of the following:

1. It appropriates the money during the fiscal year on an as received basis. On a regular schedule, forty percent of receipts would be automatically paid for the purpose intended.

2. It bases an initial appropriation on an estimate consistent with prior experience (such as the prior year) and provides that any shortfall will be replaced once the calendar year is completed. No such shortfall should prejudice the right of a damage claimant to recover merely because an estimated appropriation is later found to be in error.

Finally, in view of the statutory inconsistency, it may be advisable to bring this problem to the attention of your legislative representative for such statutory amendment as may be indicated.

GAME AND INLAND FISHERIES. DAMAGE STAMP PROGRAM. LOCALITIES MAY NOT SEGREGATE DAMAGE STAMP FUNDS INTO ARBITRARY CATEGORIES BEYOND THOSE PROVIDED BY STATUTE.

January 13, 1984

The Honorable Dudley J. Emick, Jr.
Member, Senate of Virginia
You have asked whether the damage stamp program statutes, S 29-92.1 et seq. of the Code of Virginia, permit a board of supervisors to segregate the local fund containing revenues collected under a damage stamp ordinance into three distinct portions. Although the ordinance (or portion thereof) which you attached to your letter does not so provide, Botetourt County has apparently created three categories of damage stamp revenues, to wit: (A) Deer and Bear Damage; (B) Hunter Damage; (C) Rescue Squad Fund. As a result, once a particular category is exhausted, qualified claims are not paid from the others even though there is money remaining in them.

Damage stamps are primarily sold to provide a source of funds to compensate property owners for damage done by big game and by those who hunt such animals. The intent of the General Assembly is clearly expressed in § 29-92.1 that "[a] local governing body shall encourage to the maximum extent possible the utilization of the damage stamp fund for payment of claims in keeping with the purposes of this article." (Emphasis added.) Those purposes are set forth in § 29-92.4, and include payment of damages by deer or bear at any time or by big game hunters during the hunting season. In the same statute, the General Assembly authorized localities, in their discretion, to appropriate up to forty percent (40%) of current annual damage stamp revenue for volunteer fire prevention and rescue squads and up to ten percent (10%) thereof for administrative expenses. Certain other expenses related to enforcement of game laws in cooperation with the Commission of Game and Inland Fisheries may also be paid out of this money. Consequently, approximately fifty percent (50%) must be available for payment of valid damage claims.

In the absence of other authorized categories of expenditures, principles of statutory construction require the conclusion that the General Assembly did not intend further "earmarking" of a local fund. This result is particularly appropriate in light of the legislative intent described above. There is no way other than by an arbitrary determination to assign funds among categories. The likely effect of the segregation of funds you have described would be to exclude otherwise qualified and approved claims from being paid merely because they fall within one category rather than the other. Such a result defeats not only the purpose but also the legislative intent behind the damage stamp program.

Aside from expenditures specifically authorized by § 29-92.4 as mentioned above, further categorization of funds is beyond the authority granted to the localities under the damage stamp program statutes. See 1982-1983 Report of the Attorney General at 256. It is, therefore, my opinion that the procedure you described is not permitted by statute and your inquiry is answered in the negative.

1Under the formula set out in § 29-92.2, a locality may sell damage stamps only in a year when the total amount remaining in the local fund is less than twice the average annual disbursement for payment of damage claims during the preceding three years. Failure to pay claims will naturally reduce this average and lessen the locality's ability to qualify to sell stamps.

2It should be noted that the portion of the ordinance itself which you have attached to your letter makes no provision for the method by which the funds will be segregated into the various categories.

GAME AND INLAND FISHERIES. DOGS. DOG LAWS. TOWN MAY APPOINT DOG WARDENS, IMPOSE LICENSE FEES, AND ESTABLISH DOG POUNDS PURSUANT TO AUTHORITY IN § 29-13.17:1.
The effect of the 1978 and 1981 amendments, read together, is to grant a town discretionary authority to enact ordinances with respect to appointing an animal warden, requiring licenses, or having a pound, all of which were mandatory prior to 1978.

I, therefore, conclude that a town council may enact "parallel" ordinances on all the subjects which are contained in the Dog Laws, including dog wardens, dog pounds, and license fees, and "more stringent" ordinances for animal control.

GARNISHMENT. EACH SUMMONS IN GARNISHMENT TO BE ISSUED REQUIRES SEPARATE SUGGESTION AND CLERK'S FEE.

January 27, 1984

The Honorable Fred E. Martin, Jr., Judge
Norfolk General District Court

This is in reply to your inquiry whether it is permissible, under § 8.01-511 of the Code of Virginia, to issue several summonses in garnishment on one suggestion, for which only one fee has been collected. As you have pointed out, that section, as effective on January 1, 1984, provides that "no summons shall be issued...unless it...(ii) is directed to only one garnishee for the garnishment of only one judgment debtor...."

While this provision requires that each summons be directed to only one garnishee for the garnishment of one judgment debtor, it does not prohibit the listing of several garnishees on a single suggestion. As in any other civil case, a plaintiff may sue several defendants in a single proceeding. Thus, while the clerk must issue an individual summons for each garnishee, he may do so from a suggestion naming several garnishees.

A separate fee is charged for each summons, however. Section 14.1-125(1) provides that an eight dollar fee shall be charged for "each...garnishment...." In my opinion, "each garnishment" is intended to mean the service of a single summons on a single garnishee.

GARNISHMENT. REQUIREMENT OF ALLEGATIONS AS TO TIME AND NATURE OF TRANSACTION. PROVIDING OF SOCIAL SECURITY NUMBER.

March 23, 1984

The Honorable D. B. Marshall, Judge
Sixteenth Judicial District

Section 8.01-511 of the Code of Virginia, effective January 1, 1984, imposes certain restrictions upon instituting garnishment proceedings. You request my opinion regarding the issuance of a summons in the following factual situations:

1. The judgment debtor's social security number is unknown and the judgment creditor alleges that the judgment involves a business, trade or professional credit transaction entered into on or after January 1, 1984.

2. The judgment creditor does not provide the judgment debtor's social security number and alleges alternatively that the judgment involves a business, trade or professional credit transaction, or does not involve a business, trade or professional credit transaction entered into on or after January 1, 1984.
3. The judgment creditor provides the judgment debtor's social security number, but makes no allegation concerning the time or character of the transaction involved in the judgment.

Prior to January 1, 1984, the social security number of the judgment debtor was required to be placed on the garnishment summons only if it were known. The 1983 General Assembly amended § 8.01-511, effective January 1, 1984, to prohibit the issuance of a summons without the debtor's social security number except under certain conditions. Those conditions, found in paragraph 4 of the section, are as follows:

"However, if the judgment which the judgment creditor seeks to enforce (i) does not involve a business, trade or professional credit transaction entered into on or after January 1, 1984, or (ii) is based on any transaction entered into prior to January 1, 1984, then upon a representation by the judgment creditor that he has made a diligent good faith effort to secure the social security number of the judgment debtor and has been unable to do so, the garnishment shall be issued without the necessity for such number."

As applied to your first situation, a summons may not issue because the judgment is based on a business, trade or professional credit transaction entered into on or after January 1, 1984, and the judgment creditor did not provide a social security number for the judgment debtor.

With respect to the second situation which states that the social security number is not provided, the clerk may issue the summons only if the creditor alleges the underlying transaction was either entered into after January 1, 1984, and does not involve a business, trade or professional credit transaction, or alternatively, the transaction was entered into prior to January 1, 1984. In either case, the creditor must represent that he has made a "diligent good faith effort to secure the social security number...." Because the first allegation hypothesized in situation two does not fall within one of the two required categories and the second allegation does not include the representation of diligent good faith effort to secure the number, I must conclude that the clerk should not issue the summons.

The answer to the third situation depends on the type of garnishment sought. Paragraph 6 of § 8.01-511 prohibits the issuance of a wage garnishment without an allegation identifying whether the judgment is based on a business, trade or professional credit transaction and whether such transaction was entered into before or after January 1, 1984. An allegation of good faith effort to locate the social security number of the debtor must also be made. These allegations must be made regardless of whether the social security number is furnished before a wage garnishment summons may be issued. If the garnishment sought is not directed to wages, the garnishment may be issued without these allegations if the social security number is furnished.

GENERAL ASSEMBLY. CONSTITUTION. AMENDMENTS. ELECTIONS. GENERAL ASSEMBLY HAS DISCRETION TO DETERMINE WHEN AND IN WHAT MANNER CONSTITUTIONAL AMENDMENTS SUBMITTED TO VOTERS; ABSENT GENERAL ASSEMBLY ACTION, QUESTION ON PROPOSED AMENDMENT MAY NOT BE PLACED ON ELECTION BALLOT.

February 28, 1984

The Honorable Elliot S. Schewel
Member, Senate of Virginia
This is in reply to your letter of February 22, 1984, in which you pose a question regarding the process by which the Constitution of Virginia may be amended. Your question is related to your legislative effort to amend the Constitution in order to place certain constraints upon the rate of growth of State spending.

Section 1 of Article XII of the Constitution prescribes the procedure for amending the Constitution. Generally, to amend the Constitution, an amendment may be proposed in the Senate or House of Delegates and agreed to by a majority of the members of each house at two separate sessions of the General Assembly, with an intervening general election of members of the House of Delegates occurring between the two sessions. Thereafter, the General Assembly submits the proposal to the voters in such manner as the General Assembly shall prescribe and at such time as the General Assembly shall designate, provided that the election on the proposal shall be not sooner than ninety days after final passage by the General Assembly. If the proposal is approved by a majority of those voting, the amendment becomes effective on the date prescribed by the General Assembly.¹

Under the facts which you cite, the proposal was submitted to the General Assembly on its first reference as Senate Joint Resolution No. 35 at the 1983 regular session and was agreed to by a majority of each house. See Ch. 623, Acts of Assembly of 1983. The proposal has been introduced on second reference in the 1984 session as Senate Joint Resolution No. 28. The Senate has passed S.J.R. No. 28 and it has been communicated to the House and referred to the House Committee on Privileges and Elections.

You relate that Senate Bill No. 458, which provided for the submission of the proposed constitutional amendment to the voters at the general election in November, 1984, was defeated in the Senate. Thereafter, the substantive provisions of S.B. No. 458 passed the Senate in the form of an amendment to another Senate bill which has been communicated to the House and referred to the House Committee on Privileges and Elections.

You ask if S.J.R. No. 28 proposing the amendment is passed by the House but the submission bill, originally S.B. No. 458, is not passed, whether the amendment may still be submitted to the voters in November, 1984.

Article XII, § 1, relating to constitutional amendments, reads as follows:

"Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters." (Emphasis added.)

It is clear from the language quoted above that the General Assembly's role and responsibility in the amendment process is far greater than merely approving the
proposed amendment on two successive occasions. The General Assembly is also responsible for submitting the proposal to the voters.

The manner of submitting a proposed amendment to the voters may be complex, and it involves a number of separate issues. For example, the form of the ballot may be important. In some situations, the entire text of the proposed amendment may be placed on the ballot, or, "as is more common, the effect of the amendment may be summarized in other language." II A. Howard, Commentaries on the Constitution of Virginia 1173 (1974). As an indication of the significance of this issue, in your proposal, rather than including the entire amendment on the ballot, S.B. No. 458 would have submitted to the voters only the following question: "Shall the Constitution of Virginia be amended to provide a limitation on the rate of growth of State spending from State tax revenues?"

Of equal importance is the issue of the time of submission. Section 196 of the Constitution of 1902 provided that proposed amendments should be submitted to the voters "at such time as" the General Assembly shall prescribe. The present Constitution carries with it only a limitation that the vote shall be not sooner than ninety days after final passage by the General Assembly.

A third important issue is the date on which the proposed amendment will become effective if approved. In this regard, the Constitution does not designate the effective date of a constitutional amendment although it does designate the effective date for statutes. See § 13 of Art. IV.

It is of particular significance that the Constitution provides that (1) the submission shall be "in such manner" as the General Assembly shall prescribe, (2) the submission shall be at a time which the General Assembly shall prescribe not sooner than ninety days after final passage by the Assembly, and (3) the amendment shall be effective on the date prescribed by the General Assembly in providing for the submission to the voters. Thus, it is clear that the Constitution imposes important duties upon the General Assembly with regard to the submission of the proposed amendment to the voters.

While S.J.R. No. 28 proposing the amendment does provide for an effective date of July 1, 1986, it does not prescribe the form of the ballot or the time of the submission of the issue to the voters. That was the purpose of the submission bill, originally S.B. No. 458. As described above, the determination of the form of the question and the time of submission are the constitutional responsibilities of the General Assembly and not the State Board of Elections. Indeed, I find no basis for concluding that the State Board of Elections could place the proposed amendment on the ballot at the November, 1984, general election in the absence of legislation adopted by the General Assembly prescribing the form of the question and directing that it be placed on the ballot. The Constitution vests the authority to make these determinations solely in the discretion of the General Assembly.

Accordingly, I must conclude that, if the 1984 session of the General Assembly properly adopts for a second time a resolution proposing a constitutional amendment but fails to adopt provisions prescribing the manner of submission to the voters including the form of the question and the time for such submission, then there is no basis for submitting the proposal to the voters in November, 1984. The matter must await further action by the General Assembly.

In reaching this conclusion, I am mindful of that portion of § 1 of Art. XII stating "It shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters...." Undoubtedly, the framers of the Constitution intended by that phrase to impose upon the General Assembly the responsibility of determining the mechanisms for submitting the proposal to the voters. It is unlikely that the framers
anticipated the possibility that the General Assembly would twice approve a proposal, yet refuse to submit it to the voters.

Even if one assumes that there is a mandatory duty upon the General Assembly, at some time and in some manner, to submit to the voters a proposal which it has twice approved, the Constitution obviously vests considerable latitude in the General Assembly by which it may discharge that duty. For example, on the issue of when the submission to the voters should occur, the only constitutional limitation is that it be not sooner than ninety days after final adoption by the General Assembly. As Professor Howard observed, "[a]ny challenge to an amendment on the ground that the Assembly allowed too long a period of time to elapse would doubtless be held by a court to be a 'political question' and therefore not justiciable." (Footnote omitted.) II A. Howard, Commentaries on the Constitution 1174 (1974). Because of the well established doctrine of the separation of powers, see Art. III of the Constitution, courts are reluctant to intrude upon legislative prerogatives and generally recognize that they do not have jurisdiction over "political questions."

In conclusion, only the General Assembly may provide for submission to the voters of a proposal to amend the Constitution, and it is the General Assembly's responsibility to determine the manner and time of the submission. The Constitution vests discretion in the General Assembly to make these determinations. Thus, there is no basis upon which I can conclude that the General Assembly will violate § 1 of Art. XII if it fails to submit to the voters in November, 1984, a proposal which it has approved for the second time in the spring of 1984. Finally, if the General Assembly does fail to provide for submission of the proposal to the voters, the State Board of Elections does not have authority to prescribe the form of a question and place it upon the ballot at the next general election.

1 Note that strict compliance with the prerequisites of Art. XII, § 1 is required in order to effectively amend the Constitution. See Coleman v. Pross, 219 Va. 143, 246 S.E.2d 613 (1978) (where proposed amendments approved at 1978 session of the General Assembly were not the same as the proposed amendments approved at 1977 session, there was not strict compliance with Art. XII, § 1).

GENERAL ASSEMBLY. CONSTITUTION. COUNTIES, CITIES AND TOWNS. GENERAL ASSEMBLY CONTROL OVER LOCAL GOVERNMENT PLENARY UNLESS RESTRICTED BY CONSTITUTION OF VIRGINIA (1971); MAY CREATE NEW LOCAL GOVERNMENT FORMS, CONSISTENT WITH ART. IV, § 14, AND ART. VII.

February 3, 1984

The Honorable Frank W. Nolen
Member, Senate of Virginia

The Honorable Arthur R. Giesen, Jr.
Member, House of Delegates

The Honorable Emmett W. Hanger, Jr.
Member, House of Delegates

The Honorable S. Vance Wilkins, Jr.
Member, House of Delegates
This is in reply to your request for my opinion on the constitutionality of certain legislation introduced in the 1984 session of the General Assembly relating to the proposed consolidation of Augusta County and the City of Staunton. Senate Bill 70 would amend various sections of the Code of Virginia in order to authorize creation and operation of what is described as a "two tier" local government, consisting of a consolidated county within which exists a "tier city," which, in turn, is defined as a "dependent incorporated community" having within defined boundaries a population of 15,000 or more. A "tier city" would have "the powers of a town together with such powers as may be granted it in general or special charter legislation as a unit of government by the General Assembly and which has become a tier city as provided by law." Senate Bill 71, a companion bill to S.B. 70, contains a proposed charter for the new "Tier-City of Staunton, Virginia," to become effective at a specified time, provided that consolidation of the county and the city is ordered by the Circuit Court of Augusta County. You ask whether the General Assembly has the power to enable creation of such a system of local governmental units, in light of the definitions of "county," "city," "town" and "regional government" contained in Art. VII, § 1 of the Constitution of Virginia (1971). I will confine my opinion to the above question and not comment on the legality of any particular provision of either bill, a number of which provisions, I am advised, are subjects of proposed amendments.

It is well settled in Virginia that the State Constitution does not grant powers to the legislature but, instead, restricts powers which otherwise are practically unlimited. Thus, the General Assembly has plenary power and may enact any law which is not prohibited by the Virginia Constitution. See, e.g., Development Authority v. Coyner, 207 Va. 351, 355, 150 S.E.2d 7 (1966); Trucking Corporation v. Commonwealth, 207 Va. 23, 29, 147 S.E.2d 747 (1966); Morgan v. Commonwealth, 168 Va. 731, 736, 191 S.E. 791 (1937); Strawberry, etc. v. Starbuck, 124 Va. 71, 77, 97 S.E. 362 (1918). These principles are expressly stated in Art. IV, § 14 of the Constitution, as follows:

"The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear." (Emphasis added.)

Article VII contains the provisions relating to local government, § 2 of which provides, in part, as follows:

"The General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments. The General Assembly may also provide by general law optional plans of government for counties, cities, or towns to be effective if approved by majority vote of the qualified voters voting on any such plan in any such county, city, or town.

The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine, but no such special act shall be adopted which provides for the extension or contraction of boundaries of any county, city, or town."

Section 3 of Art. VII states as follows:

"The General Assembly may provide by general law or special act that any county, city, town, or other unit of government may exercise any of its powers or perform
any of its functions and may participate in the financing thereof jointly or in cooperation with the Commonwealth or any other unit of government within or without the Commonwealth. The General Assembly may provide by general law or special act for transfer to or sharing with a regional government of any services, functions, and related facilities of any county, city, town, or other unit of government within the boundaries of such regional government.

Sections 2 and 3 of Art. VII set forth the constitutional framework for the organization and government of localities in Virginia, the central concept of which is the power of the General Assembly to control local government, subject only to the express denial of certain powers and to certain restrictions placed on its procedures.

Informed commentators agree that interpretations of the Local Government Article must be guided first and foremost by the principles set forth in Art. IV, § 14, quoted above. Thus, the General Assembly "is generally free to organize, empower, consolidate, and dissolve local governments by general law or special act." None of the limitations contained in Art. VII expressly negates the authority of the legislature to provide by law for such local governmental forms as it deems appropriate, nor does Art. VII, § 1, expressly forbid creation of other local units not therein defined, whatever name may be given them.

Accordingly, I am of the opinion that your question should be answered in the affirmative.

1. Article VII, § 1 defines those terms as follows: "As used in this article (1) 'county' means any existing county or any such unit hereafter created, (2) 'city' means an independent incorporated community which became a city as provided by law before noon on the first day of July, nineteen hundred seventy-one, or which has within defined boundaries a population of 5,000 or more and which has become a city as provided by law, (3) 'town' means any existing town or an incorporated community within one or more counties which became a town before noon, July one, nineteen hundred seventy-one, as provided by law or which has within defined boundaries a population of 1,000 or more and which has become a town as provided by law, (4) 'regional government' means a unit of general government organized as provided by law within defined boundaries, as determined by the General Assembly...." This section also states that '[t]he General Assembly may increase by general law the population minima provided in this article for cities and towns.'

2. An enactment of the General Assembly will be declared void only when shown to be plainly repugnant to some provision of the Constitution. A reasonable doubt as to the constitutionality of any law must be resolved in favor of its legality. Infants v. Virginia Hous. Dev. Auth., 221 Va. 659, 669, 272 S.E.2d 649 (1980); Blue Cross v. Commonwealth, 221 Va. 349, 358, 269 S.E.2d 827 (1980); Morgan v. Commonwealth, 168 Va. 731, 736, 191 S.E. 791 (1937) ("[t]he infraction must be clear and palpable, and seldom, if ever, should a statute be held void as repugnant to the Constitution if the question be doubtful.")

3. See I. A. Howard Commentaries on the Constitution of Virginia 538 (1974): "These principles are so well accepted that they would likely be applied even if not explicitly spelled out in a state's constitution. Nevertheless, out of an abundance of caution, the principles are laid down in the first paragraph of section 14, a paragraph added by amendment in 1928. The paragraph states three propositions: (1) that the Legislature has power to legislate on any subject unless the Constitution says otherwise; (2) that the canon of construction, expressio unius est exclusio alterius, does not apply in interpreting the legislative powers of the General Assembly; and (3) that the deletion of powers expressly granted in the Constitution before 1928 is not of itself to imply a denial of such powers. The Commission that recommended the 1928 amendments explained in its report that the new language was 'meant to obviate the necessity of conferring powers on the
General Assembly in other sections; and to prevent any misunderstanding on account of omissions." (Footnote omitted.)

"See, e.g., H A. Howard Commentaries on the Constitution of Virginia, 792, 803.


"Howard, supra, fn. 4 at 805 ("[u]nhlike its predecessor, the present Constitution makes no attempt generally to instruct the Assembly as to the form or functions of local or organizations." [Footnote omitted.]).

"See, e.g., § 2, which mandates that local boundary changes be authorized only by general law, and that a referendum be held before a regional government can be organized; § 4, which requires a referendum before any of the constitutional officers' positions may be abolished; the § 7 voting requirement on local appropriations ordinances; the § 10 local debt limitations.

"Compare Spain, supra, fn. 5, at 403 ("[i]t should be noted that the House version referred to 'independent' cities in the definition and that this language was finally adopted. No special significance was attributed to this language at the time. Under general municipal law, the General Assembly can create, alter or abolish political subdivisions and this reference to cities as being 'independent' should not change that power." [Footnote omitted.]). See, also, II Howard, supra at 797.

I note, in passing, that a "tier city" proposed to be authorized by the legislation under consideration here, would have the essential attributes of a town. I do not attach any constitutional significance to the label the General Assembly may choose to place upon it.

GENERAL ASSEMBLY. CONSTITUTION DOES NOT PROHIBIT GENERAL ASSEMBLY FROM ALLOWING LOCAL GOVERNMENTS TO INCORPORATE STATUTES AND SUBSEQUENT AMENDMENTS BY REFERENCE IN ORDINANCES.

April 16, 1984

The Honorable Stephen E. Gordy
Member, House of Delegates

This is in response to your request for my opinion regarding the constitutionality of a bill which you introduced in the 1984 session of the General Assembly, and later withdrew. The bill, House Bill 109, stated:

"1. That the Code of Virginia is amended by adding a section numbered 15.1-28.4 as follows:

§ 15.1-28.4. Incorporation of statutes in ordinances.—When counties, cities and towns are empowered to incorporate statutes in ordinances by reference, such incorporation shall include all future amendments to the incorporated statutes unless a contrary intent is stated."

In a prior Opinion, I expressed the view that local governing bodies adopting State statutes and statutory amendments by reference may not adopt an ordinance which provides for the automatic adoption by reference of future statutory amendments. See 1981-1982 Report of the Attorney General at 272. That Opinion, however, was based upon existing law. The General Assembly has not provided for incorporation of future amendments of the statute being adopted by reference. In that Opinion, I cited § 15.1-504 which provides the procedure by which counties may adopt ordinances. This section states that: "Except as otherwise provided by law, ordinances shall be adopted by the governing body of any county only in the manner prescribed by this section." (Emphasis added.) House Bill 109 would not conflict with the requirements of § 15.1-504, because
once it is enacted into law it would fall within the "as otherwise provided by law" exception to the statute.

By virtue of Art. VII, § 2 of the Constitution of Virginia (1971) the General Assembly is responsible for providing for the organization, government and powers of counties, cities, towns and regional governments. The General Assembly may delegate to such political subdivisions any powers not expressly prohibited by the Constitution. See II A. Howard, Commentaries on the Constitution of Virginia 810 (1974).

Article IV, § 14 lists the limitations placed on the General Assembly to legislate. It is my opinion that powers delegated by House Bill 109 would not fall within any of the limitations placed upon the General Assembly by the Constitution.

House Bill 109 is not mandatory. It is permissive in nature. It permits counties, cities and towns which are empowered to incorporate statutes by reference to include future amendments to such statutes. In such instances, the citizens could have the opportunity to participate at the state level of the legislative process, rather than at the local level. If the county, city or town does not wish to include future amendments by incorporation, it is free to make that choice. Local governments would still be in a position to determine whether an ordinance which is incorporating a statute by reference would also incorporate by reference subsequent amendments to that statute.

In conclusion, it is my opinion that House Bill 109 is not constitutionally defective. The Constitution does not specifically prohibit the General Assembly from allowing local governments to incorporate statutes and their subsequent amendments by reference in their ordinances.

GENERAL ASSEMBLY. EXECUTIVE REORGANIZATION ACT. POWERS OF GENERAL ASSEMBLY AND GOVERNOR TO ORGANIZE AND REORGANIZE EXECUTIVE BRANCH AGENCIES.

November 10, 1983

The Honorable Charles S. Robb, Governor
Commonwealth of Virginia

This is in reply to your letter in which you make reference to the Executive Reorganization Act (the "Act"), §§ 2.1-8.1 through 2.1-8.8 of the Code of Virginia, and ask the following questions:

"1. Do §§ 2.1-8.1 - 2.1-8.8 provide the exclusive method for proposing executive reorganization to the Assembly?

2. What are the limits, if any, of §§ 2.1-8.1 - 2.1-8.8 as a means of effecting an executive reorganization?

3. What other legal alternatives, if any, are available for proposing executive reorganization to the Assembly?

4. What are the limits of legal alternatives identified as a means of effecting an executive reorganization?"

There are three possible methods which may be considered in altering the executive branch. They are (1) enactment of a statute, (2) preparation and implementation of an executive reorganization plan under the Act, and (3) issuance of an executive order.
The first method to effect an executive reorganization is the enactment of a law altering the then existing legal status of agencies. Any reorganization which alters the statutorily prescribed status of agencies and the functions assigned to them must be accomplished by a legislative act of equal dignity. See EEOC v. Allstate Insurance Co., 570 F.Supp. 1224 (1983). Such a reorganization must be accomplished by the General Assembly. The legislative power of the Commonwealth is vested in the General Assembly, which alone has authority to create executive agencies with such authority and duties as it may prescribe by law. See Arts. III, § 1 and IV, § 1, Constitution of Virginia (1971). Cf. INS v. Chadha, et al., ___ U.S. ___, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

Article V, § 9 provides:

"The functions, powers, and duties of the administrative departments and divisions and of the agencies of the Commonwealth within the legislative and executive branches may be prescribed by law."

This provision makes express the authority of the General Assembly to specify the functions, powers and duties of the executive branch agencies by law.

Article IV, § 11 provides in part that "[n]o law shall be enacted except by bill." While the Constitution does not specify how statutes may be amended or repealed, it is well settled that the power to amend and repeal statutes is vested exclusively in the legislature. 1A Sands, Sutherland Statutory Construction §§ 22.02, 22.14 and 29.07, (4th ed. 1974). To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. Cf. INS v. Chadha, supra.

The Governor has the constitutional responsibility to recommend to the General Assembly for "its consideration such measures as he may deem expedient...." Article V, § 5, Constitution of Virginia (1971). This would, of course, include recommendations for the adoption of bills pertaining to executive reorganization.

I, therefore, am of the opinion that to the extent that a reorganization plan involves the modification of statutorily prescribed status of the agencies and their responsibilities within the executive branch, it must be accomplished by the enactment of a statute.

A second possible method to effectuate executive branch reorganization is provided by the Executive Reorganization Act. Section 2.1-8.1 of the Act directs the Governor to examine the organization of executive branch agencies periodically, and to determine what changes would reduce expenditures, increase the efficiency of operation of State government, reduce the number of agencies through consolidation, and accomplish other similar purposes. When the Governor prepares a reorganization plan, he must submit it to each house of the General Assembly at least forty-five days prior to the commencement of a regular or special session of that body. See § 2.1-8.3. The Act is expressly clear that the plan cannot authorize an agency to exercise a function not authorized by law. See § 2.1-8.5. A reorganization plan shall become effective only if both the Senate and House of Delegates approve it by a resolution of a majority of the members present and voting in each house. See § 2.1-8.6.

By adopting the Act, the General Assembly has prescribed one method by which the Governor may initiate reorganization efforts. Although Art. III, § 1 and Art. V, § 9 make express the General Assembly's authority to specify the functions, powers and duties of executive branch agencies, they do not prevent the General Assembly from providing, by statute, for executive-initiated reorganization plans. II A. Howard, Commentaries on the Constitution of Virginia 632 (1974). Executive reorganization may be accomplished, not
only by the legislature, but by any means permitted by and consistent with the Constitution of Virginia.

The Act may not be used, however, to effect a reorganization plan which alters the status and responsibilities of executive agencies when the same have been conferred by a statute. This is because the Act provides that the Governor's reorganization plan shall be effective if approved by resolution of each house of the General Assembly. As noted above, the modification of statutorily established rights and responsibilities of executive agencies can only be accomplished by passage of a law in accordance with constitutional requirements.

I find this conclusion and approach necessary in order to save the constitutionality of the Act. For example, given a literal reading of the Act, if a Governor concludes that "the expeditious administration of the public business" (§ 2.1-8.1(A)) could be achieved by the abolition (§ 2.1-8.3(D)) of the boards of visitors of several of our State colleges and universities whose boards are created by statute, then the abolition could take place upon a plan proposed by the Governor and approved by simple resolution of each house of the General Assembly. Abolition of statutorily created entities by such a method would, in effect, be tantamount to the enactment of law without complying with the strict constitutional requirement that "[n]o law shall be enacted except by bill." Art. IV, § 11.

I, therefore, am of the opinion that an executive reorganization plan proposed under the Act is a proper method of achieving executive reorganization provided it does not include provisions which effectively amend or repeal any statute or alter the statutorily prescribed status of agencies. Nor may such a plan assign to any agency the authority to exercise a function not previously authorized by law. Section 2.1-8.5; see 1978-1979 Report of the Attorney General at 110.

A third possible method of initiating a reorganization of executive agencies is through the issuance of an executive order. Although no provision of the Constitution explicitly authorizes the Governor to issue executive orders and no Virginia statute provides a general grant of authority to issue such orders, Governors of the Commonwealth have historically issued executive orders in the absence of a specific statute expressly or generally conferring the authority. The Governor has the inherent authority to issue executive orders in order to "take care that the laws be faithfully executed." Art. V, § 7. It is recognized that there is a general reservoir of powers granted by the Constitution to the Governor as the Chief Executive of the Commonwealth. See 1945-1946 Report of the Attorney General at 144.

Examples of situations in which executive orders are appropriate are as follows:

(1) Whenever a provision of the Code of Virginia expressly confers that authority upon the Governor. See, e.g., §§ 2.1-51.9, 2.1-51.15, 2.1-51.18, 2.1-51.21, 2.1-51.24 and 2.1-51.27 (permitting the assignment or reassignment of agencies to Cabinet Secretaries by executive order); and § 44.1-146.17(1) (permitting the issuance of executive orders to carry out the purposes of the Emergency Services and Disaster Law). Compare Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975), with Jackson v. Hodges, 176 Va. 89, 10 S.E.2d 566 (1940); see, also, 1941-1942 Report of the Attorney General at 75;

(2) Whenever there is a genuine emergency which requires the Governor, pursuant to his constitutional responsibility and power, to issue an order, to abate a danger to the public regardless of the absence of explicit authority. See 1945-1946 Report of the Attorney General, supra; and

(3) Whenever the order is administrative in nature, as opposed to legislative. See 1965-1966 Report of the Attorney General at 143.
An executive order may not, however, be employed when a law is required. See 1977-1978 Report of the Attorney General at 5. This is because the legislative power of the Commonwealth is vested in the General Assembly pursuant to Art. IV § 1, and the Governor may not exercise that power. See Art. III, § 1; accord Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, 72 S.Ct. 863, 867 (1952).

Nor may an executive order be used to establish an agency which has authority to implement or enforce the requirements of law. The creation of such an agency requires the exercise of legislative powers in accordance with Art. III § 1 and Art. IV, § 1. An executive order may be used to establish an agency which possesses merely advisory authority, however.

An executive order may be used to modify an organization established pursuant to executive order. For example, the Governor may abolish a commission which he previously established by executive order.

I must conclude, however, that an executive order may not be used where the General Assembly has prescribed a different method of reorganization as the exclusive method to be used. Such would clearly not be the case, however, where the General Assembly has provided for the use of executive orders as, for example, in the transfer of an agency from one secretariat to another. See, e.g., § 2.1-51.9. Thus, in those situations in which the Act may be properly used, the Governor should use the Act rather than rely upon executive order.

In summary, you have three alternative methods which, in varying circumstances, may be available to effect an executive reorganization. They are:

1. Enactment of a statute. This is necessary where the enactment, amendment or repeal of a law is required to carry out the reorganization or where the statutorily prescribed status or responsibilities of agencies are to be altered;

2. Executive Reorganization Act. This is appropriate for those purposes provided in § 2.1-8.1 which do not require the enactment, amendment or repeal of a statute and which do not grant an agency authority to exercise a function not previously authorized by law; and

3. Executive Order. This is appropriate for administrative directives to the executive branch which do not require the exercise of the legislative power and do not include objectives, provided in § 2.1-8.1, for which preparation of an executive reorganization plan prepared in accordance with the Act is required. An executive order may also be used to establish advisory agencies or groups.

This constitutional provision is a truncated version of the proposal made in 1969 by the Commission on Constitutional Revision. The Commission recommended that the new Constitution expressly empower the Governor to initiate reorganization proposals and submit them for review to the General Assembly. Under that proposal, the Governor's reorganization plan would become effective unless it was disapproved by a majority of either house during the legislative session to which it was submitted. The Constitution of Virginia, Report of the Commission on Constitutional Revision 170 (1969). This proposal was rejected by the General Assembly, however, whose members evidenced the belief that it would increase the power of the executive branch at the expense of that of the legislative branch. Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution 29, 35-36, 1969 Ex. Sess., 1970 Reg. Sess. (1971); Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 132-133, 134, 1969 Ex. Sess., 1970 Reg. Sess. (1971).
HEALTH. BEFORE MEDICAL PROCEDURE MAY BE TERMED LIFE-PROLONGING PROCEDURE, PATIENT MUST BE SUFFERING FROM TERMINAL CONDITION.

August 2, 1983

The Honorable G. Steven Agee
Member, House of Delegates

This is in reply to your recent inquiry concerning whether the use of oxygen, intravenous feeding, and kidney dialysis are life-prolonging procedures which a declarant, within the meaning of the Virginia Natural Death Act, may have terminated, or which may be terminated under the provisions of § 54-325.8:6 of the Code of Virginia.¹

Before answering your question, I shall first state what I understand the "use of oxygen," "intravenous feeding," and "kidney dialysis" to mean. As you know, there is more than one method in which oxygen can be supplied to a patient and, of course, there is more than one purpose for which it may be supplied. It can be provided in the form of a mask placed over the patient's nose and mouth to ease breathing and to relieve the patient's choking sensation and thereby to decrease the anxiety brought on by such a sensation. It can also be provided through a respirator, a mechanical device which breathes for the patient or assists him to the point that breathing, that is the exchange of oxygen and carbon dioxide in his body, is possible. The respirator is so necessary to the patient's breathing that without it he may not live. For purposes of this Opinion, I shall assume the use of oxygen to mean the use of oxygen as first described, that is the provision of oxygen through a mask to ease breathing and to alleviate a choking sensation in the patient, thereby decreasing the anxiety which accompanies the choking sensation.²

"Intravenous feeding" may also be defined in two ways. It can refer solely to the provision of such fluids as are necessary to achieve or maintain hydration and prevent the sensation of thirst. It can also mean the provision of such number of calories and nutrients as are necessary to prevent death by starvation. For purposes of this Opinion, I shall assume that intravenous feeding means the former.

Finally, for purposes of this Opinion, I define "kidney dialysis" to mean the chemical cleansing of blood by removing substances from the blood which the kidneys, if they were properly functioning, would otherwise remove. It is the washing of the blood by artificial means in order to remove the toxic wastes which would otherwise cause uremia, and cloud the brain, a symptom of which, among others, is slumber, followed by death.

With these definitions in mind, I shall proceed to other necessary terms defined in the statute.

"Life-prolonging procedure," as it applies to the Natural Death Act, §§ 54-325.8:1 through 54-325.8:13, is defined in § 54-325.8:2 as follows:

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¹ During the debates on Art. V, § 9, a member of the House explained the action of the House General Laws Committee in rejecting the Commission's proposal described in footnote 1 above. He stated that "the General Assembly can grant reorganization authority to the Governor without it being in the Constitution." Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, supra at 29. Similarly, the Senate also reasoned that executive reorganization could be effected through the normal legislative action without the provision being tied into the Constitution. Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, supra at 133.
"[A]ny medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and (ii) when applied to a patient in a terminal condition, would serve only to prolong the dying process. 'Life-prolonging procedure' shall not include the administration of medication or the performance of any medical procedure deemed necessary to provide comfort, care or to alleviate pain." (Emphasis added.)

Before it can be determined whether a medical procedure being used is life-prolonging, the individual patient being treated must be suffering from a terminal condition. A "terminal condition" is defined in § 54-325.8:2 as "a condition caused by injury, disease or illness from which, to a reasonable degree of medical certainty, (i) there can be no recovery and (ii) death is imminent."

Proper interpretation of a statute requires that words be given their ordinary meaning in absence of a clearly intended contrary meaning. McCarron v. Commonwealth, 169 Va. 387, 394, 193 S.E. 509, 512 (1937). In addition, when a statute includes ambiguous terms, the words are to be interpreted in such a way so as to further the purpose of the statute. Rountree Corp. v. City of Richmond, 188 Va. 701, 711, 51 S.E.2d 256, 260 (1949).

In this case, there is some ambiguity in the definition of "life-prolonging procedures," particularly with respect to the exception from that definition of procedures which provide comfort, care, or alleviation of pain. This problem was noted by the joint subcommittee that studied the rights of the terminally ill. See House Document No. 32 at 7 (1983). Thus, to interpret the statute properly, it is necessary to ascertain the purpose or the legislative intent behind the definition of "life-prolonging procedures."

House Document No. 32 refers to "extraordinary" life-prolonging procedures when discussing the subcommittee's intent. Absent some indication to the contrary, the subcommittee's intent can, in my judgment, be construed to be evidence of the General Assembly's intent. With this intent in mind, and giving the words of the statute their ordinary meaning, I am of the opinion that the use of oxygen and of intravenous feeding, as these terms are defined above, are not "extraordinary." In the limited purpose described above, the provision of oxygen and intravenous feeding does not primarily sustain, restore or supplant a spontaneous vital function, but provides comfort, care, or alleviation of pain to the individual patient. Accordingly, under those circumstances, a physician would not be permitted under the Act to terminate the procedures. A different result would undoubtedly follow if oxygen were administered by different means for the purpose of supplanting the spontaneous function of breathing; similarly, a different result would undoubtedly follow if intravenous feeding was not for the purpose of providing comfort against dehydration but was mainly for the purpose of supplanting the spontaneous functions of receiving necessary nourishment into the body in amounts adequate to maintain life. In both situations, of course, before terminating the procedure, it would be necessary for the physician first to find that the patient was in a terminal condition and that the process served only to prolong the dying process.

With respect to kidney dialysis, a legitimate question exists as to whether this procedure provides care, or comfort, or alleviation of pain. While it is not necessarily an "extraordinary" procedure, it does restore or supplant a spontaneous vital function, unlike the limited provision of oxygen or of fluid. Again, ascertainment of legislative intent is of paramount importance in resolving this particular issue.

Because § 54-325.8:2 defines "terminal condition," in part, as a situation where death is "imminent," I believe that a physician may withhold continued dialysis treatment
when, in his or her professional judgment, the dialysis is no longer adding significantly to
the patient's care, comfort, or alleviation of pain. As death becomes imminent the
dialysis treatment becomes an "extraordinary" procedure which is substantially serving
only to prolong life. See § 54-325.8:2(ii).

Section 54-325.8:3 provides a procedure for a competent adult to make a written
declaration, at any time, directing the withholding or withdrawal of life-prolonging
procedures in the event such person should have a terminal condition.

The purpose and effect of a medical procedure is a determination which, initially, is
pequarly within the judgment of the physician.

Of course, this conclusion should not be construed to prevent a physician from
terminating one procedure and replacing it with another which, in the judgment of the
physician, is medically more beneficial to the patient.

HEALTH. CHILDREN MUST BE IMMUNIZED AGAINST MEASLES IN ACCORDANCE
WITH REGULATIONS OF STATE BOARD OF HEALTH OR BE EXCLUDED FROM
SCHOOL.

July 25, 1983

The Honorable Frank W. Nolen
Member, Senate of Virginia

This is in reply to your recent inquiry concerning the statutory requirements for
immunization of children against certain diseases and for the mandatory exclusion from
school of any child who has not been so immunized. See §§ 32.1-46 and 22.1-271.2 of the
Code of Virginia. Specifically, you ask whether a student who was immunized for
measles at an age of less than 365 days may be legally denied admission to a school until
he is immunized again for measles.¹

Section 32.1-46 sets forth the requirement that parents, guardians, or persons in
loco parentis of minor children have their children immunized against certain diseases,
such as measles, before attaining the age of two years. Section 22.1-271.2 then
complements that health statute by providing a means of effective enforcement of the
immunization requirement, i.e., the identification of non-immunized children and their
exclusion from school until appropriately immunized. Section 22.1-271.2(G) specifies
that the State Board of Health, in cooperation with the State Board of Education, shall
promulgate the rules and regulations for the implementation of this immunization
program. Pursuant to that authority, the Board of Health promulgated regulations which
specify that measles vaccine must be administered "at age 12 months or older." See
§§ 3.02.03 and 3.02.04 of the Regulations for the Immunization of School Children, State
Board of Health (July 1, 1983).

I am advised that the State Board of Health imposed a twelve month minimum age
requirement for measles immunization for purposes of complying with § 22.1-271.2
because premature immunization may not be effective. In light of this regulation, which
furthers the legislative intent behind §§ 32.1-46 and 22.1-271.2, I am of the opinion that
a child who was immunized before he or she was 365 days old must be excluded from
school until he or she is properly immunized as specified in the regulations of the State
Board of Health. See § 22.1-271.2(D).
HEALTH. STATUTES. LAW DOES NOT FAVOR REPEAL BY IMPLICATION, UNLESS REPUGNANCE QUITE PLAIN, THEN ONLY TO EXTENT OF SUCH REPUGNANCY.

May 29, 1984

The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked whether a home health agency will require a certificate of public need after July 1, 1984.

Section 32.1-102.1 of the Code of Virginia defines "medical care facility" for purposes of obtaining a certificate of public need and provides in pertinent part:

"5. 'Medical care facility' means any institution, place, building or agency, whether licensed or required to be licensed by the Board or the State Mental Health and Mental Retardation Board, whether operated for profit or nonprofit and whether privately-owned or privately-operated or owned or operated by a local governmental unit, (i) by or in which health services are furnished, conducted, operated or offered...or (ii) which is the recipient of reimbursements from third-party health insurance programs or prepaid medical service plans. The term includes, but is not limited to:

(k). Home health agencies required to be licensed pursuant to Article 6 (§ 32.1-157 et seq.) of Chapter 5 of this title." (Emphasis added.)

The 1984 session of the General Assembly repealed the home health agency licensure law, Art. 5 of Ch. 6 of Title 32 (§§ 32.1-157 to 32.1-162). See Ch. 497, Acts of Assembly of 1984. But, it did not modify the definition of medical care facility in § 32.1-102.1(5)(k). Thus, because the certificate of need definition continues to refer to home health agencies "required to be licensed" and those particular agencies will no longer be required to be licensed under Ch. 497, the actual question is whether the repeal of the licensure law impliedly repealed the requirement that home health agencies comply with the certificate of need law.

According to the Supreme Court of Virginia, "[t]he well settled rule is that the law does not favor a repeal by implication, unless the repugnance be quite plain, and then only to the extent of such repugnancy." Supervisors v. Commonwealth, 116 Va. 311, 313, 81 S.E. 112 (1914). (Emphasis added.)

In my opinion, the repeal of the home health agency licensure requirements, §§ 32.1-157 to 32.1-162, affected § 32.1-102.1(5)(k) only to the extent of implicitly repealing the language "required to be licensed pursuant to Article 6 (§ 32.1-157, et seq.) of Chapter 5 of this title," which modified the definition of home health agencies. In this way, the disfavored doctrine of implied repeal is limited to the least possible extent as required by the Supreme Court.

There is ample evidence that the General Assembly did not intend to repeal the statute's requirement that home health agencies obtain certificates of public need.
First, the requirement of the certificate of public need law is not necessarily predicated upon the fact that a facility must be licensed. See § 32.1-102.1(5) where a "medical care facility" is defined as "any institution, place, building or agency, whether licensed or required to be licensed...." (Emphasis added.) Had the General Assembly intended only licensed facilities to obtain certificates, it would have said "if licensed or required to be licensed" rather than "whether."

Secondly, the definition in § 32.1-102.1(5), setting forth a list of medical care facilities that require certificates of public need, provides that "[t]he term [medical care facility] includes, but is not limited to...." (Emphasis added.) Thus, the term is not limited to licensed home health agencies.

Thirdly, and perhaps most importantly, both the 1983 and the 1984 sessions of the General Assembly rejected bills that would have explicitly repealed the language in the certificate of public need law which requires home health agencies to obtain such certificates. See House Bill 255 (introduced in the 1984 Session of the General Assembly) and House Bill 183 (introduced in the 1983 Session of the General Assembly).

It is a well recognized rule of statutory construction that where two statutes are passed by the same session of the legislature, that fact furnishes strong evidence that they were intended to stand together. See, Lilard v. Fairfax Airport Authority, 208 Va. 8, 13, 155 S.E.2d 338, 342 (1967). Similarly, the General Assembly's concomitant action of repealing the home health agency licensure law and of rejecting a bill that would have eliminated home health agencies from the certificate of public need law is conclusive evidence, in my judgment, that it intended home health agencies to remain subject to the certificate of public need law.

In summary, because of the definition of "medical care facility" and the General Assembly's refusal to pass either bill which would have excluded home health agencies from the necessity of obtaining a certificate of public need, I am of the opinion that home health agencies must continue to obtain certificates of public need prior to commencing operations, notwithstanding the repeal of the home health licensure law.

HEALTH REGULATORY BOARDS, DEPARTMENT OF. DIRECTOR OF DEPARTMENT MAY APPOINT NON-LICENSED PERSONNEL FOR INSPECTION AND INVESTIGATION OF LICENSEES AND PERMITTEES OF BOARD OF FUNERAL DIRECTORS AND EMBALMERS.

September 19, 1983

The Honorable Herbert S. Small, President
Board of Funeral Directors and Embalmers

You have asked for my opinion concerning §§ 54-955(E) and 54-260.69 of the Code of Virginia, as well as other relevant statutes, as they relate to the authority of the Board of Funeral Directors and Embalmers (the "Board") and of the Director of the Department of Health Regulatory Boards (the "Director") to hire investigative personnel. You specifically wish to know if the Board and the Director are empowered to appoint investigative personnel and whether investigators must be licensees of the Board.

Section 54-260.69, which was first enacted in 1972, provides that: "[t]here may be appointed by the Board agents whose title shall be 'Inspector of the Board of Funeral Directors and Embalmers of the State of Virginia'...." (Emphasis added.) That section further provides that any such agent appointed by the Board must be a licensee of the Board and must have had five consecutive years' experience prior to the appointment.
Section 54-955 was enacted in 1977 at the time of the creation of the Department of Health Regulatory Boards.\(^1\) Ch. 579, Acts of Assembly of 1977. As originally enacted therein, S 54-955(E) authorized the Director of the Department to "[]provide for investigative and such other services as needed by the boards to enforce their respective laws or rules and regulations." (Emphasis added.) In 1980, the General Assembly amended S 54-955(E) by deleting the preposition "for." Ch. 678, Acts of Assembly of 1980.

The use of the preposition "for" prior to 1980 implied that the authority of the Director to appoint investigators was to be exercised "on behalf of" the boards for which the Director provides administrative functions and services. This appointive authority was derivative of the boards' authority to enforce their laws and was not authority independently conferred upon the Director. By deleting the preposition "for" from S 54-955(E), however, the General Assembly apparently intended to grant independent authority to the Director for the appointment of investigative personnel.

This legislative intent is further indicated by the contemporaneous enactment in 1980 of S 54-960, which provides in pertinent part:

"The Director and investigative personnel appointed by him shall be sworn to enforce the applicable statutes and regulations and shall have the authority to investigate any violations of those statutes and regulations." (Emphasis added.)

This statute clearly establishes the authority of the Director to appoint and supervise investigative personnel. This authority is granted to the Director independent of earlier provisions of law conferring the power to appoint investigators upon various boards within the Department. In the exercise of this independent authority, the Director is not bound in the appointment of investigative personnel by the provision of S 54-260.69, which limits the discretionary appointment of inspectors by the Board of Funeral Directors and Embalmers to licensees of that Board.\(^2\)

In reaching the foregoing conclusion, I am mindful of S 54-949, which provides that "nothing in this chapter [creating the Department of Health Regulatory Boards] shall be construed to remove from any individual board any of its statutory powers." The authority of the Board to appoint agents pursuant to S 54-260.69 remains undisturbed by S 54-955(E). Such authority, however, is discretionary, as evidenced by the use of the term "may" in S 54-260.69, and need not be exercised by the Board unless circumstances so require. I am, therefore, of the opinion that both the Board and the Director are authorized to appoint investigators.\(^3\) Moreover, the Director, in the exercise of his independent authority to appoint investigators pursuant to S 54-955(E), is not bound by the limitation of S 54-260.69 which applies only to the appointment of inspectors by the Board of Funeral Directors and Embalmers.

In reaching the foregoing conclusion, I have employed the well recognized principle of statutory construction that requires all legislative enactments be given effect to the extent that they can be reconciled. Statutes purporting to relate to the same subject are read in pari materia in order to give effect to each provision. See 1980-1981 Report of the Attorney General at 265; Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961).

\(^1\) The Department of Health Regulatory Boards was created in 1977 for the purpose of "unify[ing] and coordinat[ing] the administrative, enforcement, education, and legislative activities of the several health regulatory boards...." Section 54-949. The Department, as originally constituted, consisted of the Boards of Dentistry, Medicine, Nursing, Pharmacy, Examiners in Optometry, Funeral Directors and Embalmers, and Veterinary Examiners.
Section 54-960 also confers upon investigators appointed by the Director the authority to enforce applicable laws and regulations and to investigate violations of those laws and regulations. Such investigators are therefore authorized to inspect and investigate licensees and permittees of the Board of Funeral Directors and Embalmers regardless of whether they are licensed by the Board.

In the time of severe budgetary constraints, it seems unlikely that both the Director and the Board can justify the employment of personnel which may be rendering duplicative services. Although the two statutes can be legally reconciled it is difficult to do so as a sound governmental practice. This particular legislation should be brought to the attention of the General Assembly for further consideration.

HIGHWAYS. OUTDOOR ADVERTISING. FREEDOM OF SPEECH.

February 15, 1984

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

You advise that in October 1983, a citizen whose residence was located along Route 8, a federal-aid primary highway, displayed a campaign poster in his yard. The campaign poster was located off the highway right-of-way and did not in any way obstruct the view of the traveling public. Based upon these circumstances, you have inquired whether there are pertinent provisions in the Code of Virginia or rules and regulations adopted by the Virginia Department of Highways and Transportation which could be construed to prohibit the use of such signs.

Section 33.1-351 et seq., Outdoor Advertising in Sight of Public Highways (the "Act") governs generally the regulation of outdoor advertising along public highways in Virginia. The purpose of the Act is to promote and protect public safety, to attract tourism and, thereby, enhance the economic well-being and general welfare of the Commonwealth, and to enhance scenic beauty or aesthetic features of highways and adjacent areas. See § 33.1-351(a). "Advertisement" is defined, in pertinent part, by the Act to be "any writing, printing, picture, painting, display, emblem, drawing, sign or similar device which is posted or displayed outdoors on real property and is intended...solicit the patronage or support of the public ...for any political party or for the candidacy of any individual for any nomination or office...." See § 33.1-351(b)(1). It is clear that the poster which you describe would fall within that definition.

Section 33.1-370 deals specifically with advertisements along interstate and federal-aid primary highways. It was enacted in 1960 to regulate advertising along the Interstate System (Ch. 406, Acts of Assembly of 1960) and amended in 1966 in response to the federal Highway Beautification Act of 1965 (23 U.S.C. § 131) to also govern the federal-aid primary system of highways (Ch. 663, Acts of Assembly of 1966). This section provides that no sign or advertisement which is visible from the highway, shall be erected, maintained or displayed unless it qualifies as an official sign, an on-premise sign or a sign in a commercial and industrial area. Route 8 in Floyd County is part of the federal-aid primary system of highways; hence, the poster in question would be subject to regulation. Based on the information related to me and based upon the assumption that the sign in question is visible from the highway, I am of the opinion that the poster does not qualify for one of the three categories mentioned above and is, therefore, prohibited by State law. See § 33.1-370.

I am, however, of the further opinion that it is questionable whether § 33.1-370 could withstand constitutional scrutiny under the First Amendment of the United States Constitution to the extent that the section operates as an abridgement of free speech in
the particular circumstances you have described. The Supreme Court of the United States, while generally upholding regulations of outdoor advertising in the realm of commercial speech, has struck down such regulations as unconstitutional if they also regulate protected, noncommercial speech. Metromedia v. City of San Diego, 453 U.S. 490 (1981). Because political speech is afforded the highest form of protection under the First Amendment, a court might find that the temporary noncommercial sign which you describe would be protected under the First Amendment, notwithstanding § 33.1-370.

1 In Metromedia, Inc. v. San Diego, 453 U.S. 490, 507 (1981), the Supreme Court of the United States characterized these benefits as being substantial governmental goals. While striking down San Diego's billboard ordinance as violative of First Amendment protection of freedom of speech, the Court in that case specifically declined to pass upon the question whether the federal Highway Beautification Act, 23 U.S.C. § 131, was unconstitutional under the First Amendment. 453 U.S. at 515, n.20.

2 Failure to comply with the Highway Beautification Act may result in a withholding of 10% of federal Highway funds to a noncomplying state upon a determination by the Secretary of Transportation of noncompliance with the Highway Beautification Act. Such a penalty has been upheld as constitutional under a variety of legal attacks. South Dakota v. Adams, 506 F.Supp. 50 (D.S.D. 1980) aff'd, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984. In recognition of these factors, the Virginia statute largely mirrors 23 U.S.C. § 131 and federal regulations adopted pursuant thereto. See 23 C.F.R. Part 750 (1983).

3 An official sign generally directs the traveler to food, lodging, other services and tourist information. An on-premise sign advertises the sale, lease or activities being conducted upon the real property on which the sign is located. The only other exempt category of signs are those located in zoned or unzoned commercial or industrial areas which are, nonetheless, subject to size regulation by the Highway and Transportation Commission. See § 33.1-370(b).

4 The Highway and Transportation Commission's Outdoor Advertising Regulations would not be applicable to the sign in question.

5 In Metromedia, the Supreme Court approved other decisions reaching similar results. See John Donnelly and Sons v. Campbell, 639 F.2d 6 '1st Cir. 1980), aff'd, 453 U.S. 916 (1981); State v. Lotze, 92 Wash.2d 52, 593 P.2d 811 (1979), cert. denied, 444 U.S. 921. Since Metromedia, several state courts have struck down as unconstitutional similar regulations and ordinances. See, e.g., Van v. Travel Information Council, 52 Or.App. 399, 628 P.2d 1217 (1981); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52 (1981); Norton Outdoor Advertising v. Village of Arlington Heights, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982).

6 Please note, however, that if the sign solicits funds, such a solicitation would be commercial in nature.

HIGHWAYS. PRIVATE ACCESS. EMINENT DOMAIN. REAL PROPERTY. BLUE RIDGE PARKWAY, CLOSURE OF ACCESS ROADS.

January 5, 1984

The Honorable Willard R. Finney
Member, House of Delegates

You have asked whether the National Park Service may unilaterally close private access roads over federal lands along the Blue Ridge Parkway reserved by deed upon the cessation of the purpose for which they were created.
It is my understanding that on June 17, 1983, the United States Department of Interior, through officials of the National Park Service, Blue Ridge Parkway, closed an access road servicing Mrs. W. W. Compton's property. I am advised that the access road in question was an easement created by reservation in a deed from W. W. Compton to the Commonwealth on April 21, 1938. Mr. Compton conveyed lands to the Commonwealth which in turn conveyed the property to the United States for creation of the Blue Ridge Parkway and adjacent scenic federal parkland. The reservation for the access road was involved in the subsequent deed from the Commonwealth to the United States dated June 2, 1938, and stated that the lands therein described were conveyed "subject to the following reservations in behalf of the owners of adjacent lands... their successors and grantees." The Compton easement in question was thereafter described as extending to State Route 716.

State Route 716 was abandoned at that location in 1957 and relocated on the other side of the Blue Ridge Parkway. I understand that it is the position of the Park Service that because the Comptons have access to relocated Route 716 and the purpose of the easement was to provide access to the old roadway, the need for the old easement has been extinguished. Since 1957, however, the Comptons have continued to use the easement in its entirety for access to State Route 8 and to the Parkway itself.

The Constitution of the United States provides that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation. United States Const., amend. V. I find the case of County of Patrick, Va. v. United States, 596 F.2d 1186 (4th Cir. 1979) is dispositive of the legal issues raised in the closure of Mrs. Compton's access road. In County of Patrick, the Fourth Circuit held that similar deeds containing similar language reserving access roads along the Blue Ridge Parkway for landowners in Patrick County created a right whereby the landowners could use the access road for ingress and egress to and from the Blue Ridge Parkway. 596 F.2d at 1192. The Court saw no specific limitation on the use of the easement in the language of the deeds creating the reservation. Id. at 1191. See, also, United States v. Parkway Towers, Inc., 282 F.Supp. 341 (E.D. Va. 1968) aff'd 405 F.2d 500 (4th Cir. 1969).

Under Virginia law, which has been applied in the federal court in such instances, an easement may be terminated upon the cessation of the purpose for which it was created, but whether there has been a cessation of purpose turns upon the intent of the parties as expressed in the instrument creating the easement. McCreery v. Chesapeake Corp., 220 Va. 227, 257 S.E.2d 858 (1979). American Oil Co. v. Leaman, 199 Va. 637, 101 S.E.2d 540 (1958). The resolution of such a question, absent agreement between the parties, is ordinarily a judicial determination.

From the facts as related to me, there was no limitation on the use and there has been no cessation of purpose in the instance of the Compton easement. Consequently, I am of the opinion that the National Park Service may not unilaterally close the private access road in question.

HIGHWAYS. SECONDARY ROADS. RURAL ADDITIONS. ACCEPTANCE OF ROADS INTO STATE SECONDARY SYSTEM.

May 24, 1984

The Honorable C. Richard Cranwell
Member, House of Delegates
You have asked for my opinion regarding the legality of certain actions taken by the Virginia Department of Highways and Transportation (the "Department") in its administration of § 33.1-72.1 of the Code. These actions are outlined in a letter to you from James E. Buchholtz, County Attorney for Roanoke County, and concern the acceptance of county streets into the State secondary system of highways.

The first question raised in Mr. Buchholtz's letter involves the application by the Department of the three-family-per-mile requirement included in the statute. Specifically, § 33.1-72.1(A) defines "street" to be a street or highway shown on a plat which was recorded or open to use prior to July 1, 1977, which had not been taken into the secondary system of highways and which has on it at least three families per mile. I am advised by the Department that in interpreting this requirement consideration has been given to the question of whether there is sufficient public service offered by a street to merit acceptance. Under long-standing policy adopted by the Highway and Transportation Commission,1 roads of less than a mile with no more than two families are considered to offer private rather than public service and are thereby not eligible for acceptance under the statutory requirement. Roanoke County suggests that this interpretation is contrary to the statutory criteria and that it would be more logical for the Department to prorate the three families per mile.

I am of the opinion that, given the plain statutory requirement, the Department's interpretation is not clearly erroneous. Moreover, this administrative interpretation has been one of longstanding duration enacted by the agency charged with the application of the statute in question. It is a well recognized rule of statutory construction that the interpretation of a statute by the agency charged with its administration is entitled to great weight. County of Henrico v. Mgt. Rec., Inc., 221 Va. 1004, 277 S.E.2d 163 (1981); Commonwealth v. Research Analysis, 214 Va. 161, 198 S.E.2d 622 (1973); see Davis, Administrative Law Treatise § 7.14 (3rd ed. 1979). Finally, the Department's interpretation is further supported by a recent amendment to the statute. That amendment removed the words "has on it" and substituted "serves" so that the statute now reads "and serves at least three families per mile." Chapter 146, Acts of Assembly of 1984.

The second question raised in Mr. Buchholtz's letter is whether, under § 33.1-72.1(C1), the Department may require the county to obtain additional right-of-way and drainage easements as a condition for acceptance of "rural additions." A review of the entire statute and other related parts of the Code is helpful at this point. Subsection (E) of § 33.1-72.1 specifically relieves the Department from the responsibility of obtaining such easements or rights-of-way. As noted by Mr. Buchholtz, subsection (C) of § 33.1-72.1 does authorize the Department to require the county to undertake right-of-way and drainage acquisitions as conditions precedent to acceptance of any additions to the secondary system. Further, § 33.1-72.1(C1) itself states that "[a]ny street added to the secondary system under this provision shall be constructed to the Department's standards for the traffic served."

Chapter 96, Acts of Assembly of 1980 added subsection (C1) to § 33.1-72.1 to provide a mechanism whereby existing streets could be taken into the secondary system of highways as rural additions. Prior to that time, the sole mechanism for acceptance of such county roads (which continues to be available at this time) was found in § 33.1-229. This section also provides for the establishment of new county roads and subsequent acceptance into the secondary system of highways. In prior Opinions of this Office, it has been opined that, under § 33.1-229, the Department can demand a guarantee of right-of-way and drainage from the county as a condition precedent to acceptance of a county street into the State secondary system. I concur in those Opinions and I am of the opinion that the Department can set similar conditions for the acceptance of "rural additions."
This conclusion is supported by what I perceive to be the legislative intent behind § 33.1-72.1. The purpose of the legislation is to address the costly problem associated with accepting substandard roads into the secondary system. See Opinion to the Honorable A. Willard Lester, Commonwealth's Attorney for Bland County, dated December 19, 1983 (copy enclosed). Although, under § 33.1-72.1(C1), the Department may share in the cost of improving such streets to standards from "rural addition" funds, § 33.1-72.1(E) does not require the acquisition of additional right-of-way by the Department. The Department's argument that the cost is best borne by the local governing body is not clearly erroneous and is consistent with existing "rural addition" policy adopted by the State Highway and Transportation Commission. See footnote 1, supra and the language of § 33.1-72.1(C).


HIGHWAYS. SECONDARY SYSTEM. SUBDIVISION STREETS. ACCEPTANCE OF ROADS INTO STATE SECONDARY SYSTEM SPECULATIVE INTEREST OF DEVELOPER.

February 22, 1984

The Honorable Thaddeus R. Cox
Commonwealth's Attorney for Craig County

Section 33.1-72.1 of the Code of Virginia concerns special assessments for improvements of certain roads brought within the State secondary system and provides a separate category for special assessments for developers who maintain a speculative interest in property abutting the roads. You have inquired whether, under the circumstances which you describe, a developer maintains a speculative interest in property abutting a road within the meaning of § 33.1-72.1 of that section.

I am advised by you that a developer owned a tract of approximately 210 acres off a State-maintained highway and subdivided a portion of that land over a period of years. The developer subdivided a portion into 16 lots with family dwellings thereon. Access to the subdivided portion is by a gravel road built by the developer which traverses approximately one-half mile from the State highway. All of the lots are located on the same side of the gravel road. The developer retains no interest in those lots. The property on the other side of the gravel road, however, was not subdivided or developed and is retained by the developer. It consists of one tract of approximately 148 acres. The future intentions of the developer regarding this tract are not known.

You advise that you are of the opinion that the developer does not maintain a speculative interest in the abutting property as contemplated by § 33.1-72.1.

Section 33.1-72.1 provides the procedure by which subdivision streets recorded on plats or otherwise opened to the public prior to July 1, 1977, shall be taken into the secondary system of highways. Subsection (C) provides, inter alia, that the streets in question must first meet certain minimum standards for acceptance set by the Department of Highways and Transportation and that, should the streets fail to meet
such standards, the county must agree to contribute from county revenue or by a special assessment on the abutting landowners, one-half the cost necessary to bring the streets up to the minimum standards. Subsection (C) reads in part:

"Provided, that no special assessment of landowners on such streets shall be made unless the governing body of the county receives written declarations from the owners of seventy-five percent of the platted parcels of land abutting upon such street stating their acquiescence in such assessments. The basis for such special assessments, at the option of the local governing body, shall be either (i) the proportion the value of each abutting parcel bears to total value of all abutting parcels on such street as determined by the current evaluation of the property for real estate tax purposes, or (ii) the proportion the abutting road front footage of each parcel abutting the street bears to the total abutting road front footage of all parcels abutting on the street; provided that no such special assessment on any parcel shall exceed one-third of the current evaluation of such property for real estate tax purposes, provided further that neither the original developer, developers, nor successor developers retain a speculative interest in property abutting such streets for the purpose of this section. Ownership or partnership in two or more parcels abutting such streets shall constitute speculative interest." (Emphasis added.)

The issue is whether the developer's ownership of one large tract of land constitutes a speculative interest when the Code provision states that "ownership or partnership in two or more parcels abutting such streets shall constitute speculative interest."

It is probable that the General Assembly focused upon a situation in which the developer retained ownership of two or more of the subdivided lots or parcels created by the subdivision of an entire parcel. One can certainly argue that retention of ownership of a large parcel, here over 100 acres, constitutes a speculative interest to the same degree as ownership of two small lots.

The issue is resolved, however, by the clear language of the statute. The statute requires ownership of "two or more parcels" to constitute speculative interest. Where the language of a statute is clear and unambiguous, rules of statutory construction are not required. Harbor Cruises v. Commonwealth, 217 Va. 458, 460, 230 S.E.2d 248, 250 (1976).

Because the developer in your situation retained ownership of only one parcel, albeit a very large one, he does not meet the test of having a speculative interest for the purpose of § 33.1-72.1.

I note that the developer would not escape the special assessment of landowners on the street as contemplated by § 33.1-72.1(C), but the assessment would be limited to one-third of the current evaluation of the property for real estate purposes.
You have asked whether the Subdivision Ordinance of Bland County fulfills the requirements of § 33.1-72.1 of the Code of Virginia. Section 33.1-72.1 provides, among other things, that at a county's request the Virginia Department of Highways and Transportation (the "Department") must take subdivision streets into the secondary system of state highways, subject to certain limitations, and pay 50% of the cost to upgrade such streets to State standards, provided that the county has adopted an ordinance requiring subdivision streets to be developed to the secondary system standards.  

The Subdivision Ordinance, adopted May 17, 1977, by Bland County requires the streets of new subdivisions to be built to secondary system standards, but the ordinance exempts streets in subdivisions where all lots exceed three acres. Your question specifically is whether this large lot exemption precludes the ordinance from complying with § 33.1-72.1.

In my opinion, an ordinance with a large lot exception fails to satisfy the statutory requirement and defeats the purpose of the statute.

The provisions of § 33.1-72.1(B) do not specify whether the local ordinance must control all subdivision street development to the necessary standards for acceptance into the secondary system, but that requirement is implicit. There is nothing in the statute which indicates a distinction is to be drawn between sizes of lots.

The Department has adopted a policy guideline to deal with large lot size exceptions in local subdivision ordinances. The Department refuses to recognize such exemptions in the requirement that streets must meet the standards for inclusion in the secondary system.

In addition, my conclusion is supported by the purpose of the legislation which was passed in response to the costly problem associated with accepting substandard roads into the secondary system. Substantial expense can occur in upgrading these roads to secondary standards when they are taken over from private citizens.

Section 33.1-72.1 is an attempt to resolve this problem. The county adopts an ordinance to compel developers to build future streets to the standards of the state secondary system. In return, the Department accepts the county's established streets into the State system and pays 50% of the cost to upgrade these streets. Thus, the county is helped with its current street problem in exchange for an assurance to the Department that the problem will not be allowed to occur in the future. If the statute is interpreted to permit the county ordinance to include whatever exceptions the county desires, the Department's assurance of future control is lost.

1The relevant portion of § 33.1-72.1 is as follows: "B. 'County' means a county in which the secondary system of the state highways is constructed and maintained by the Department of Highways and Transportation and which has adopted a local ordinance for control of the development of subdivision streets to the necessary standards for acceptance into the secondary system.

C. Whenever the governing body of a county recommends in writing to the Department of Highways and Transportation that any street in the county be taken into and become a part of the secondary system of the state highways in such county, the Department of Highways and Transportation thereupon, within the limit of available funds and the mileage available in such county for the inclusion of roads and streets in the secondary system, shall take such street into the secondary system of state highways for maintenance, improvement, construction and reconstruction provided...the governing body of the county agrees to contribute from county revenue or the special assessment of
the landowners on the street in question one-half of the cost to bring the streets up to the necessary minimum standards for acceptance."

2"Article 7.7 of the Bland County Subdivision Ordinance provides as follows: "Street Construction. In subdivisions of land into parcels any one of which is three acres or less, involving a new street, or streets, the developer shall construct those streets to the appropriate Highway Department design standard for inclusion in the state system of highways. In subdivisions of land into parcels all of which are more than three acres each the developer may choose not to construct the new streets involved according to Highway Department standards in which case Article 12.1, Design Standards for Streets, will apply.""

3"Subdivision Street Requirements of Virginia Department of Highways and Transportation," page 5, adopted by Resolution of the Virginia Department of Highways and Transportation dated January 17, 1980 provides as follows:

"Large-Lot-Size Subdivisions

Some counties have provisions in their local control ordinances that except certain large-lot-size subdivisions from their definition of subdivision. The Department does not recognize these in the application of this policy. Since it is the intent of the Department that the acceptance of subdivision streets for maintenance not impose a financial burden on the Secondary System, streets within these subdivisions must meet the requirements shown in Table 1-A."

HIGHWAYS. UNITED STATES. CLOSING OF FOREST SERVICE ROAD ON U.S. FOREST LANDS.

July 25, 1983

The Honorable Edward M. Jasie
Commonwealth’s Attorney for Craig County

You have inquired whether the United States Forest Service has sole discretion and jurisdiction to close a certain road to public travel. You advise that the road in question, United States Forest Service Road 176, known as the "Old Stagecoach Road," is located on national forest land in Craig County, Virginia. You also advise that it has been in existence since the late 18th century and was maintained by public funds until the enactment of the Byrd Road Act in 1932 which created the secondary system of highways. It is not clear who maintained the roadway between 1932 and 1936 when the General Assembly ceded the property to the United States for use as parkland. See Ch. 382, Acts of Assembly of 1936. Since this cession of jurisdiction, the United States has maintained the roadway without aid from either the county or the Commonwealth.

The Supreme Court of Virginia has held that the ancient maxim of common law, "once a highway, always a highway" controls in this State unless and until a highway is vacated or abandoned in the manner prescribed by statute or by nonuser. Bond v. Green, 189 Va. 23, 52 S.E.2d 169 (1949). It is also the general rule that the establishment of a national park within a state will not be construed to curtail the rights or jurisdiction of the state over the highways within the limits of the park without an act of cession from the state. Colorado v. Toll, 268 U.S. 228 (1924); 39 Am.Jur.2d Highways, Streets and Bridges § 201 (1968). Notwithstanding this general rule, however, when the General Assembly ceded the property in question to the United States in 1936 that cession provided:

"Over all lands heretofore or hereafter acquired by the United States for the purposes mentioned in this section, the Commonwealth of Virginia hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways
maintained by the United States thereon...." Chapter 382, Acts of Assembly of 1936 at 611.

Because (1) the Commonwealth has ceded the property to the United States, including the right to regulate traffic on the roadway in question, (2) neither the Commonwealth nor Craig County has expressed any control or dominion over the roadway since the cession of jurisdiction in 1936, (3) nor have they provided any funding for that roadway since that time, it is my opinion that neither the State nor county now has standing or jurisdiction to prohibit the closing. This is not to say that either is prohibited from voicing a position on the matter to the United States. Moreover, it is still incumbent upon the United States to follow proper procedures and relevant federal statutes and regulations in executing this closing. Assuming that the United States has done so in the case at hand, it is my opinion that they have the sole jurisdiction and discretion to close such road. See 1971-1972 Report of the Attorney General at 449 (United States may close beachfront to vehicular traffic at Back Bay Wildlife Refuge).

HOMESTEAD EXEMPTION. NOT AUTOMATIC; HOUSEHOLDER MUST CLAIM BY FILING HOMESTEAD DEED AND VALUATION.

January 10, 1984

The Honorable E. L. Wingo
Sheriff for Chesterfield County

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

"Is anything automatically exempt from levy without the judgment debtor first filing a homestead deed in the circuit court stating the items that are to be exempt from levy? Would the items mentioned in Code § 34-26 be in addition to the maximum $5,000 exemption under the homestead deed?"

Section 34-4 of the Code of Virginia grants a $5,000 homestead exemption as follows:

"Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding five thousand dollars."

Section 34-4 expressly places upon the householder the responsibility for selecting those articles which he wishes to exempt from levy or distress. See 1982-1983 Report of the Attorney General at 750. The privilege of selecting the real or personal property to be exempted is personal to the householder. If he or she fails or neglects to claim the exemption, no one else may claim it on his or her behalf. Linkenhoker's Heirs v. Detrick, 81 Va. 44 (1885); Scott v. Cheatham, 78 Va. 82 (1883); White v. Owen, 71 Va. 43 (1878). To claim the exemption for real property, the householder must file a homestead deed in the appropriate circuit court which describes the property and affixes thereto his cash valuation. See § 34-6. To claim the exemption for personal property, the householder must file a similar writing in the appropriate circuit court, describing the personal property and listing his cash valuation thereof. See § 34-14. Thus, there is no automatic exemption under § 34-4; the householder must act affirmatively to claim his homestead exemption.
The situation is quite different under § 34-26, however. The section provides:

"In addition to the estate, not exceeding in value five thousand dollars, which every household resident in this State shall be entitled to hold exempt, as provided in chapter 2 (§ 34-4, et seq.) of this title, he 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...."

The statute then lists the types and quantities of exempt articles, concluding with the clear statement that "[n]o officer or other person shall levy or distrain upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process."

I am of the opinion, therefore, that both your questions are answered in the affirmative. Section 34-26 plainly states that the articles listed therein are in addition to the homestead exemption provided by § 34-4. Further, these listed articles are automatically protected against levy or distress. Unlike the homestead exemption, there is no requirement that the judgment debtor file any type of writing in order to gain the protection of § 34-26. Section 34-28, however, does require the judgment debtor to select the articles to be covered by the automatic exemption.

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**HOMESTEAD EXEMPTION. SECTION 34-4 APPLIES EXEMPTION TO JUDGMENT FOR DAMAGES RESULTING FROM NEGLIGENT OPERATION OF VEHICLE.**

June 5, 1984

The Honorable Fred E. Martin, Jr., Judge
General District Court, City of Norfolk

This is in response to your request for an opinion whether the homestead exemption contained in § 34-4 of the Code of Virginia applies to a judgment for damages resulting from the negligent operation of a motor vehicle.

Section 34-4, which creates the homestead exemption of a householder, states:

"Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under §§ 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000. The word 'debt,' as used in this title, shall be construed to include a liability incurred as the result of an unintentional tort."

The starting point on a question of statutory interpretation is the language of the statute itself. Where the language is clear and unambiguous, the court's duty is to enforce the statute as written. See Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944); Shackelford v. Shackelford, 181 Va. 869, 27 S.E.2d 354 (1943).

The clear meaning of the last sentence, which was added to the statute in 1978, is to apply the exemption to unintentional torts. See, Ulrich, Virginia's Exemption Statutes - The Need for Reform and A Proposed Revision, 37 Wash. & Lee L. Rev. 127, 142 (1980). Inasmuch as the negligent operation of a motor vehicle is an unintentional tort, the exemption may be claimed against a judgment on that basis. I, therefore, answer your question in the affirmative.
INDUSTRIAL DEVELOPMENT. BONDS. INDUSTRIAL DEVELOPMENT AUTHORITY BONDS MAY NOT BE ISSUED TO FINANCE PROPOSED RENOVATION OF BUILDING FOR USE BY COUNTY DEPARTMENT OF SOCIAL SERVICES.

April 26, 1984

The Honorable Daniel W. Bird, Jr.
Member, Senate of Virginia

This is in reply to your request for my opinion whether the Wythe County Industrial Development Authority (the "Authority") may issue its revenue bonds to finance a proposed renovation of a building for use by the Wythe County Department of Social Services. For the reasons hereinafter discussed, this question is answered in the negative.

The Authority was created pursuant to the Industrial Development and Revenue Bond Act (the "Act"), which is codified in Ch. 33 of Title 15.1 of the Code of Virginia. The first paragraph of § 15.1-1375 recites the overall purposes of the Act to be as follows:

"It is the intent of the legislature by the passage of this chapter to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth and further the use of its agricultural products and natural resources, and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity. It is not intended hereby that any such authority shall itself be authorized to operate any such manufacturing, industrial or commercial enterprise or any facility of an institution of higher education. (Emphasis added.)"

Section 15.1-1375 further states that the chapter is to be liberally construed in conformity with the intentions stated therein.

The Authority is empowered, in § 15.1-1378, to acquire, improve, maintain and lease authority facilities to others in order to carry out the purposes of the Act. The term "authority facilities" is defined as follows, in § 15.1-1374(d):

"[A]ny or all (i) medical (including, but not limited to, office and treatment facilities), pollution control, industrial facilities; (ii) facilities for the residence or care of the aged; (iii) multi-state regional or national headquarters offices or operations centers; (iv) facilities for private, accredited and nonprofit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education such facilities being for use as academic or administration buildings or any other structure or application usual and customary to a college campus other than chapels and their like; (v) parking facilities, including parking structures; and (vi) facilities for commercial enterprises; now existing or hereafter acquired, constructed or installed by or for the authority for lease or sale by the authority pursuant to the terms of this chapter."
Section 15.1-1374(j) defines the term "enterprise" as follows:

"[A]ny industry for the manufacturing, processing, assembling, storing, warehousing, distributing, or selling any products of agriculture, mining, or industry and for research and development or scientific laboratories, including, but not limited to, the practice of medicine and all other activities related thereto or for such other businesses as will be in the furtherance of the public purposes of this chapter."

This Office has been called upon to construe the scope of the Act on numerous occasions since its first enactment in Ch. 651, Acts of Assembly of 1966. It has been held that an industrial development authority may assist in building facilities for a State-operated mental health clinic, because §§ 15.1-1374(d) and 15.1-1375 specifically refer to financing of any and all medical facilities as being within the purposes of the Act. See 1978-1979 Report of the Attorney General at 140. In that regard, it has been held also that an authority may lease property to physicians and dentists and may finance a community hospital. See Reports of the Attorney General: 1973-1974 at 185; 1971-1972 at 222. A bank is a "commercial enterprise" within the meaning of § 15.1-1375 and therefore may be assisted under the Act, and facilities also may be leased for wholesale and retail sales of agricultural products, within the language contained in § 15.1-1374(j). See Reports of the Attorney General: 1975-1976 at 170; 1973-1974 at 185; 1971-1972 at 223.

On the other hand, prior Opinions held: that an industrial development authority may not use bond proceeds to refinance previous financial obligations of a business, in that the Act specifically allows such assistance only with respect to medical facilities and homes for the care of the aged (1980-1981 Report of the Attorney General at 194); that, while an authority may assist the purchase of existing nursing homes and hospitals, it may not assist the purchase of "homes for adults" unless they function as medical facilities (1973-1980 Report of the Attorney General at 198); that the purposes of industrial development authorities do not include the purchase of land for resale to individuals in order to prevent its sale to a national forest and subsequent exemption from taxes (1972-1973 Report of the Attorney General at 224); and that a race track proposed to be financed with authority bond proceeds is neither a facility nor an enterprise within the definitions contained in § 15.1-1374 (1971-1972 Report of the Attorney General at 45).

Other Opinions held that an office building, which would serve as the operations center for a company which owns and operates residential care facilities for the aged in another state, would not be considered either a facility for the residence and care of the aged or a multi-state regional or national headquarters office or operation center under the Act, and that the office of a doctor of chiropractic would not qualify either as a medical facility or as an enterprise related to the practice of medicine, although in each case it also was held that the activity may be found to be among "other businesses as will be in the furtherance of the public purposes" of the Act. See 1980-1981 Report of the Attorney General at 197 and at 199.

I find from my review of the above and other Opinions dealing with application of the Act that, taken as a group, the opinions are consistent both with the requirement of liberal construction contained in § 15.1-1375 and with the accepted limitation that a liberal construction does not mean enlargement of the meaning of the terms of a statute or of its scope to include cases or objects not manifestly within the legislative contemplation. The Act is to be given a fair and rational construction consistent with its purposes.

Applying the above to the present inquiry, in order for the project in question to be found within the scope of the Act, the building and its proposed use must fit fairly and rationally within the definitions contained in § 15.1-1374. In my opinion, a building which
will be used to house offices of a county social services department cannot be assigned fairly to any of the six categories of facilities listed in § 15.1-1374(d), quoted above. As for the definition of "enterprise" contained in § 15.1-1374(q), the scope of the general phrase "such other businesses as will be in the furtherance of the public purposes of this chapter," may be determined by reference to the more specific language employed in the earlier part of the definition. See Martin v. Commonwealth, 224 Va. 298, 301-302, 295 S.E.2d 890 (1982); Commonwealth v. United Airlines, 219 Va. 374, 389, 248 S.E.2d 124 (1978); Rockingham Bureau v. Harrisonburg, 171 Va. 339, 344, 198 S.E. 908 (1938). The words first used in defining "enterprise" are keyed to the word "industry," which "in its common or ordinary sense, means any...business conducted for a livelihood or for profit and it applies especially to a distinct branch of trade in which labor and capital are extensively employed." Mayor, supra, fn. 2, 221 Va. at 870 (citation omitted). Moreover, the "industries" listed in the definition are those for "the manufacturing, processing, assembling, storing, warehousing, distributing, or selling any products of agriculture, mining or industry," and for "research and development or scientific laboratories, including, but not limited to, the practice of medicine and all other activities related thereto ...." Section 15.1-1374(q). In my opinion, the functions of a local public social services agency cannot fairly be brought within the definition of "enterprise," nor is industrial development bond assistance for facilities to house such functions contemplated within the public purposes of the Act.

A question nearly identical with the present one was considered in a prior Opinion of this Office, which noted that the purpose of the Act is not to provide a means whereby local governments may fund the construction of facilities to house their agencies and held that a county industrial development authority cannot issue revenue bonds to construct facilities for its health or welfare department. See 1976-1977 Report of the Attorney General at 109. That holding was reaffirmed in an Opinion contained in the 1981-1982 Report of the Attorney General at 202. From the time of the 1976 Opinion to the present, the General Assembly has amended §§ 15.1-1374 and 15.1-1375 in eight separate Acts of Assembly, but in so doing it has not disturbed the holding of the two Opinions on the point. The General Assembly is presumed to have had knowledge of this interpretation of the Act, and its failure to make corrective amendments evinces legislative approval of the holding of those Opinions. See Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603 (1983); Deal v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983).

Based upon the foregoing analysis, it is not necessary to explore in detail additional reasons for my conclusion. Nevertheless, I do note that it is highly problematic that a Virginia local government undertaking discharge of a governmental function can be induced to enter or remain within the Commonwealth. As stated in the prior Opinion found in the 1976-1977 Report of the Attorney General, supra, local governmental agencies may have offices only within Virginia. Secondly, and of even more concern, if a county were able to contract debt through the Act, it would circumvent or entirely avoid the stringent provisions of the Code comprising the Public Finance Act, § 15.1-170 et seq. which regulates county debt. If those provisions are to be circumvented, it should be through clear legislative direction and not through strained construction by this Office.

1Note that the 1983 amendments to § 15.1-1374 limit these latter holdings. See Ch. 514, Acts of Assembly of 1983.
3Mayor v. Industrial Dev. Auth., 221 Va. 865, 869, 275 S.E.2d 888 (1981); Jordan, supra, fn. 1, 138 Va. at 842: "Whether the rule of construction be strict or liberal, the statute should have a fair construction in the light of its enactment, and if the legislative intent can be gathered from its language, it should be given effect."

JAMESTOWN-YORKTOWN FOUNDATION. CORPORATION ESTABLISHED BY FOUNDATION IS INSTRUMENTALITY OF COMMONWEALTH.

August 4, 1983

The Honorable Ross Weeks, Jr.
Executive Director
Jamestown-Yorktown Foundation

You have requested my opinion regarding the status of the Jamestown-Yorktown Foundation, Inc. (the "Corporation") as an instrumentality of the Commonwealth.

The Corporation was established by the Jamestown-Yorktown Foundation (the "Foundation"), an agency of the Commonwealth, pursuant to express authority set forth in § 9-97 of the Code of Virginia. That statute authorizes the Foundation:

"(d) [t]o establish a nonprofit corporation as an instrumentality to assist in the details of administering the affairs of the Foundation." (Emphasis added.)

An examination of the Articles of Incorporation of the Corporation reveals it to be incorporated under Ch. 2 of Title 13.1 as a non-stock corporation. Its stated purposes are consistent with § 9-97. It is, therefore, by statute and by declaration in its charter, an instrumentality of the Foundation and, thereby, of the Commonwealth.

JUDGES. CIRCUIT COURT JUDGE MAY NOT SERVE AS ARBITRATOR.

April 20, 1984

The Honorable William T. Wilson
Member, House of Delegates

You have asked whether private parties may, by agreement, designate a circuit court judge as an arbitrator and submit various disputes to him.

I am of the opinion that a judge may not serve as an arbitrator. Canon 5E of the Canons of Judicial Ethics provides that "[a] judge shall not act as an arbitrator or mediator." Accordingly, a circuit court judge may not serve as outlined in your question.

JUDICIAL SALES, GENERAL PROVISIONS FOR SPECIAL COMMISSIONERS. SALE OF LAND. SECTION 8.01-96 SILENT AS TO SPECIFIC TIME LIMITATION ON SALE OF PROPERTY.

January 13, 1984

The Honorable Ford C. Quillen
Member, House of Delegates
This is in response to your request for an opinion on several questions presented by a constituent concerning bonds for special commissioners. I assume the commissioners in question are appointed for the purpose of making judicial sales. I will address each of the questions in the order presented in your letter.

The first question asks how long a special commissioner has to sell the property after his appointment. Section 8.01-96 of the Code of Virginia provides for the appointment of special commissioners in judicial sales. This section is silent as to any specific time limitation on sale of the property. Therefore, in absence of a court order, no specific time limit is placed upon the special commissioner.

The second question is whether § 64.1-184 requires that the sale of land must take place within one year after the death of the testator or intestate. Section 64.1-184 states in pertinent part that:

"Any alienation of such estate made within one year after the death of the testator or intestate shall be valid against creditors of such testator or intestate, if such estate be sold and conveyed under and pursuant to decrees of a court of competent jurisdiction in a proper suit for partition, sale of lands of persons under disability, or other judicial sale, and the net proceeds of sale thereof be paid to a special commissioner appointed by the court for the purpose."

"The net proceeds so paid shall be held by the special commissioner appointed by the court for the purpose, in lieu and in place of such estate subject to the claims of creditors of the testator or intestate in the same manner and to like extent in every respect as such estate would have been if not sold, for a period ending no sooner than one year after the death of the testator or intestate, at which time, if no claim shall have been made or asserted against the net proceeds, they shall be distributed by the special commissioner...."

The statute specifically deals with alienation of an estate which is made within a year after the death of the owner. It also speaks of the net proceeds being held by the special commissioner in lieu of the estate subject to the claims of creditors, as if the estate had not been sold, for a period ending "no sooner than one year after the death of the testator or intestate...." Section 64.1-184 does not dictate that the sale of land must take place within a year after the death of the testator or intestate. This section protects creditors if the sale occurs within a year after the death.

The third question presented deals with the issue of who is primarily responsible for the bond premium payment to the insurance agent. I am not aware of any statute which fixes responsibility for the payment of the bond premium. The special commissioner must obtain a bond before any payment for the property can occur, unless the court acts in the manner provided for in § 8.01-99 or the parties waive such bond protection by ratifying the acts of an unbonded special commissioner. See Lee v. Swepson, 76 Va. 173 (1882). It is reasonable to assume that when a bond is required, the court will determine how the bond premium will be ultimately paid. See § 49-16. Initially, however, the special commissioner might have to advance the bond premium in order to secure the bond.

The fourth question is how long the payment of the bond premium by the special commissioner can be postponed. I am not aware of any specific time limit with regard to payment of a bond premium. This is a matter of contract between the bonding company and the commissioner.

The fifth question asks which officer of the court is responsible for ensuring that the special commissioner will perform his or her duties within the requisite time period. The court appoints a special commissioner to serve as an officer of the court. See
THE SPECIAL COMMISSIONER IS AN AGENT OF THE COURT AND THE MEDIUM THROUGH WHICH THE PURCHASER MAKES AN OFFER TO THE COURT. SEE FRENCH V. POBST, 203 VA. 704 127 S.E.2d 137 (1962). Thus, if the special commissioner is not fulfilling his duties, it is the duty of the court to take appropriate action.

The sixth question is whether the court can deny an insurance agent's request to be relieved of a special commissioner's bond if that agent has given timely notice of his desire to be relieved to the court and the special commissioner. Section 49-22 provides a statutorily prescribed procedure by which courts may relieve sureties of future liability on bonds. In accordance with the provisions of that section, a surety desiring to be relieved of his suretyship may obtain a court order requiring the officer posting bond to give a new bond with surety. When that is done, the first surety is relieved of future liability, but the court is not empowered to enter an order relieving the surety on an existing bond from future liability until and unless a new bond is given and accepted. AETNA CASUALTY CO. V. SUPERVISORS, 160 VA. 11, 168 S.E. 617 (1933).

The seventh question is whether a special commissioner's unpaid bond premium acts as a lien against the property involved in the sale. In the absence of a statute creating such a lien, an unpaid bond premium cannot be interpreted as a lien on the property for which the special commissioner is responsible.

The last question is whether the special commissioner is in any way responsible for the payment of the bond premium by the owners. Absent a statute or a decree by the court, I am of the opinion that the special commissioner is not responsible for monitoring the payment of the bond premium by the owners. As stated in reply to your third question, the responsibility for fixing the source of payment for the bond is upon the court that appoints the commissioner.

JURIES PAYMENT OF PER DIEM ALLOWANCE INCLUDES TRAVEL EXPENSES.

February 14, 1984

The Honorable B. A. Davis, III, Judge
Twenty-Second Judicial Circuit

You have asked whether payment of reasonable mileage to jurors may be made by the court under § 14.1-195.1 of the Code of Virginia. As you indicated, prior to 1982 that section specifically authorized the payment of mileage expenses to jurors. In 1982 the General Assembly amended the section to remove all references to reimbursement for mileage expenses. See Ch. 610, Acts of Assembly of 1982. At that time the General Assembly also increased the per diem reimbursement by $5.00.

In a prior Opinion I concluded that it was "reasonable to assume that the General Assembly intended the per diem allowance to include mileage expenses and any other incidental expenses, rather than have the clerk determine the mileage allowance for each juror." See 1982-1983 Report of the Attorney General at 307. While § 14.1-195.1 does authorize the court to pay a juror any "other necessary and reasonable costs," it continues to be my opinion that the General Assembly intended to include mileage expenses in the per diem allowance. Your question, therefore, is answered in the negative.

JURISDICTION WHAT. STATE AND COUNTY POLICE JURISDICTION OVER CERTAIN FEDERAL LANDS IN WARREN COUNTY.
The Honorable Lynn C. Armentrout  
Sheriff of Warren County  

You have asked my opinion as to what jurisdiction county and State law enforcement officers have on the following property owned by the United States within Warren County:

(1) National Park Shenandoah,  
(2) National Forest Property,  
(3) U.S. Customs Day Training Center,  
(4) National Zoological Park Conservation and Research Center,  
(5) Other United States entities.

The jurisdiction you speak of is commonly called "legislative jurisdiction." The jurisdiction from the federal point of view is either exclusive, concurrent, proprietary or partial. "Exclusive" means solely to the exclusion of others. "Concurrent" means that State and local law enforcement authorities enjoy jurisdiction equal to that of their counterparts with the United States. "Proprietary" means the State and local authorities enjoy full authority, with their federal counterparts having none. "Partial" means that the State and local authorities enjoy some authority with the federal officers.

The question of federal/state jurisdiction over land in Virginia owned and administered by the United States is a complicated problem, dependent on a variety of factors. Initially, it must be determined when the United States originally acquired the land in question. Once the acquisition date is known, a review of Virginia law must be made to determine which "consent" statutes, if any, are applicable to the acquisition in question. These statutes which are both special and general in nature, relate to the granting of consent of the State to the acquisition of land in Virginia by the United States. Further, a review of the land records may reveal what jurisdiction was being acquired by the United States. In an attempt to shorten the time to make jurisdiction determinations, in 1976 an Inventory of Jurisdiction was prepared by this Office, in conjunction with the federal authorities, which indicated the jurisdiction exercised by federal agencies. The following is the property listed in Warren County in the 1976 report.

(1) Department of Interior  
Agency: Park Service  
Land Involved: Shenandoah National Park, 13,218 acres, acquired between 1935 to 1969  
Jurisdiction: Partial jurisdiction  

(2) Department of Agriculture  
Agency: Research Service  
Land Involved: Beef Cattle Research Station, 4,136 acres, acquired between 1911 to 1915
Jurisdiction: Exclusive and concurrent
Agency: Forest Service

Land Involved: George Washington National Park, 5,899 acres, acquired between 1913 to 1974

Jurisdiction: Proprietary

With respect to the Shenandoah National Park, the General Assembly has specifically provided that the United States use exclusive criminal jurisdiction over the lands within the Shenandoah National Park as initially developed and as it has been extended. This jurisdiction has been accepted and assumed by the United States. 16 U.S.C.A. § 403(c)-i (1974). State and county law enforcement officers have no authority in the Shenandoah National Park. The Commonwealth retained jurisdiction to serve civil and criminal process within the Shenandoah National Park. See § 7.1-19 of the Code of Virginia. Because that section dealt with more than police jurisdiction, jurisdiction was listed as partial on the 1976 Inventory of Jurisdiction.

With respect to the George Washington National Park, which I believe involves the Forest Service, not the Park Service, the United States has only proprietary jurisdiction meaning that State and county law enforcement officers have full authority.

With respect to the Beef Cattle Research Station, on which I believe the other United States operations which you listed are situated, the answer depends on which portion of the property is in question. To be certain, one would have to examine the land records in the 1911-1915 time frame when the 4,136 acres was acquired. A surveyor may be needed to pinpoint the exact line of demarcation on the ground between areas of exclusive and concurrent jurisdiction. It is necessary to review the general jurisdiction statute in force at the time of acquisition by the United States or the language in the document by which the United States obtained control of the property before an exact determination of jurisdiction can be made. The land records at the circuit court should have the documents and deeds available for review. If there is no contravening language in the deeds of acquisition or jurisdiction deeds, under the general jurisdiction statute the United States enjoys exclusive jurisdiction over lands acquired before March 14, 1912. See Ch. 482, Acts of Assembly 1901-1902; § 15a of the Code of Virginia of 1904. For lands acquired after March 14, 1912, through 1915, the United States and the Commonwealth share concurrent jurisdiction by virtue of § 19 of the Code of Virginia of 1919.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. ATTORNEYS FEES. COUNSEL FEES MAY BE ASSESSED AGAINST PARENT OR OTHER PERSON STANDING IN LOCO PARENTIS UNDER § 16.1-267.

August 1, 1983

The Honorable James A. Leftwich, Judge
Juvenile and Domestic Relations Court for the City of Chesapeake

You have inquired whether the provisions of §§ 16.1-266(B) and 16.1-267 of the Code of Virginia empower the juvenile and domestic relations district court to assess costs against a guardian, legal custodian or other persons standing in loco parentis, as well as against a parent, in situations where counsel has been appointed pursuant to § 16.1-266(B).
Section 16.1-266(B) provides that in certain cases a child and his parent, guardian, legal custodian or other person standing in loco parentis must be informed of the child's right to counsel and "of the liability of the parent, guardian, legal custodian or offer person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267...." (Emphasis added.) The second paragraph of § 16.1-267 concerns appointment of counsel by the court under § 16.1-266(B) and provides that if the parents are financially able to pay for the attorney in whole or in part and refuse to do so, the court shall assess costs in whole or in part against the parents for such court appointed legal services in an amount not to exceed one hundred dollars ($100.00).

While § 16.1-267 does not specifically mention the assessment of costs against persons other than "the parents", both § 16.1-266(B) and § 16.1-267 cover the same general subject matter. Thus, both statutes can reasonably be said to be in pari materia and must be construed together, if reasonably possible, so as to give force and effect to each. Kirkpatrick v. B'd of Supervisors, 146 Va. 113, 136 S.E. 186 (1926).

Section 16.1-266(B) plainly extends the liability for payment of legal fees beyond a child's parents. It would be inconsistent and unreasonable to conclude that the legislature intended to list those liable for such costs in § 16.1-266(B) and then, in essence, limit liability to "parents" in § 16.1-267. Full effect can only be given to both of these statutes by concluding that the word "parents" as used in § 16.1-267 was intended to include all those listed in § 16.1-266(B).

Similar phrasing occurs in §§ 16.1-279(A)(5) and 16.1-283. Section 16.1-279(A)(5) provides that a court may "[t]erminate the rights of such parent, guardian, legal custodian or other person standing in loco parentis pursuant to § 16.1-283." Nevertheless, § 16.1-283 refers only to the termination of "[t]he residual parental rights of a parent or parents...." It is thus apparent that the legislature intended the term "parent" in these contexts to include and refer to not only the natural and adoptive parents of a child but also his guardian, legal custodian or other persons standing in loco parentis.

Additionally, a person who stands in loco parentis "stands in the place of the natural parent, and the reciprocal rights, duties, and obligations of parent and child continue, so long as such relation continues." Doughty v. Thornton, 151 Va. 785, 792, 145 S.E. 249 (1928). By thus reading §§ 16.1-266(B) and 16.1-267 in pari materia, the statutes permit the assessments of costs for a child's attorney against those persons, who, by virtue of standing in loco parentis, have the duties and obligations of a parent, including the payment of attorneys' fees. Such a construction clearly comports with the imposition of liability for attorneys' fees against parents, guardians, custodians or other persons standing in loco parentis.

I am, therefore, of the opinion that juvenile and domestic relations district courts are empowered under § 16.1-267 to assess costs for a child's attorney appointed pursuant to § 16.1-266(B), not only against the child's natural or adoptive parents, but also against the child's guardian, legal custodian or other persons standing in loco parentis.

You have also asked whether the juvenile and domestic relations district court has any means to collect unpaid assessed costs beyond forwarding a record of such delinquent amounts to the circuit court as an uncollected cost. In considering this question, it must be remembered that §§ 16.1-266(B) and 16.1-267(A) together impose a liability upon the parents, guardian, legal custodian or other person standing in loco parentis for necessary legal services provided to the child. Section 16.1-267 clearly contemplates an ability on the part of the child's parent, guardian, legal custodian or other person standing in loco parentis to pay for such services in whole or in part coupled with a refusal to pay such amounts.
With respect to fees assessed against parents or others as a result of proceedings initiated under §§ 16.1-266(A) or 16.1-266(B), it seems clear that the legislature intended that the court may direct an order to pay the fees under § 16.1-267. If a person refuses to comply with such an order, the court, subject to constitutional and statutory requirements and limitations, may then proceed to employ its contempt powers under §§ 18.2-458 and 16.1-69.24 to enforce compliance with its order in an appropriate case.

It is my opinion that in addition to the method you have suggested, a court may fashion appropriate orders to effectuate payment of the award of attorneys' fees and use its statutory contempt powers to enforce these orders.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. BAIL. GENERAL DISTRICT COURT JUDGE DOES NOT HAVE JURISDICTION TO HEAR APPEAL OF BOND UNDER § 19.2-124.

April 19, 1984

The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You have inquired whether a judge of the general district court may hear an appeal on the reasonableness of the bond fixed by a deputy clerk of the juvenile and domestic relations district court under § 19.2-124 of the Code of Virginia.

Section 19.2-124 provides in pertinent part that "[i]f a magistrate or other judicial officer denies bail to an accused, or juvenile taken into custody pursuant to § 16.1-246 or requires excessive bail...the accused or juvenile may appeal therefrom successively to the next higher court or judge thereof...." To answer your question, therefore, an analysis must be made of whether a general district court is a higher court than the juvenile and domestic relations court.

It is clear from a review of the statutes encompassing the jurisdiction and operation of the juvenile and domestic relations courts that the next highest court is the circuit court and not the general district court. The juvenile and domestic relations courts have exclusive original jurisdiction over the cases, matters and proceedings enumerated in § 16.1-241. All appeals are taken to the circuit court. See § 16.1-296. The same statutory provisions that provide for the organization and operation of general district courts also apply to juvenile and domestic relations courts. Section 16.1-230. The only State court to have concurrent jurisdiction of matters falling within the jurisdiction of juvenile and domestic relations courts is the circuit court. Section 16.1-244.

From this review, it is clear that the circuit court is the next highest court to the juvenile and domestic relations district court. I, therefore, am of the opinion that under § 19.2-124, a general district court judge does not have the authority to hear an appeal on a bond fixed by a deputy clerk of the juvenile and domestic relations district court.

June 28, 1984

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

You have asked whether the statutory requirement for the destruction of all records in certain juvenile cases applies in a circuit court, as well as juvenile and domestic relations courts.

Section 16.1-306(G) of the Code of Virginia provides that when a juvenile and domestic relations court notifies a circuit court of the destruction of certain juvenile records, 1 the circuit court shall also destroy any records it has in connection with the same proceeding. Your specific question is whether it is also mandatory for the circuit court to delete all index references to such records pursuant to § 16.1-306(F). 2

This Office has previously stated that § 16.1-306(G) was intended to ensure that all references to the juvenile case in question be deleted from public records, so that the circuit court could treat the offense as if it never occurred. See 1978-1979 Report of the Attorney General at 163. Section 16.1-306(F) does not restrict the requirement for the deletion of index references in a juvenile matter to the juvenile and domestic relations court. Simply because § 16.1-306(G) makes no specific reference to the deletion of "index references" when it directs the circuit court to "destroy records" does not exempt the circuit court from the requirements of § 16.1-306(F).

I am, therefore, of the opinion that the specific requirement in § 16.2-306(G) that a juvenile court delete "index references" as well as its "records" applies with equal force to the circuit court.

1Section 16.1-306(G) provides that "[t]he court shall notify all pertinent agencies and the circuit court of the destruction of records provided for in subsections A, C and C1. Such agencies and circuit courts shall also destroy any records they have in connection with the same proceeding."

2Section 16.1-306(F) provides that "[u]pon destruction of the records of a proceeding as provided for in subsections A, C and C1, the violation of law shall be treated as if it never occurred. All index references shall be deleted and the court and law-enforcement officers and agencies shall reply and the person may reply to any inquiry that no record exists with respect to such person."

June 21, 1984

The Honorable Eugene E. Lohman, Judge
Juvenile and Domestic Relations District Court for Smyth County

You have asked whether a juvenile and domestic relations district court possesses continuing jurisdiction over a person who is the subject of a foster care service plan prepared pursuant to § 16.1-282 of the Code of Virginia after such person, who is otherwise competent, has attained the age of majority. You have also asked whether a local department of social services must file a petition for a hearing to review a foster care plan of a person prepared pursuant to § 16.1-282 after that person, otherwise competent, has attained the age of majority.
Section 16.1-242 provides that if a juvenile and domestic relations district court has attained jurisdiction of a child, it "may" retain jurisdiction until such person becomes twenty-one years of age, except when the person is in the custody of the Department of Corrections or when jurisdiction is divested pursuant to § 16.1-244. Section 16.1-285 further provides as follows:

"All commitments [including foster care placements] under this law shall be for an indeterminate period having regard to the welfare of the child and interests of the public, but no child committed hereunder shall be held or detained after such child shall have attained the age of twenty-one years; provided, however, any child who is committed under this law as an abused or neglected child or a child in need of services shall have the right upon request to be released from such commitment at the age of eighteen years."

It is my opinion that if a juvenile and domestic relations district court has assumed jurisdiction under a foster care plan of a child before his eighteenth birthday, it possesses continuing jurisdiction over that person until he reaches twenty-one years of age, subject to the limited exceptions found in §§ 16.1-242 and 16.1-285. See, generally, 1981-1982 Report of the Attorney General at 215. I, therefore, answer your first question in the affirmative.

The provisions of § 16.1-282, providing for foster care service, are generally applicable to all children in the custody of a local board of social services or a child welfare agency. See § 16.1-282(A). Section 16.1-282(B) requires the preparation of a foster care plan within sixteen months following the initial placement of a child and further requires the filing of a petition to seek a review of that plan for the child by the juvenile and domestic relations district court. Once the petition is filed, the court must schedule a hearing within sixty days. See § 16.1-282(C). At the conclusion of the hearing, the court must then enter the appropriate order of disposition. See § 16.1-282(D). The court possesses continuing jurisdiction over such cases reviewed under § 16.1-282 for so long as the child remains in a foster care placement, and the statute requires the court to schedule a hearing on the case periodically thereafter. See § 16.1-282(E).

All of the subsections of § 16.1-282 deal with requirements to be met by a local agency or by the court for a "child." Section 16.1-228(D) defines a "child" as a person less than eighteen years of age. I am, therefore, of the opinion that the requirements of § 16.1-282 regarding the preparation of the foster care plan, the petition for review, and the court's hearing of the petition are applicable only for persons less than eighteen years of age who are in the custody of a local board of social services or a child welfare agency. They would not be required when the person is over eighteen years of age. I, therefore, answer your second question in the negative.

In sum, the court may retain and exercise jurisdiction over persons placed in foster care plans until such persons are twenty-one years of age, but the court is not mandated to adhere to the provisions of § 16.1-282 after a child reaches the age of eighteen.

JUVENILE & DOMESTIC RELATIONS DISTRICT COURTS. RECORDS. SOCIAL HISTORY, MEDICAL, PSYCHOLOGICAL AND PSYCHIATRIC REPORT, PREPARED AT DIRECTION OF COURT BY AGENCY OTHER THAN COURT SERVICE UNIT BECOME PROPERTY OF COURT AND MUST BE MAINTAINED IN CONFORMITY WITH ART. 12 OF CH. 11 OF TITLE 16.1.
August 25, 1983

The Honorable R. P. Zehler, Jr., Judge
Charlottesville-Albemarle Juvenile and Domestic Relations District Court

You have asked for my opinion on several questions related to the maintenance and confidentiality of records maintained by courts not of record, which include the juvenile and domestic relations district courts. Requirements for the maintenance of this information is contained in Art. 12, Ch. 11 of Title 16.1 of the Code of Virginia. Your questions regard the ownership and confidentiality of reports submitted to the juvenile and domestic relations district court, pursuant to its order, by an agency other than the court service unit.

Your first inquiry is whether a social history, medical, psychological, or psychiatric report prepared at the direction of the court becomes the "property" of the court when submitted by an agency other than the court service unit. I assume that your inquiry is concerned with the type of reports prepared pursuant to §§ 16.1-273, 16.1-275 and 16.1-278. Such reports are prepared to assist the court in making proper adjudicatory or dispositional decisions regarding the juvenile subject to its jurisdiction. When such reports are submitted to a court they become the "property" of that court as a part of its record, and must be maintained in conformity with Art. 12. See §§ 16.1-304 and 16.1-305.

Your second inquiry is, if these reports are the "property" of the court, may the agency submitting such report maintain a copy of the report in its agency files. I am aware of no prohibition which would prevent the agency from maintaining in its own agency files a copy of a report submitted to the court. Having prepared the report, agency personnel would be aware of its contents and retaining a copy would not appear to be inconsistent with the disclosure restrictions contained in § 16.1-303.

Your third inquiry is whether the agency must acquire the approval of the court to share the agency copy of the report with a third party. Section 16.1-303 provides that "[a]ll information obtained in discharge of official duties by any official or by any employee of the court shall be privileged, and shall not be disclosed to anyone other than the judge unless and until otherwise ordered by the judge or by the judge of a circuit court...." Section 16.1-305 also imposes a requirement of confidentiality upon certain records, including reports of the type described herein. Therefore, the disclosure restrictions imposed upon the court by law would similarly apply to the copies maintained by the submitting agency.

In summary, I am of the opinion that the report becomes the "property" of the court for which it was prepared and to which it was submitted by order of that court and that the agency preparing such report may keep in its possession a copy thereof; however, the agency must first obtain the approval of the court to share the reports or the contents thereof with a third party. Pursuant to §§ 16.1-301(B)(3) and 16.1-305(A)(4), the judge may issue an order permitting other persons to examine the law enforcement or court records of juveniles if they have a legitimate interest in the case, in the work of the law-enforcement agency, or in the work of the court. See 1979-1980 Report of the Attorney General at 132.
June 7, 1984

The Honorable Royston Jester, III
Member, House of Delegates

You have asked whether a judge of a juvenile and domestic relations district court may, after July 1, 1984, designate a policeman to serve a preliminary protective order entered in a spouse abuse case pursuant to § 16.1-253.1 of the Code of Virginia.

Chapter 631, Acts of Assembly of 1984, becomes effective on July 1, 1984, and provides, in part, for the entry of an ex parte preliminary protective order "against an allegedly abusing spouse" in order to protect the health and safety of the petitioner. See § 16.1-253.1. Such order may grant the petitioner possession of the residence occupied by the parties to the exclusion of the allegedly abusing spouse. See § 16.1-253.1(A)(3). The order "shall be served as soon as possible on the allegedly abusing spouse in person as provided in § 16.1-264." See § 16.1-253.1(B). Section 16.1-264 provides, in part, that "[s]ervice of summons may be made under the direction of the court by...police officers in counties and cities...."

Section 15.1-138 provides generally for the powers and duties of a police force in towns and cities and states, in part, as follows:

"[such] policeman shall have no power or authority in civil matters...but he shall...execute such warrants or summons as may be placed in his hands by any justice of the peace or trial justice for the city or town...."

Your question is thus whether a judge of a juvenile and domestic relations district court is prohibited by § 15.1-138 from designating a policeman to serve a preliminary protective order entered pursuant to § 16.1-253.1 which is required to be served as provided in § 16.1-264.

When two statutes are in apparent conflict, they should be construed, if reasonably possible, to give them a construction that will give force and effect to each.1

It is an accepted rule of statutory construction that a statute applicable to a special or particular set 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.2 Following this rule, § 16.1-253.1 and § 16.1-264(B) would operate as an exception to § 15.1-138 and would require the service of ex parte preliminary protective orders by a policeman when requested by the court. Moreover, the later enactment of the General Assembly, in this case in the 1984 session enactment of § 16.1-253.1, must be construed as expressing the will of the legislature. See 1973-1974 Report of the Attorney General at 219.

I am, therefore, of the opinion that a juvenile and domestic relations district court judge may request a policeman to serve a preliminary protective order entered pursuant to § 16.1-253.1 in a case of alleged spouse abuse.

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The Honorable W. L. Person, Jr.
Commonwealth's Attorney for the City of Williamsburg and County of James City

You ask whether §§ 16.1-301, 16.1-309, or 16.1-309.1 of the Code of Virginia prohibit a State or local law enforcement officer from testifying against a juvenile student at a disciplinary hearing before a school board. The statutory sections you cite in your question concern the confidentiality of records and information derived from proceedings in the Juvenile and Domestic Relations District Courts. Specifically, § 16.1-309 provides:

"Except as provided in §§ 16.1-299, 16.1-300, 16.1-301, 16.1-305 and 16.1-307, any person who files a petition, receives a petition or has access to court records in an official capacity, participates in the investigation of allegations which form the basis of a petition, is interviewed concerning such allegations and whose information is derived solely from such interview or is present during any court proceeding who discloses or makes use of or knowingly permits the use of identifying information concerning a juvenile who is suspected of being or is the subject of a proceeding within the jurisdiction of the juvenile court...or who is in the custody of the State Board of Corrections, which information is directly or indirectly derived from the records or files of a law-enforcement agency, court or the Department of Corrections or acquired in the course of official duties, shall be guilty of a Class 3 misdemeanor." (Emphasis added.)

You note in your question that the testimony about which you are concerned is testimony consisting of facts which the law-enforcement officer is personally aware from his own observation or investigation; that is, facts derived independently from juvenile court hearings, proceedings or juvenile records. Further, you note that the most common situation in which such testimony would be given is that where the law enforcement officer observes the student committing a criminal offense, or through his investigation determines that the student committed an offense which constitutes a violation of a school system's disciplinary policy. The officer may or may not have obtained a juvenile petition against the student.

The information that §§ 16.1-299 to 16.1-309.1 seeks to control is that which would specifically identify or describe a juvenile, or would otherwise concern a particular juvenile, who has become involved with a law-enforcement agency or court, if that information is derived either directly or indirectly from an agency or court file or acquired by anyone in the course of official duties. See 1977-1978 Report of the Attorney General at 219.

Witnesses and parties in juvenile proceedings are only prohibited from disclosing identifying information concerning the juvenile which is obtained from the court proceeding or records of the court. They are not subject to the sanction provided for in § 16.1-309 upon revealing nonidentifying information or any information gained from other sources or from their own observations independent from court sources. See 1980-1981 Report of the Attorney General at 217.

In response to your question, therefore, it is my opinion that a law-enforcement officer is not prohibited by §§ 16.1-299 to 16.1-309.1 from testifying against a juvenile student at a disciplinary hearing before a school board if the testimony consists of facts which the officer observed personally, independently of juvenile court hearings, proceedings and records.
Presumably, the hearings to which you refer include those in which students may be suspended for more than ten school days or expelled from school pursuant to § 22.1-277. I note that nothing in the statutory provisions of Title 22.1 relating to these hearings before a school board prohibits the type of testimony you describe in your inquiry.

Section 16.1-301 requires that special precautions be taken by the court to ensure that law-enforcement records concerning children before the court are protected from unauthorized disclosure, and it specifies those to whom such records may be disclosed. Section 16.1-309.1 provides that, where required by the public interest, a judge may make public identifying information about a child before the court in specific types of cases.

A Class 3 misdemeanor is punishable by fine of not more than $500. See § 18.2-11(c).

It should be noted that this Office previously has held that certain reports, which are in the records of the juvenile court (for example, drug analysis reports), may be made available, pursuant to an appropriate court order, to school authorities. See 1979-1980 Report of the Attorney General at 132.

JUVENILES. JAILS. MANDATORY JAIL SENTENCE PROVISIONS FOR SECOND OFFENSE DRUNKEN DRIVING (§ 18.2-270) APPLICABLE TO JUVENILES UNDER PROVISIONS OF § 16.1-279(E)(8).

August 3, 1983

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You have asked whether the mandatory jail sentence provisions of § 18.2-270 of the Code of Virginia, for the offense of driving while intoxicated, a misdemeanor, are applicable to juveniles in light of the 1983 amendment to § 16.1-284 which has limited a juvenile court's power to incarcerate juveniles in jail for crimes which would be classified as felonies if committed by an adult.

Section 16.1-284 provides specific authority to the juvenile and domestic relations district court to sentence juveniles to adult jail sentences after making a finding that such a sentence is in the best interest of the child and community. Prior to the 1983 amendment this authority to incarcerate in jail included crimes that would be classified as felonies as well as misdemeanors if committed by an adult, but now the court's authority under this section is limited solely to felonies. Therefore, absent another source of authority, the court cannot impose adult jail sentences on juvenile misdemeanor offenders.

The amendment to § 16.1-284 does not, however, affect the provisions of § 16.1-279(E)(8) which provide similar authority to the court to impose adult penalties after a finding of delinquency "[i]n case of traffic violations or traffic infractions...." The appropriate inquiry under this section is whether the juvenile offender has committed a traffic violation and may be deemed a delinquent.

Section 18.2-270 provides that any person driving while intoxicated in violation of § 18.2-286, is guilty of a misdemeanor, a crime under Virginia law. Section 16.1-228(1) defines "delinquent child" as "a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his or her eighteenth birthday." Paragraph H of the same statute defines "delinquent act" as "an act designated a crime under the law of this State...." Although the term "traffic violation" is not defined, this Office has by
previous Opinion interpreted the term to include a criminal act relating to the operation of a motor vehicle.

Inasmuch as a violation of §§ 18.2-266 and 18.2-270 constitutes a crime, it is both within the definition of "traffic offense" and a sufficient basis for a finding of "delinquency" by the juvenile court. It is, therefore, my opinion that a juvenile and domestic relations district court may make a finding of delinquency based on evidence that a juvenile violated the drunk driving provisions of § 18.2-266, a serious traffic offense, and thus may impose the same penalties that would be applicable to an adult specified in § 18.2-270, including the mandatory jail sentence.

You further ask whether the court must conduct a study as required by § 16.1-284 prior to sentencing a juvenile to jail. As previously discussed, the authority to sentence a juvenile to jail for the misdemeanor of drunk driving is found in § 16.1-279(E)(8), and not § 16.1-284. This statute does not provide for a precedent report prior to sentencing similar to the provisions of § 16.1-284, and consequently, one would not be required.

1Section 18.2-270 reads as follows: "Penalty for driving while intoxicated; subsequent offense; prior conviction.--Any person violating any provision of § 18.2-266 shall be guilty of a Class 1 misdemeanor. Any person convicted of a second offense committed within less than five years after a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $1,000 and by confinement in jail for not less than one month nor more than one year. Forty-eight hours of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court. Any person convicted of a second offense committed within a period of five to ten years of a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $1,000 and by confinement in jail for not less than one month nor more than one year. Any person convicted of a third offense or subsequent offense committed within ten years of an offense under § 18.2-266 shall be punishable by a fine of not less than $500 nor more than $1,000 and by confinement in jail for not less than two months nor more than one year. Thirty days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within less than five years. Ten days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within a period of five to ten years of a first offense."


3See 1977-1978 Report of the Attorney General, supra, at 227. "Since traffic violations other than 'traffic infractions' are, by definition, crimes under both Titles 18.2 and 46.1, a juvenile who commits such a violation would be a delinquent ...."

4When juveniles are held in a jail, it is my view that they should be held separate from adult offenders. Sections 16.1-249(B)(i) and (D) require such separation for juvenile pretrial detainees. In addition, § 16.1-227 provides that the Juvenile and Domestic Relations District Court judge shall "possess all necessary and incidental powers and authority..." to insure the well-being of the child. Therefore, when a child is sentenced to jail pursuant to § 16.1-279(E)(8), the Court should order that the child be held in a jail certified for the detention of children with attendant separation from adult offenders. See Minimum Standards For Local Jails and Lockups, Virginia Board of Corrections, adopted March 24, 1980, (as amended May 13, 1980), Section 6.01 et seq.
1983-1984 REPORT OF THE ATTORNEY GENERAL

JUVENILES. JUVENILE MAY BE DETAINED BY MERCHANT UNDER § 18.2-105.1 WHEN THERE IS PROBABLE CAUSE TO BELIEVE THAT SHOPLIFTING OFFENSE HAS OCCURRED.

May 2, 1984

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

This is in reply to your letter in which you refer to the Opinion of this Office of March 6, 1984, addressed to the Honorable Royston Jester, Ill, Member, House of Delegates. That Opinion concluded that law enforcement officers have no authority under § 16.1-246 of the Code of Virginia to arrest a juvenile without a warrant for a misdemeanor shoplifting offense not committed in the officer's presence even though that authority exists with respect to adults under § 19.2-81. You have asked whether a similar rationale would prohibit the temporary detention of a juvenile by a merchant under §§ 18.2-105, 18.2-105.1 and 18.2-106.

Section 18.2-105.1 authorizes a merchant, his agent or employee to detain a person up to one (1) hour pending the arrival of a law enforcement officer if the merchant has probable cause to believe that the person has committed a shoplifting offense.1

In the context of detaining a juvenile, it is important to recognize that this authorized detention by a merchant in no way involves placing a juvenile in a jail, detention home, shelter or other facility which requires separation from a child's family or legal custodian. Moreover, it minimizes the possibility that a child will be put in contact with persons who might abuse or harm him such as might occur in a jail setting. By contrast, it is obvious that § 16.1-246 was intended to cover situations where a child will be brought into the juvenile justice system regardless of whether the resulting custody is of short or long duration. The phrase "taken into immediate custody" under § 16.1-246 clearly contemplates more than mere detention until a law enforcement officer arrives. Once a juvenile is "taken into immediate custody" by a law enforcement official, § 16.1-247 places additional duties and responsibilities for the child on the official taking custody. Those responsibilities, however, and other duties such as ascertaining the identity and age of the suspect and the value of the item are not contemplated for a merchant under § 18.2-105.1, because the merchant merely has to wait for a law enforcement officer to arrive. Given the fact that the detention authorized by § 18.1-105.1 is of a limited nature, that it will not recur within the confines of the police station or detention facility, and that it is simply a prelude to the formal custody provisions of § 16.1-248 et seq., I am of the opinion that a merchant may temporarily detain any person, including a juvenile, under § 18.2-105.1 until a law enforcement officer arrives, provided the merchant has probable cause to believe that the person has committed a shoplifting offense.2

To hold otherwise would lead to an anomalous result. When a merchant observed a shoplifting offense, he would be powerless to detain the offender if the offender is a juvenile. In such a situation, unless the merchant had some reliable way to ascertain the child's identity, as a practical matter there would be no way to bring the child before the juvenile justice system. Recognizing (1) the need to deter shoplifting at all levels, (2) the fact that police rather than merchants are trained in investigatory techniques and (3) that limited detention outside the police station will not expose the juvenile suspect to convicted criminals, I believe that the General Assembly did not intend for a merchant to be governed by the requirements of § 16.1-246. I, therefore, am of the opinion that §§ 18.2-105, 18.2-105.1 and 18.2-106 apply to juveniles as well as to adults.

It should be noted that questions in this area of the law are troubling and not susceptible of clear and compelling answers. I am of the view that legislative attention to some of the ambiguous and inconsistent provisions of law is required.
1983-1984 REPORT OF THE ATTORNEY GENERAL

There are instances in which a registered guard of a private security services business is considered an arresting officer; hence, it is not then necessary to await the arrival of a law enforcement officer before placing a person under arrest. See § 54-729.33.

Depending on the value of the item taken and whether the person has been previously convicted of a like offense, shoplifting may be a Class 1 misdemeanor, or one of two classes of felonies. See §§ 18.2-96 and 18.2-104.

The Honorable Royston Jester, III
Member, House of Delegates

You have requested my opinion concerning a potential conflict between §§ 19.2-81 and 16.1-246 of the Code of Virginia. Your concern is whether law enforcement officers may arrest a juvenile without a warrant for an alleged shoplifting misdemeanor not committed in their presence. The answer to your question hinges on whether the general exception of § 19.2-81 allowing such an arrest is applicable to juveniles in light of § 16.1-246.

Section 19.2-81 provides, in part, that law enforcement officers "may arrest without a warrant for an alleged misdemeanor not committed in their presence involving shoplifting in violation of §§ 18.2-96 or 18.2-103...when such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense." This language was added to § 19.2-81 by Ch. 515, Acts of Assembly of 1976, following an Opinion from this Office that warrantless arrests could not be made for shoplifting misdemeanors not committed in the officer's presence. See 1975-1976 Report of the Attorney General at 15. By amending § 19.2-81 in this manner, the legislature created an exception to the general common law rule prohibiting warrantless arrests for misdemeanors not committed in the officer's presence. See 1978-1979 Report of the Attorney General at 15, 16 n.2.

On the other hand, §§ 16.1-226 through 16.1-330 give the juvenile and domestic relations district courts exclusive jurisdiction over matters and proceedings concerning juveniles, and set forth the procedures and criteria for the arrest and detention of juveniles. Section 16.1-246 lists those specific instances under which a child may be taken into immediate custody. While this provision specifically permits a child to be taken into immediate custody if that child commits a crime in the presence of the officer, or if the officer has probable cause to believe that the child has committed an offense which would be a felony if committed by an adult, there is no exception here to the general common law rule prohibiting a warrantless arrest for a misdemeanor similar to the exception in § 19.2-81. Specifically, there is no authority in § 16.1-246 to allow a child to be taken into immediate custody for any misdemeanor not committed in the presence of an officer unless a detention order or warrant has been issued.

It is a well recognized maxim of statutory construction that when a statute expressly limits an act to be done in a particular manner, it also implies that it shall not be done otherwise. Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982). Furthermore, there is an equally well recognized rule that a statute which imposes a limitation or creates authority over specific subject matter takes precedence over the

Given the intent and purpose of the juvenile laws to provide, inter alia, a separate system for the treatment of juveniles in the criminal justice system and the specific provisions for the arrest and detention of children, I must conclude that § 16.1-246 creates a specific law for the arrest of juveniles and governs as to that group over the more general provisions of § 19.2-81. Consequently, I am of the opinion that there is no authority to arrest a juvenile without a warrant for a misdemeanor shoplifting offense not committed in the officer's presence even though that authority exists for adults under provision § 19.2-81.

1Depending on the value of the item taken and whether the person has been previously convicted of a like offense, shoplifting can be a Class 1 misdemeanor, or one of two classes of felonies. See §§ 18.2-96 and 18.2-104.
2See § 16.1-246(C).
3See § 16.1-246(D).
4See § 16.1-227.

JUVENILES. RECORDS. HEALTH, PHYSICIANS, SCHOOLS. NONCUSTODIAL PARENT MAY REQUEST MEDICAL/SCHOOL RECORDS OF MINOR CHILD.

June 28, 1984

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

You have asked for my opinion concerning the rights of a noncustodial parent to obtain medical and school records of the parent's minor child, and whether such a parent may consent to medical treatment of the child. You indicate that § 8.01-413(B) and § 22.1-287 of the Code of Virginia allow a "parent," under certain conditions, to obtain the medical and educational records of a minor child, but neither provision of law indicates whether the parent must be a custodial parent. Given these statutes, you have asked, first, whether, in the absence of a judicial order to the contrary, educational and/or medical authorities must provide educational and/or medical records of a child to the noncustodial parent pursuant to the above-cited statutes, and, secondly, whether a noncustodial parent may give consent for the medical treatment of his or her minor child.

This Office has previously expressed the opinion that either parent may have access to a minor child's school records regardless of which parent has custody. See 1980-1981 Report of the Attorney General at 296. Therefore, school records are generally available to a noncustodial parent.

The question of whether medical records are available to a noncustodial parent must be decided by examining several relevant statutory definitions. "Legal custody," as defined in § 16.1-228(0), is a legal status created by court order which vests in the custodian a number of rights including, but not limited to, the physical custody of the child, the choice of where and with whom the child will live, the right and duty to protect, train, and discipline the child, and to provide him with food, shelter, education, and ordinary medical care. Section 16.1-228(0), however, clearly provides that these

"Residual parental rights and responsibilities" are defined in § 16.1-228(S) as follows:

"[A]ll rights and responsibilities remaining with the parent after the transfer of legal custody...including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support." (Emphasis added.)

Although the right to access to medical records is not explicitly stated to be a residual parental right and responsibility, it is similar in nature to several which are expressly listed in the statute. The language in the statute specifically indicates that the inclusion of certain rights and responsibilities is not intended to exclude all others.

By acknowledging that the right to access to records is a residual parental right and responsibility, the provisions of § 8.01-413(B) which provide that medical records will be given to "either parent" in certain situations can be construed in a manner which reinforces both §§ 16.1-228(O) and 16.1-228(S). It is a basic rule of statutory construction that when construing statutes on the same subject matter in pari materia, the statutes should be harmonized if possible. The Covington Virginian v. Woods, 182 Va. 538, 549, 29 S.E.2d 406, 411 (1944). A similar approach was followed when I opined that a noncustodial parent may consent to the marriage of a minor child. See 1981-1982 Report of the Attorney General at 218. Accordingly, I conclude that § 8.01-413(B) contemplates that a noncustodial parent where residual rights and responsibilities have not been terminated may have access to the child's medical records.

Likewise, your second question concerning consent for the medical treatment of the child must be answered in the affirmative. Nothing has severed the parent/child relationship, and the noncustodial parent may consent to the medical treatment of his/her child. Furthermore, I would point out that § 54-325.2(6) allows any person standing "in loco parentis" to consent to medical treatment for a minor child. This signifies, in my judgment, an intent to allow any responsible adult person, who acts in the place of the parent, to consent to the treatment of a minor child, particularly in emergency situations. Such an interpretation would also be consistent with the discussion in §§ 16.1-228(O) and 16.1-228(S) given above.

1It is my understanding that a judicial order may be entered which vests custody only in one parent but the order will not terminate the other parent's rights or more clearly delineate the rights, duties and responsibilities of the parents.

2That Opinion relied on § 22.7-237(1) and 45 C.F.R. § 99.1 et seq. The latter regulation is now recodified at 34 C.F.R. § 99.11 et seq.

3A parent's residual rights and responsibilities may be terminated. Such termination is not affected, however, by an order which merely vests custody in one parent rather than the other.
The Honorable Willard M. Robinson, Jr.
Commonwealth's Attorney for the City of Newport News

You have asked under what legal authority a Commonwealth's attorney may participate in a hearing on a civil support petition filed in a juvenile and domestic relations district court pursuant to § 16.1-241(A)(3) of the Code of Virginia seeking (1) support of a child from a father who is married to the mother, or (2) support of a child from a putative father where paternity may be at issue. You have also asked under what legal authority a Commonwealth's attorney may participate in such cases when they are appealed to the circuit court pursuant to § 16.1-190.

The jurisdictional basis for a civil support petition to be filed in a juvenile and domestic relations district court is found in § 16.1-241(A)(3). Prior to July 1, 1980, a juvenile and domestic relations district court judge had the authority to request the Commonwealth's attorney to assist the court in any proceeding under the law governing those courts. The 1980 session of the Virginia General Assembly, however, amended § 16.1-232 and limited that broad authority. That section now limits a Commonwealth's attorney to prosecution of felony charges or misdemeanor charges if requested by the court. See Ch. 530, Acts of Assembly of 1980. Therefore, § 16.1-232 provides no legal basis for your office's involvement in a civil support matter in a juvenile and domestic relations district court.

There are, however, other legal bases for a Commonwealth's attorney to be involved in a civil support matter. If the child, the parent, or caretaker of the child receives public assistance or services from a local department of welfare/social services or from the State Department of Social Services, the Director of the Department of Social Services may request the Commonwealth's attorney to represent the child in a civil support matter. See § 63.1-281. Also, § 63.1-289.2 allows the Virginia Department of Social Services to enter into a contract with a county or city for an assistant attorney for the Commonwealth to provide these types of services. Finally, in civil cases involving nonsupport which are filed pursuant to the Uniform Reciprocal Enforcement of Support Act ("URESA"), § 20-88.12 et seq, the Commonwealth's attorney "shall prosecute the case diligently. See § 20-88.23. I am aware of no other legal authority for a Commonwealth's attorney to become involved in a civil support matter in a juvenile and domestic relations district court.

For matters involving appeals of civil support matters to a circuit court, § 16.1-232 provides, in part, that "[t]he Commonwealth's attorney shall represent the State in all cases appealed from the juvenile and domestic relations district court to the circuit court." Furthermore, §§ 63.1-281, 63.1-289.2 and 20-88.23 also provide additional legal bases for the Commonwealth's attorney to participate in such civil support matters pending in the circuit court.

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LARCENY. VALUE OF FOOD STAMPS DETERMINES WHETHER PETIT OR GRAND.

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

You have asked whether a retail merchant charged with violation of § 63.1-124.1 of the Code of Virginia for larceny due to the fraudulent and unauthorized acquisition of food stamps, should be charged with grand larceny or petit larceny if the food stamps...
have a face value in excess of $200.00, but are purchased from an undercover officer to whom he pays $100.00 in cash.

Section 63.1-124.1 states as follows:

"Whoever knowingly and with intent to defraud transfers, acquires, alters or uses food stamps, or possesses food coupons or authorization to purchase cards in any manner not authorized by law shall be deemed guilty of larceny and, upon conviction thereof, be punished accordingly."

Section 18.2-95 provides that an individual is guilty of grand larceny if he "[c]ommits simple larceny not from the person of another of goods and chattels of the value of $200.00 or more...." (Emphasis added.) Therefore, the Commonwealth is required to prove only the value of the goods stolen. See Dunn v. Commonwealth, 222 Va. 704, 705, 284 S.E.2d 792 (1981). It is immaterial to the offense that the government received $100 for the stamps.

I am, therefore, of the opinion that a merchant charged with the violation of § 63.1-124.1 can be guilty of grand larceny if, with intent to defraud, he receives food stamps with a face value of $200.00 or more from an undercover officer to whom he pays $100.00 in cash.

LIBRARIES. BOARD CERTIFIED LIBRARIAN OR STATE LIBRARY SUPERVISION REQUIRED CONDITIONS TO RECEIPT OF PUBLIC FUNDS.

January 17, 1984

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

This is in response to several inquiries which you and A. Willard Lester, the Wythe County Attorney, have posed concerning the Wythe-Grayson Regional Public Library (the "Regional Library") as follows:

1. Does § 54-271 of the Code of Virginia require that the Wythe-Grayson Regional Librarian hold a librarian's license issued by the State Board for the Certification of Librarians (the "State Board")?

2. Does § 54-271 require branch librarians of the Regional Library to be State Board licensed?

3. Can Wythe County use public funds to support the Regional Library if a State Board licensed librarian is not employed by that library?

4. Does § 42.1-52 relieve the regional library board of the responsibility to employ a licensed librarian if the regional library board enters into a contractual agreement as described in the last paragraph of § 42.1-52?

You note in your inquiry that both Wythe and Grayson Counties have populations in excess of 5,000 and that no licensed librarian is employed in the Regional Library or any of its branches. The Regional Library, however, is now seeking to employ a licensed librarian. You further note that there is currently no contract between the regional library board and the State Library Board as is described in § 42.1-52.
Section 54-271 provides:

"No public library serving a political subdivision or subdivisions having over five thousand population and no library operated by the State or under its authority, including libraries of institutions of higher learning, shall have in its employ, in the position of librarian or in any other full-time professional library position, a person who does not hold a librarian's license issued by the Board.

A professional library position as used in this section is one that requires a knowledge of books and of library technique equivalent to that required for graduation from any accredited library school.

No public funds shall be paid to any library failing to comply with this chapter."

In answer to your first question, it is my opinion that because both Wythe and Grayson Counties have populations well in excess of 5,000, the Wythe-Grayson Regional Librarian must be licensed by the State Board as required by § 54-271. In answer to your second question concerning the necessity for branch librarians to be licensed, it is my opinion that if a "branch librarian" is serving under the direction of the Regional Library Board the full-time position of librarian or in any other full-time professional library position which requires a knowledge of books and of library technique equivalent to that required for graduation from an accredited library school that "branch librarian" must be a licensed librarian. A "branch library" is recognized by the State Library as consisting of an outlet with a permanent collection of reference and circulation books, with a permanent paid staff open at least 20 hours per week. Branch libraries are administered from a central library unit. The general job description for the position of "Branch Librarian" of the Wythe-Grayson Regional Library, however, does not require a specialized knowledge of library technique equivalent to that required for graduation from an accredited library school. The position description for "Branch Librarian" in Wythe-Grayson Regional Library lists as "Special Requirements" only the following: "(1) a broad understanding of library services; (2) knowledge of library methods and procedures; (3) ability to deal with co-workers and the public with tact and courtesy; and (4) bachelors degree or the equivalent in experience." Unless the tasks or conditions set by the Regional Library Board for the particular branch librarian of the Regional Library require a specialized knowledge of library technique equivalent to that required for graduation from an accredited library school, it appears that the "Branch Librarian" position within the Wythe-Grayson Regional Library System is not one generally requiring a license from the State Board.

In response to your third question concerning the ability of the Regional Library to receive public funds if a Board licensed librarian is not employed by the library in a position requiring a librarian so licensed, it is my opinion that § 42.1-52 provides that a library may receive State funds, even without employing a licensed librarian if it meets the criteria of that statute. These criteria are (1) that the library in all other respects meets the standards of the State Library Board but is unable to hire a certified librarian and (2) that it contracts with the State Library Board for supervision by the State Library of the Regional Library's services.

You stated that there is currently no contract between the Regional Library Board and the State Library Board as described in § 42.1-52, but that the Regional Library Board is now seeking to employ a licensed librarian. If the Regional Library Board is unable to employ a licensed librarian, but desires to continue to receive State funds, it must contract with the State Library Board for supervision by the State Library. It is my opinion that this arrangement would qualify the Regional Library for public funds from Wythe and Grayson Counties as well as the State.
In answer to your fourth question, therefore, it is my opinion that § 42.1-52 would relieve the Regional Library Board of responsibility to employ a licensed librarian if the Regional Library Board satisfies the above described criteria of that statute.

Section 42.1-52, which relates to the duties of the State Library Board, provides in pertinent part: "In the event that any library meets the standards of the State Library Board but is unable to conform to chapter 11 (§ 54-261 et seq.) of Title 54 of the Code relating to the employment of certified librarians, the Library Board may, under a contractual agreement with such library, provide professional supervision of its services and may grant State aid funds to it in reduced amounts under a uniform plan to be adopted by the State Library Board."

An accredited library school, according to the Standards for Accreditation of the American Library Association, is one which offers a graduate level program in library science. Graduation from an accredited library school requires, for example, credit hours in library history, reference terminology and techniques, the collection and offering of library materials, computer technology, cataloging and classification, library personnel and financial management, and principles of collection development.

LIBRARIES. COUNTY LIBRARY SYSTEM MAY FILL FULL-TIME LIBRARY POSITION WITH TWO PART-TIME BOARD CERTIFIED LIBRARIANS.

March 28, 1984

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether § 54-271 of the Code of Virginia permits a county library system to employ two part-time Board certified librarians performing the same function, who jointly fill one full-time position, in order to qualify for State funding under § 42.1-51.

Grants of State aid are made by the State Library Board to library systems which qualify under standards established by the Board and statute. See § 42.1-48 et seq. In particular, personnel standards of such library systems must conform to the provisions of Ch. 11 of Title 54. See § 42.1-51. Among the statutory provisions relating to the certification of librarians is § 54-271, which, in pertinent part, provides:

"No public library serving a political subdivision or subdivisions having over five thousand population and no library operated by the State or under its authority, including libraries of institutions of higher learning, shall have in its employ, in the position of librarian or in any other full-time professional library position, a person who does not hold a librarian's license issued by the Board.

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No public funds shall be paid to any library failing to comply with this chapter." (Emphasis added.)

The term "full-time" is not defined by § 54-271. As a result, the meaning ascribed thereto is that which generally is understood as furthering the legislative design. Furthermore, the term "full-time" must be judged in relation to the specific profession or work activity under consideration. See Lovisi v. Commonwealth, 212 Va. 848, 188 S.E. 2d 206 (1972); 1982-1983 Report of the Attorney General at 94. The statute in question provides that a full-time librarian position be occupied by duly licensed personnel; it does not require that the librarian position be staffed only by one person. The manifest purpose is one of assuring that the local library system has the benefit of a duly licensed
librarian at all times. That purpose may be met through employment of two such part-
time employees who collectively manage the library, in fact, on a full-time basis.

I am of the opinion, therefore, that two Board certified librarians may collectively
fill a single "full-time" librarian position, provided their duties and commitment to the
library provide the service and expertise as would a single individual in the "full-time"
librarian position. The librarian position must be staffed full time by certified personnel.

LIBRARIES. ELIGIBILITY OF BOARD MEMBERS OF REGIONAL LIBRARIES FOR
REAPPOINTMENT. TWO TERM LIMITATION DOES NOT INCLUDE PARTIAL TERM
WHEN APPOINTED TO FILL VACANCY IN UNEXPIRED TERM.

September 23, 1983

The Honorable Donald Haynes
State Librarian

You have asked whether a member of a regional library board, who was appointed
to serve part of an unexpired term is eligible for appointment for two additional full
terms, or whether service during the partial term limits service to one additional
successive term.

Members of regional library boards are appointed pursuant to § 42.1-39 of the Code
of Virginia, which reads in pertinent part as follows:

"The members of the board of a regional library system shall be appointed by the
respective governing bodies represented. Such members shall in the beginning draw
lots for expiration of terms, to provide for staggered terms of office, and
thereafter the appointment shall be for a term of four years. Vacancies shall be
filled for unexpired terms as soon as possible in the manner in which members are
regularly chosen. No appointive member shall be eligible to serve more than two
successive terms."

There is no uniform legislative practice utilized in the various statutes imposing a
limitation of terms for administrative agency boards. Most legislative enactments
creating such boards with limitation of terms contain explanatory or modifying language
to express legislative intent. For example, § 3.1-1, creating the Board of Agriculture and
Consumer Services, provides "[n]o member of the Board, except the ex officio member,
shall be eligible for more than two successive terms; provided that persons heretofore or
hereafter appointed to fill vacancies may serve two additional successive terms after the
terms of the vacancies they were appointed to fill have expired." Such language clearly
expresses the intention of the General Assembly that the service for the partial term is
not to be considered as one of the two successive terms allowed on such board.

Section 54-1.18:1, relating to regulatory boards, provides that no member shall
serve more than two successive full terms on any regulatory board. A similar provision is
found in § 54-1.23, creating the Board of Commerce. Such language clearly means that
members are permitted to serve two full terms, despite the fact that a prior appointment
may have been to fill an unexpired term.

Another form of qualification on the limitation of terms is a clear expression that a
partial term is not considered one of the successive terms. For example, § 23-41,
relating to the Board of Visitors of the College of William and Mary in Virginia, provides
that "[n]o person shall be eligible to serve more than two successive four-year terms,
except that a member may be appointed to a term of less than four years immediately
prior to or between the four-year terms." A similar provision is provided in § 23-95 (Virginia Military Institute). The statutory forerunner to § 23-95 contained additional language that incumbency during the current term when the amendment took effect would constitute the first of the two successive terms with respect to eligibility or appointment. Chapter 250, Acts of Assembly of 1946 at 414.

Section 54-285, pertaining to the State Board of Medicine, contains qualifying language similar to that used in Ch. 250, Acts of Assembly of 1946. That section provides "incumbency during the term in force on June 24, 1944, constitutes the first of the two successive terms with respect to eligibility to appointment." In an opinion construing that language as applied to an appointee to fill an unexpired term, this Office concluded that the person was eligible for reappointment to two four-year terms. The rationale there was that the statute provided that service as an incumbent on the initial board expressly included that term as the first of two successive terms; there was no comparable language providing that service as an appointee to fill a subsequent unexpired term would constitute the first of two successive terms; hence, the legislative intent was not to consider the partial term as one of the two successive terms. See 1960-1961 Report of the Attorney General at 189.

Still another form of statutory limitation or explanation is the utilization of the words "for or during more than two successive terms." For examples, see §§ 23-155.8 (Radford University); 23-164.5 (James Madison University); 23-165.5 (Virginia State University). I am of the opinion that the words "for or during" a term, without further qualification, restrict members to two successive terms, even though the person may have served only a partial term. See 1961-1982 Report of the Attorney General at 408.

Unlike the other statutes discussed above, § 42.1-39 contains no modifying language to evince the legislative intent in restricting members of regional library boards to two successive terms. It speaks only to "two successive terms." Consequently, it is necessary to ascribe to the words their ordinary usage in construing the statute. As used in § 42.1-39, a "term" could be for a one, two, three or four year-period for the first staggered terms, or four years for all appointments subsequent to the initial term. For example, a person appointed for a one-year term when a board is created would have served a "term" at the expiration of the one year. Thereafter, such member would be eligible for appointment to only one more successive term, which would, of course, be for a four-year period.

In the situation posed in your letter, the member was appointed to serve part of an unexpired term. Under such circumstances, the member would be serving a portion of someone else's term. Inasmuch as there is no legislative indication that service for that portion of a term is to be considered as the first of the two terms to which the member may be appointed, I concur in the earlier Opinion of this Office found in the 1960-1961 Report of the Attorney General at 189, discussed supra. I am of the opinion that a regional library board member is eligible to serve two full terms following the expiration of the partial term for which he was appointed to fill a vacancy.

LIBRARIES. REGIONAL LIBRARY LACKS POWER TO INCUR DEBT.

May 10, 1984

The Honorable Donald Haynes
State Librarian

You ask whether the Eastern Shore Public Library, which is governed by a regional library board established under § 42.1-38 of the Code of Virginia, has the authority to
borrow money to use in providing library services and, if so, whether in doing so it acts on behalf of the two county governments which participate in that regional public library.¹

A regional library board is expressly empowered by statute to adopt rules and regulations, to control the expenditure of funds credited to the regional free library fund and to accept donations and bequests. See § 42.1-39. It also has, under § 42.1-40, the express statutory authority:

"to execute contracts with...any and all other agencies for the purpose of administering a public library service within the region, including contracts concerning allocation and expenditure of funds, to the same extent as the library board of any one of the jurisdictions which are parties to the agreement would be so authorized."¹

See 1981-1982 Report of the Attorney General at 228. Regional library boards, however, have no explicit statutory authority to incur debts in excess of the funds appropriated to them by the participating localities.²

Debt may be contracted by, or on behalf of, any county or regional governmental entity in Virginia only as is authorized by Article VII, § 10(b), of the Constitution of Virginia (1971), which provides in relevant part:

"No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law." (Emphasis added.)

While a regional public library board has certain attributes of sovereignty, see Opinion to the Honorable David T. Stitt, County Attorney for Fairfax County, dated August 30, 1983, the power to incur debt is not a power which the General Assembly has conferred by law upon regional library boards. A regional library board is not, therefore, an independent political or governmental subdivision for the purpose of incurring debt.

In the absence of express statutory authority to do so, I am of the opinion that the Eastern Shore Regional Library Board lacks authority to borrow money either in its own name or on behalf of the governments of Accomack and Northampton Counties.

¹You state in your letter that the Eastern Shore Public Library is the regional public library for Accomack and Northampton Counties.

²I assume for the purpose of this Opinion that the regional library in question desires to borrow an amount of money in excess of the funds appropriated to it by the participating counties.

LOCAL CORRECTIONAL FACILITIES. STATUTES. CONSTRUCTION. ADMINISTRATIVE INTERPRETATION CONTROLS. IN ABSENCE OF CLEAR LEGISLATIVE INTENT.

April 16, 1984

The Honorable Frank M. Slayton
Member, House of Delegates
You have asked my opinion whether the maximum rate of reimbursement provisions of § 53.1-83 of the Code of Virginia which provide for reimbursement to localities for the construction, enlargement or renovation of a jail or regional jail facilities should be interpreted to apply to the existing rated capacity of the facility or the projected capacity after the facility is enlarged, renovated or constructed. That section establishes reimbursement rates as follows: (1) one hundred thousand dollars for any jail or regional jail facility with a capacity of 35 or less beds; (2) two hundred thousand dollars for any jail or regional jail facility with a capacity of more than 35 beds and less than 100 beds; and (3) three hundred thousand dollars for any jail or regional jail facility with a capacity of 100 beds or more.

Under the provisions of § 53.1-80, the Commonwealth may reimburse the locality one-half the cost of construction, enlargement or renovation of a jail, or each locality's pro rata share up to one-half the cost of a regional jail under provision of § 53.1-81, upon a basis approved by the Board of Corrections. These sections provide, however, that no such reimbursement will exceed the maximum rates provided as outlined above in § 53.1-83.

There is no expressed legislative guidance on the question whether the rate categories of § 53.1-83 are meant to be based upon the existing bed capacity of the facility or the proposed capacity after construction, and the wording of the statute conceivably lends itself to either interpretation. Consequently, where a statute may be the subject of one or more reasonable interpretations, it is a basic premise of statutory construction to consider as determinative the reasonable, contemporaneous, operative interpretation of the agency charged with its implementation. See 2A Sands, Sutherland Statutory Construction § 49.03 (4th ed. 1973).

The Department of Corrections is the receiving agent of a locality's request for construction reimbursement. It makes recommendations for reimbursement to the Board of Corrections under § 53.1-80 in the case of new construction or enlargement on the basis of the proposed capacity of the facility. In the case of a request for funds to renovate without expanding bed capacity, the Department makes its recommendation on the basis of the existing capacity of the facility.

Given the apparent legislative intent to provide a means to reimburse localities which wish to improve their confinement facilities either by new construction or renovation, it is my opinion that the Department's operative interpretation of the statute is reasonable and supportive of that general principle, and consequently, should be determinative of the issue in the absence of further guidance from the General Assembly.

MAGISTRATES. CRIMINAL PROCEDURE. MAGISTRATE OR DESIGNATED OFFICIAL SHOULD EXAMINE CONDITION OF PERSON DETAINED AFTER ARREST UNDER § 18.2-388 OR § 18.2-266 BEFORE PERSON Released FROM CUSTODY.

August 16, 1983

The Honorable A. S. White
Sheriff of York County

You have asked whether a magistrate is required to come to the jail and observe the physical condition of a person before the person is released from custody in a situation in which a magistrate has previously ordered a person detained after arrest on a charge of public drunkenness or driving while intoxicated. You state that at the time of
commitment, the magistrate authorizes the release of the accused at a later, specified time.

Both public drunkenness, § 18.2-388 of the Code of Virginia, and driving while intoxicated, § 18.2-266, are misdemeanors. Arrests for these offenses are covered under § 19.2-74(A)(1), which provides that the arresting officer may detain a person "reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person...." After arrest, the person charged must be taken promptly before a magistrate. Section 19.2-82.

The magistrate, not the arresting officer or the jailer, decides whether the condition of the person charged requires that he be confined temporarily or released. Winston v. Commonwealth, 188 Va. 386, 395, 49 S.E.2d 611, 615 (1948). Upon examining the accused, the magistrate may order him confined, based upon a finding that the accused represents a threat to his own safety or the safety of others. Section 19.2-120(2). The accused's intoxicated condition justifies his detention.

No specific time period is fixed by statute for the commitment. Because of the limited justification for this detention, the confinement should last only until the accused can be released to the supervision of a responsible third person or the condition which presents a danger to the accused and others changes. Allen v. Burke, Civil Action No. 81-0040-A (E.D. Va. June 4, 1981), aff'd, 690 F.2d 396 (4th Cir. 1982).

Although the legislature and the courts have not provided specific guidelines to follow before releasing a person detained in these circumstances, the case law and statutes referenced above strongly suggest that a determination must be made that the accused no longer presents a danger to himself or others or can safely be released to the custody of third party before release is warranted. Some examination of the accused is contemplated before his release, whether it occurs shortly after his arrest or several hours thereafter. The decision to be made at the time of release after several hours is identical to the initial determination made by the magistrate - whether the accused presents an unreasonable danger to himself and others. See § 19.2-120(2). Thus, it logically follows that the decision to release the accused, regardless of when it is made, must be based on a subjective evaluation of the condition of the accused at that time.

A prediction that an intoxicated person will regain his ability to care for himself at a certain time, is not sufficient. Such a prediction is inadequate to safeguard the interest of the public and the accused in confining the accused until he may be released without danger, as expressed in § 19.2-120(2). Additionally, designating a specific time for release may not adequately protect the interest of the accused in not being unreasonably held long after his condition has changed. See Allen v. Burke, supra.

The question remains as to whether a magistrate must personally make the determination. The legislature has provided that the release decision can be delegated to non-judicial persons when the arresting officer, under § 18.2-388, places an intoxicated person in the care of a court-approved detoxification center. Moreover, inasmuch as the justification for the accused's detention is limited to his intoxicated condition, under the mandate of Allen v. Burke, supra, he should be released once his condition changes rather than being detained for an extended time until a magistrate is available. Thus, when it appears that a magistrate may not be readily available at the time the accused's condition changes, it is logical for the committing magistrate to authorize the custodian to release the accused if the custodian is satisfied that he is no longer intoxicated. This would meet the requirement of the Allen v. Burke mandate.

I am, therefore, of the opinion that a magistrate or other designated official, should examine the condition of a person temporarily detained because of his intoxication, and find that the person is not a threat to his own safety or the safety of others, before the
1983-1984 REPORT OF THE ATTORNEY GENERAL

person is released from custody. If circumstances suggest that a magistrate will not be available to examine the accused at a later time, I am of the opinion that the custodian may be designated to determine when the accused may be released safely.

1 Both offenses are excepted from the provisions of §§ 19.2-74(A)(1) and 19.2-74(A)(2) permitting the issuance of a summons by the arresting officer in lieu of detention and an appearance before a magistrate.

2 An exception to this procedure is found in § 18.2-388, which provides that "[i]n any area in which there is located a court-approved detoxification center a law-enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to such detoxification center in lieu of arrest...."

MARRIAGE. CLERKS. MINISTERS. CLERK AUTHORIZED BY § 20-26 TO PERMIT UNORDAINED MINISTER TO PERFORM RITES OF MATRIMONY.

April 10, 1984

The Honorable Teddy Bailey, Clerk
Circuit Court for Dickenson County

This is in response to your request for my opinion whether you have the authority to appoint a "minister" of the Jehovah's Witnesses to perform the rites of matrimony in Virginia. You indicate that the "minister" has no certificate of ordination or license. You further indicate that it is your understanding that all members of his faith can be "ministers" without being appointed or selected for such a position.

Section 20-26 of the Code of Virginia provides:

"Marriages between persons belonging to any religious society which has no ordained minister, may be solemnized by the persons and in the manner prescribed by and practiced in any such society. One person chosen by the society shall be responsible for completing the certification of marriage in the same manner as a minister or other person authorized to perform marriages; such person chosen by the society for this purpose shall be required to execute a bond in the penalty of $500, with surety."

This section requires that a person be chosen by the society to be responsible for completing the certificate of marriage in the same manner as a minister or other person authorized to perform marriages. The selected individual must also execute a bond in the penalty of $500, with surety. If the "minister" in your situation complies with the provisions of § 20-26, he or she may be authorized to perform the rite of matrimony in accordance with the practices of the religion. This practice was recognized by the Supreme Court of Virginia in Cramer v. Commonwealth, 214 Va. 561, 202 S.E.2d 911, cert. denied, 419 U.S. 875, 95 S.Ct. 137 (1974).

MEDICAID. REGISTERED DRIVER PROGRAM NOT SUBJECT IN REGULATION BY STATE CORPORATION COMMISSION.
You have asked whether a person transporting persons participating in the "Registered Driver Program" of the Virginia Medical Assistance program, § 32.1-74 et seq., Code of Virginia ("Medicaid"), is exempted by § 56-274(10) of the Code from registering with the State Corporation Commission as a motor carrier pursuant to § 56-275.

Medicaid is a program wherein the federal government and each participating state share in the cost of providing medical care to the eligible needy. In order to ensure that the Commonwealth receives her fair portion of federal funds, the Virginia Medicaid program must meet the federal requirements for a state Medicaid program. One of those requirements is that a state plan assure necessary transportation for Medicaid recipients to and from health care providers. See 42 C.F.R. § 431.53 (1983). Under the provisions of the 1983 Appropriation Act, Ch. 622, Acts of Assembly of 1983, the Medicaid program was directed to reduce transportation costs to the minimum legally required by federal regulation.

One of the methods chosen to accomplish this was the registered driver program. See Item 418, Appropriation Act, supra. Under this program, a Medicaid recipient, if he does not have his own transportation, is required to seek out the least costly transportation. Therefore, a Medicaid recipient, prior to obtaining authorization for the use of a taxicab, must determine whether free or public transportation is available or whether a private individual is available to transport the recipient to medical care. With respect to the latter alternative, a Medicaid recipient is directed to select and register his own volunteer driver, who shall be reimbursed $.20 per mile for any transportation provided to the Medicaid recipient between hospitals and clinics. The Medicaid program has established guidelines to determine who may be a registered driver.

Section 56-275 provides that a motor carrier operating any motor vehicle for the transportation of passengers or property is subject to regulation by the State Corporation Commission unless specifically exempted. The exemption you cite, § 56-274(10), exempts "[a]ny motor vehicle while transporting not more than fifteen passengers in addition to the driver, if the driver and the passengers are engaged in a share-the-ride undertaking and if they share not more than the expenses of operation of the vehicle."

The General Assembly has defined a "ridesharing arrangement" in § 46.1-556 as follows:

"[T]he transportation of persons in a motor vehicle where such transportation is incidental to the principal purpose of the driver, which is to reach a destination and not to transport persons for profit." (Emphasis added.)

The transportation of a Medicaid recipient by a driver who is reimbursed for expenses is not analogous to a "share-the-ride" program. Although both are operated not for profit, there is no requirement in the "Registered Driver Program" that the transportation be only incidental to the principal purpose of the driver. The purpose of delivering the Medicaid recipient for medical service may well be the only purpose for the trip. I am, therefore, of the opinion that the exemption in § 56-274(10) is not applicable.

This is not to say, however, that a person transporting Medicaid recipients must register as a motor carrier pursuant to § 56-275. The key phrase is "motor carrier," defined to include "a common carrier by motor vehicle, a restricted common carrier by motor vehicle, and a contract carrier by motor vehicle." See § 56-273(h). The vehicle in
a registered driver program cannot be a "contract carrier by motor vehicle" because, by definition, such carrier transports only property by motor vehicle for compensation. See § 56-273(f). Likewise, the driver of a motor vehicle participating in the registered driver program is not a "restricted common carrier by motor vehicle." He is not transporting passengers or property of a restricted class or classes, because, as that term is used by the State Corporation Commission, it applies to situations where vehicles are restricted as to specific geographic boundaries or number of passengers who can be transported.

Finally, "common carrier by motor vehicle" is defined to include "any person who undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property for the general public by motor vehicle for compensation over the highways of the Commonwealth...." (Emphasis added.) See § 56-273(d). The driver of a motor vehicle participating in the registered driver program is not, in my opinion, transporting passengers or property for the general public. Neither is he transporting for compensation. It is an individual arrangement between the driver and the Medicaid recipient. This driver is not offering his services to the general public, nor does he have a regularly scheduled route of stops like a municipal bus company. The program contemplates reimbursement of expenses only, at a rate of $.20 a mile. This is also the distinguishing factor from a "taxicab service." Section 56-273(g) defines such a service as the transportation of passengers for hire or for compensation.

I am, therefore, of the opinion that transportation provided under the Registered Driver Program of the Medicaid program is not that of a motor carrier for compensation, and therefore, not subject to the provisions of § 56-275.

MENTAL HEALTH. "DANGER TO SELF OR OTHERS" STANDARD FOR ISSUANCE OF TEMPORARY DETENTION ORDER UNDER § 37.1-67.1. HOSPITAL MAY BE WILLING DETENTION FACILITY. COMMITMENT HEARING REQUIRED WITHIN 48-72 HOURS OF DETENTION. FEE FOR PSYCHIATRIST'S TESTIMONY SET UNDER § 37.1-89. ANY SUITABLE PERSON MAY MAKE ARRANGEMENTS FOR EXAMINATION. COURT'S ORDER FOR EXAMINATION MAY BE ENFORCED THROUGH CONTEMPT.

September 2, 1983

The Honorable Von L. Piersall, Jr., Judge
Juvenile and Domestic Relations District Court for the City of Portsmouth

You have asked my opinion on several questions concerning the provisions of §§ 37.1-67.1, 37.1-67.2 and 37.1-67.3 of the Code of Virginia, involving the involuntary detention and commitment of individuals to mental health facilities.

You give as an example a situation which appears on its face to be a routine domestic relations matter involving a warrant for assault, trespass or destruction of property. When appearing before the court, however, the complainant states that she does not want the defendant sentenced to jail, but instead wants him to seek help for a mental illness. She is then advised by the court of her right to file a civil commitment petition in the clerk's office. If that is done, the matter would then be brought before the court which advises the defendant of his rights and then continues the matter for a commitment hearing.

You first ask what authority the court has to detain an individual prior to a commitment hearing. Section 37.1-67.1 provides that the judge, or a magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, may issue an order of temporary detention if the person cannot be conveniently brought before the judge. In the example you give, however, the individual is already before the court on a
domestic relations matter and a petition for his involuntary commitment has just been filed. Section 37.1-67.1 authorizes the judge to "release such person on his personal recognizance or bond set by the judge if it appears from all evidence readily available that such release will not pose an imminent danger to himself or others." It is, therefore, my opinion that you may issue an order of temporary detention at that time if it appears from all evidence readily available that the person's release would pose an imminent danger to the person or others. If such a finding is not made, the court must release the person upon his own recognizance or bond as set by the court.

You next ask if the individual can be ordered detained in a hospital pending the examination and commitment hearing. Section 37.1-67.1 provides that "[t]he officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place for a period not to exceed forty-eight hours prior to a hearing." (The period may be extended to seventy-two hours in certain situations.) It is, therefore, my opinion that the individual may be ordered detained in a hospital pending the examination and commitment hearing, provided the hospital is a willing institution and the individual continues to pose an imminent danger to himself or others based on all the evidence readily available.

You further ask if the individual is ordered detained in a hospital pending the examination and commitment hearing, must the hearing be held within forty-eight hours, or seventy-two hours if applicable, or can it be longer if it is held "as soon as possible" as stated in § 37.1-67.3. Section 37.1-67.3 provides in the first paragraph:

"The commitment hearing shall be held within forty-eight hours of the execution of the detention order as provided for in § 37.1-67.1; provided, however, if the forty-eight hour period herein specified terminates on a Saturday, Sunday or a legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday, but in no event may he be detained for a period longer than seventy-two hours."

The second paragraph of § 37.1-67.3 provides that if a person is incapable or unwilling to accept voluntary admission and treatment pursuant to § 37.1-67.2, a commitment hearing must be scheduled as soon as possible after allowing the individual time to prepare such defenses as he may have. It is my opinion, however, that, although the commitment hearing may be held sooner, it must nonetheless be held within forty-eight hours of the execution of the detention order, or within seventy-two hours when applicable.

You next ask how much the court may lawfully pay for the psychiatrist's examination and for his testimony in court. Section 37.1-89 provides in pertinent part:

"Every physician, clinical psychologist or interpreter for the deaf appointed pursuant to § 37.1-67.5 who is not regularly employed by the Commonwealth of Virginia who is required to serve as a witness or as an interpreter for the Commonwealth in any proceeding under this chapter shall receive a fee of twenty-five dollars and his necessary expenses for each preliminary hearing, each commitment hearing and each certification hearing in which he serves."

It would, therefore, be my opinion that a psychiatrist testifying at a commitment hearing under § 37.1-67.3, would be paid a fee of $25.00 by the Commonwealth. The fee of $25.00 would be the same whether the psychiatrist actually testifies at the hearing or submits a written certification of the individual's condition to the court. Should the psychiatrist's expertise be necessary at a preliminary hearing or other hearing, he would be paid $25.00 per hearing.
In conclusion, you ask if the individual is not detained, who chooses the psychiatrist and makes the appointment, and if the person refuses to be examined, may he be punished for contempt. Section 37.1-67.3 provides that the judge shall require an examination of such person by a psychiatrist or, if a psychiatrist is not available, by a physician qualified in the diagnosis of mental illness or a clinical psychologist. The judge may, therefore, appoint the psychiatrist to perform the examination. In doing so, he may consider the recommendations and utilize the services of the community services board or community mental health clinic in the jurisdiction, the clerk of court, court service unit staff, the petitioner or the respondent in making the arrangements for the examination. Section 37.1-67.3 provides that the person who is the subject of the hearing may also obtain an independent evaluation at his own expense.

If the person who is the subject of the petition refuses to be examined, the court theoretically could use its contempt power §§ 16.1-69.24 and 16.1-292, to enforce its order. [I note, however, that § 37.1-67.1 precludes placement in jail of a person temporarily detained pursuant to that section unless that confinement is authorized by the judge pursuant to regulations duly adopted by the Board of Mental Health and Mental Retardation.] Such an enforcement measure may not be appropriate when an individual is mentally ill.

Unless the individual is subject to a temporary detention order under § 37.1-67.1, the court may wish to consider other alternatives. The disposition in each case would depend upon the nature and extent of the individual's mental health problems.

MENTAL HEALTH AND MENTAL RETARDATION. SHERIFF REQUIRED TO TRANSPORT PERSONS COMMITTED TO PRIVATE FACILITIES MAY CHARGE REASONABLE AND NECESSARY EXPENSES.

August 4, 1983

The Honorable Charles W. Jackson
Sheriff of Westmoreland County

This is in response to your request for my opinion regarding your responsibility to provide transportation for mental patients pursuant to § 37.1-71 of the Code of Virginia.

You first ask if a special justice has the authority to order the transportation of a mental patient to a private institution when there is a more conveniently located State institution.

A special justice is a person appointed by the chief judge of a judicial circuit for the purpose of performing the duties required of a judge by Title 37.1. As such, a special justice has all the powers and jurisdiction conferred upon a judge by that title. Section 37.1-88. A special justice thus has the authority to commit a mentally ill patient to a State or private hospital pursuant to § 37.1-67.3. While the closer State facility may seem the logical facility to use, there is no statutory requirement that a State facility be chosen over a private one because the State facility is nearer to the site of the hearing.

You next inquire if you would be in violation of the law if you refused to transport patients to the more distant private institution. This inquiry is answered in the affirmative. Section 37.1-71 provides that once a person has been committed under § 37.1-67.4 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 consistently ruled that § 37.1-71 requires the sheriff to transport a patient who has been committed
The only limitation on this requirement is where the director of the hospital requests the sheriff to convey the person to the hospital pursuant to § 37.1-78. In such situations, the statute does not require the sheriff to provide the transportation. See 1982-1983 Reports of the Attorney General at 470.

You next ask whether, in a situation in which two deputies are required because the person being transported to a private hospital is violent, the petitioner is required to pay the salaries of two deputies, their meals and mileage. Section 37.1-71 provides that the "cost of care and transportation of a person certified for admission to a private hospital shall be paid by the petitioners." I find no statutory limitations on the expenses that may be charged to the petitioner, nor is there any guideline to determine the exact measure of "cost of care and transportation." It is my opinion that you may therefore charge necessary and reasonable transportation expenses which can be attributed to furnishing the service. Such expenses clearly include meals and mileage for as many deputies as are necessary to safely transport the patient. In the absence of statutory guidance, however, I am of the opinion that the salary of personnel cannot be assessed as a part of the costs.

1There is legislative precedent for assessing costs of personnel in certain instances. For example, § 2.1-342 makes provision for a public body to make reasonable charges for supplying copies of public records, including search time expended in supplying such records.

MENTAL HEALTH AND MENTAL RETARDATION. SHERIFFS. DETENTION ORDERS RETURNABLE TO COURT WITHIN 48 OR 72 HOURS.

February 27, 1984

The Honorable Joe Harris
Sheriff for the City of Waynesboro

You have asked for my opinion on two matters concerning temporary detention orders issued pursuant to § 37.1-67.1 of the Code of Virginia.

You first ask at what point you are required to make return to the court if you are unable to find a person for whom a temporary detention order has been issued pursuant to § 37.1-67.1. I presume that the court's order itself provides that return shall be made to the court or special justice prior to the hearing. No hearing date is specified on the order, however, and unlike criminal and search warrants, there is no statutory provision for return of temporary detention orders if the person is not found. A "reasonable" time must therefore be presumed.

Although civil in nature, a temporary detention order is similar to a criminal warrant in that the person who is the subject of the order is taken into custody. Section 19.2-76.1 requires that a felony arrest warrant unexecuted for fifteen years and a misdemeanor arrest warrant, summons, capias or other criminal process unexecuted for five years must be submitted to the circuit court for destruction. A search warrant which remains unexecuted for fifteen days must be returned to, and voided by, the officer issuing the warrant. See § 19.2-56. Unlike arrest warrants, a search warrant must be based upon facts reasonably related in time to the date of issuance of the search
Civil detention and commitment involve a significant deprivation of personal liberty. 

Addington v. Texas, 441 U.S. 418 (1979). The principal basis for involuntary commitment is that the subject presents an imminent threat to himself or others. Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980); Project Release v. Prevost, 551 F.Supp. 1298 (E.D.N.Y. 1982). "Imminent" is defined by Webster's New Collegiate Dictionary (1979) as "hanging threateningly over one's head," connoting some urgency as to time. In my opinion, a temporary detention order issued pursuant to § 37.1-67.1 is similar to a search warrant in that the facts which form the basis of probable cause that a person is mentally ill and in need of hospitalization is subject to change and must, therefore, be closely related in time to the issuance of the detention order.

The statutory time for detention on a detention order is fixed by § 37.1-67.1 as follows:

"The officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place for a period not to exceed forty-eight hours prior to a hearing....If the forty-eight hour period herein specified terminates on a Saturday, Sunday or a legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday, but in no event may he be detained for a period longer than seventy-two hours."

When the subject cannot be found, it is my opinion that a "reasonable" time for return of a temporary order of detention to the court would be forty-eight or seventy-two hours, the time frame within which a commitment hearing would have been held had the person been found. The judge may then decide whether to rescind the temporary detention order or reissue it, based upon continued probable cause.

You next ask whether a magistrate may sign a commitment order at any time, or only after the courts are closed for normal business. A magistrate may not sign a commitment order. Only a judge or special justice may enter a commitment order following a hearing pursuant to § 37.1-67.3. A magistrate may, however, upon the advice of a person skilled in the diagnosis or treatment of mental illness, enter an order of temporary detention pursuant to § 37.1-67.1.

Section 37.1-67.1 provides, in pertinent part:

"Any judge as defined in § 37.1-1, or a magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, may, upon the sworn petition of any responsible person or upon his own motion based upon probable cause, issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before the judge and, if such person cannot be conveniently brought before the judge, may issue an order of temporary detention....The chief judge of each general district court shall establish and require that a judge, as defined in § 37.1-1, or a magistrate as provided by this section, be available seven days a week, twenty-four hours a day, for the purpose of performing the duties established by this section." (Emphasis added.)

Unlike § 16.1-256, which limits the authority of a magistrate to issue a warrant of arrest for a child to a time when the court is not open and the judge, intake officer and clerk of the juvenile and domestic relations district court are not reasonably available, § 37.1-67.1 does not explicitly limit the authority of a magistrate to issue a temporary detention order to a time when the court is not open. See 1981-1982 Report of the
The chief judge of the general district court has the administrative duty under §§ 16.1-69.35 and 37.1-67.1 to ensure the availability of court services to the public during normal times of business and after hours.

It is, therefore, my opinion that a magistrate may not sign a commitment order, but he has the authority to issue a temporary detention order at any time, subject to the supervisory authority of the general district court judge, and is not restricted to times when the courts are closed for normal business.

Mental Health and Mental Retardation. Voluntary Admission Pursuant to § 37.1-67.2. Sheriff's Authority to Transport. State Mental Hospital's Authority to Refuse Admission. Involuntary Civil Commitment Proceedings-Renewal.

February 6, 1984

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

You have asked my opinion on several questions concerning the hospitalization and transportation of an individual who is the subject of an involuntary civil commitment proceeding but, during the proceeding, accepts voluntary admission and treatment pursuant to § 37.1-67.2 of the Code of Virginia.

You present a hypothetical situation in which an individual has been transported to a willing institution under a temporary detention order issued pursuant to § 37.1-67.1. Prior to the commitment hearing, a prescreening report is completed in which a psychiatrist concludes that the individual is an imminent danger to others and that he is capable of accepting voluntary admission and treatment. At the preliminary hearing conducted pursuant to § 37.1-67.2, the judge ascertains that the individual is capable of accepting voluntary admission and requires that he accept voluntary admission for a minimum period of treatment not to exceed 72 hours and give the hospital 48 hours notice prior to leaving unless sooner discharged pursuant to § 37.1-98. The judge then requires the individual to execute the Application for Voluntary Admission to a State Hospital or Other Facility in Virginia pursuant to § 37.1-67.2 (DMH Form 1006-B(1-78), hereinafter the "Form"). The sheriff then transports the individual to the State hospital.

During the examination and admission interview at that facility, the individual indicates that he does not wish to accept voluntary admission or treatment. The staff psychiatrist conducting the admission interview then concludes that the individual does not present an imminent danger to himself or others and is not so seriously mentally ill as to be substantially unable to care for himself. The hospital refuses to admit the person and directs the sheriff to return him to the local institution. The sheriff returns the individual to the local institution but psychiatric staff there continues to be of the opinion that the individual presents an imminent danger to others and is in need of hospitalization and treatment. The time period under the prior detention order has expired and the psychiatric staff requests the issuance of an additional temporary detention order.

You first ask whether the judge's requirement that the respondent accept 72 hours of treatment and after such period that he give 48 hours notice prior to leaving the hospital, together with the execution of the Form, constitutes an order of the court that the respondent receive a minimum treatment of 72 hours. Section 37.1-67.2 provides that when a person who is the subject of an involuntary detention order is produced before the judge, the judge is required to inform the person of his right to make application for voluntary admission and treatment as provided for in § 37.1-65 and shall
afford the person the opportunity for voluntary admission. Section 37.1-67.2 then requires the judge to hold a preliminary hearing to ascertain whether the individual is willing and capable of seeking voluntary admission and treatment. If the judge finds the person willing and capable of accepting voluntary admission and treatment, § 37.1-67.2 states that the judge shall require the person to accept the treatment for a minimum period not to exceed 72 hours and to give the hospital 48 hours notice prior to leaving unless sooner discharged pursuant to §§ 37.1-98 or 37.1-99. The individual has the right to terminate the court proceeding by voluntarily making application for admission and treatment.

I am of the opinion that the voluntary admission form does not become an order of the court requiring the respondent to receive a minimum period of treatment. A written order or decree endorsed by a judge is evidence of the judgment of the court. Haskins v. Haskins, 185 Va. 1001, 41 S.E.2d 25 (1947). To constitute an order, a paper must be unambiguous in its terms and must be sufficiently explicit to enable parties affected thereby to perform the act directed. See, generally, 60 C.J.S. Motions and Orders § 51. An examination of the Form reveals that it is titled an Application for Voluntary Admission and is executed by the individual. The judge or special justice must also sign the Form stating that the applicant appeared before him on a certain date and agreed to accept voluntary admission subject to the specified terms and conditions. The judge's statement contains no directory language requiring the individual to take any action. The person is free to revoke his consent to hospitalization at a later time. The Form must further be signed by the Director or admitting physician certifying that the provisions regarding the rights of a voluntary patient have been explained and that he is accepted as a patient. Your first question is therefore answered in the negative.

You next ask whether the respondent is subject to the contempt powers of the court if he subsequently declines voluntary admission after agreeing to accept such admission and treatment. The commitment proceeding in effect has been dismissed upon the respondent's agreement to accept voluntary admission and treatment and no court order has been entered. The respondent would, therefore, not be subject to the contempt powers of the court. The involuntary commitment proceeding must be reinitiated and, should the individual indicate his willingness again to accept voluntary admission and treatment pursuant to § 37.1-67.2, the judge may consider all relevant evidence including respondent's prior conduct in ascertaining his willingness and capacity to do so.

You further ask whether there is a duty upon the State hospital to admit the respondent for the minimum period of treatment unless sooner discharged pursuant to § 37.1-98; whether the hospital may refuse to admit pursuant to § 37.1-70; or whether the hospital may refuse to admit upon the sole ground that the respondent has changed his mind and no longer wishes to accept voluntary admission and treatment. The respondent has the right under § 37.1-67.2 to make application for voluntary admission and treatment as provided for in § 37.1-65. Section 37.1-65 provides that any State hospital shall admit any person requesting admission who has been prescreened by the community services board and examined by a physician on the staff of the hospital, when both the prescreening report and examination deem the individual to be in need of hospitalization for mental illness. There is, therefore, a legal duty upon the State hospital to admit an individual when the prescreening report and the staff physician's examination reveal that the person is in need of hospitalization for mental illness. Section 37.1-70 provides that any person presented for admission to a hospital shall be examined by a staff physician within 24 hours. If the examination reveals there is sufficient cause to believe such person is mentally ill, he shall be retained at the hospital; if not, he shall be returned to the locality in which the petition was initated or in which the person resides. The hospital shall refuse to admit an involuntarily committed individual pursuant to § 37.1-70 if the physician's examination reveals that sufficient cause does not exist to believe that the person is mentally ill. See 1979-1980 Report of the Attorney General at 314. In addition, the State hospital may discharge the
person who has been accepted for admission prior to the expiration of the 72-hour treatment period if the requirements of § 37.1-98 have been met. The hospital has no authority to admit a person after he has effectively revoked his consent to hospitalization and it therefore must refuse to admit upon the sole ground that the respondent has changed his mind and no longer wishes to accept voluntary admission and treatment. See 1975-1976 Report of the Attorney General at 222. If the respondent has changed his mind concerning voluntary admission but the examination indicates that the individual presents an imminent danger to himself or others, the hospital must request that a temporary detention order be issued pursuant to § 37.1-67.1 or release him.

You next ask whether the sheriff has the authority to involuntarily transport the respondent from the local facility to the hospital if the Form does not constitute an order of the court. Section 37.1-67.2 provides that such person shall be subject to the transportation provisions as provided in § 37.1-71. Section 37.1-71 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."

Section 37.1-71, therefore, directs the sheriff to transport such a person to the proper hospital. If the person notifies the sheriff prior to the initiation of the transportation that he has changed his mind concerning voluntary admission, the sheriff should immediately notify the court so that any further necessary legal action may be initiated. See Reports of the Attorney General: 1982-1983 at 470 and 1976-1977 at 260.

You next ask, if the Form does not constitute an order of the court, how does it differ in effect from a request for voluntary admission pursuant to § 37.1-65. A voluntary admission pursuant to § 37.1-67.2 differs from a voluntary admission pursuant to § 37.1-65 only in that § 37.1-67.2 requires the person to accept a minimum of 72 hours of treatment and to give the hospital 48 hours notice prior to leaving. The notice requirement thus authorizes the hospital to detain the person until a petition for involuntary commitment can be filed and a detention order obtained if the person notifies the hospital of his intent to leave. Otherwise, it does not differ from a voluntary admission pursuant to § 37.1-65. See 1975-1976 Report of the Attorney General, supra.

You next ask whether the refusal of the hospital to admit the respondent terminates the authority to hold the respondent involuntarily and, if not, when such authority terminates. Generally, the authority to hold a respondent terminates upon the hospital's refusal to admit pursuant to § 37.1-70, unless another detention order is secured pursuant to § 37.1-67.1. Under your hypothetical question, however, the authority to hold the respondent involuntarily has terminated as soon as the respondent signs the Form pursuant to § 37.1-67.2.

You then ask whether the hospital upon refusing admission has the authority to direct that the respondent be returned to the local institution from which he was transported. Section 37.1-70 provides in pertinent part: "If the examination reveals insufficient cause, the person shall be returned to the locality in which the petition was initiated or in which such person resides." The statute is silent on the identity of the person responsible for returning the respondent, but it is logical to assume that this burden rests on the sheriff, inasmuch as he is responsible for the transportation of the respondent. The hospital has no authority, however, to require that the respondent be returned to the local institution from which he was transported.

You further ask whether there is any legal duty upon the sheriff to return the respondent to the local institution or any other mental health facility even if he believes
the respondent is mentally ill and in need of treatment. Section 37.1-71 requires the sheriff to transport the person to the "proper hospital." Section 37.1-70 requires the person to be returned to the locality in which the petition was initiated or in which the person resides if sufficient cause does not exist to believe that the person is mentally ill. The sheriff is therefore obligated to transport the person back to the locality, and may transport him to the local institution or other mental health facility if the person so desires. The sheriff has no authority to deliver the person to the care of the local institution or other mental health facility unless a new petition for involuntary commitment is filed and a new detention order is secured.

Your next question is whether there is a legal duty upon the local institution to accept the respondent, in view of the hospital's refusal to admit him, if its psychiatric staff continues to believe the respondent presents an imminent danger to others and is in need of hospitalization and treatment. The local institution has no authority to detain the person unless the person applies for voluntary admission or the involuntary commitment process is reinitiated pursuant to §§ 37.1-67.1 through 37.1-67.3.

You then ask whether under the circumstances presented, it would be proper under § 37.1-67.1 to issue an additional temporary detention order if the respondent's condition remains unchanged from the time of issuance of the prior detention order. If all of the conditions exist for the issuance of a detention order under § 37.1-67.1, such an order may be proper.

Your last question is whether it would be proper under § 37.1-67.1 to issue an additional temporary detention order upon allegations that the respondent's condition has substantially worsened since the issuance of the prior detention order. Assuming that all of the conditions specified under § 37.1-67.1 are met, such an order would be proper.

MINES AND MINING. CERTIFICATION NOT REQUIRED OF INDIVIDUALS ENGAGED IN ACTIVITIES SPECIFIED IN § 45.1-12 PRIOR TO EFFECTIVE DATE OF REGULATIONS REGARDING CERTIFICATION.

January 11, 1984

The Honorable Harry D. Childress, Chairman
Virginia Board of Mine Examiners

You have asked for my interpretation of the provision of § 45.1-12 of the Code of Virginia which provides that "[a]ny person engaged in any activity for which certification is required by the Board before the effective date of the Board's regulations promulgated hereunder may continue such activity without certification." Specifically, you ask whether this provision operates as a "grandfather" clause or as a grace period until the effective date of the Board of Mine Examiners (the "Board") regulations relating to certification.

I note that the language in question was enacted by the General Assembly at its 1972 session. You inform me that the Board promulgated regulations in July, 1972.

Section 45.1-12 authorizes the Board to provide for examination and certification of persons who work in mines and are responsible for operation, inspection or maintenance of machinery or equipment. The statute specifies certain positions for which certification is mandatory and others which the Board may require certification. In all cases, however, it is the Board that certifies the persons. The statute does not contain any language which would indicate that the provision should be viewed as a temporary grace period. Accordingly, I am necessarily of the opinion that the provision
operates as a grandfather clause for those individuals engaged in the activities specified in § 45.1-12 prior to the effective date of regulations regarding certification.

The conclusion is reinforced by rules of statutory construction which must be applied due to the nature of the legislation. In Sellers v. Bles, 198 Va. 49, 92 S.E.2d 486 (1956), the Supreme Court of Virginia addressed the effect of the failure of a contractor to register and qualify as a subcontractor as required by Ch. 7, Title 54 of the Code of Virginia. The Court stated that "[i]n Virginia the well-settled rule of construction is that even though a statute be remedial, when, at the same time, it is also in derogation of the Code of common law, it must be strictly construed." 198 Va. at 53 quoting O'Connor v. Smith, 188 Va. 214, 222, 49 S.E.2d 310, 314 (1948). In O'Connor, the Court stated that "statutes which impose restrictions upon trade or common occupation...must be construed strictly." 188 Va. 223 quoting Combined Saw and Planer Co. v. Flournoy, 88 Va. 1029, 1034, 14 S.E. 976 (1892). While remedial and laudatory in its purpose, § 45.1-12 is in derogation of the common law because it imposes restrictions upon the ability of individuals to be employed in the mining industry and, therefore, it must be strictly construed.

Additionally, the provision in question must be accorded a strict interpretation due to the penal provision contained in § 45.1-12.1. That section makes it unlawful for any person to perform any task for which certification is required until he has been certified. In Sellers, supra, the Court noted that the contractor's registration statute in question was penal and stated "and for that reason, in applying its penal provision or giving effect to its sanctions, strict construction is required." 198 Va. at 53.

I am, therefore, of the opinion that a strict construction of the questioned provision of § 45.1-12 is required and that certification is not required of individuals who were engaged in the activities specified in § 45.1-12 prior to the effective date of regulations regarding certification.

In view of the nature of the work here involved, I am compelled to advise that this is an area which logically should be brought to the attention of the General Assembly for exploring whether a continuation of activities by uncertified persons creates a danger.

MINES AND MINING. WELL REVIEW BOARD HAS AUTHORITY OVER WELL WORK PERMITS.

January 3, 1984

The Honorable John M. Goldsmith, Jr., Chairman
Virginia Oil and Gas Conservation Commission

I have received your recent letter in which you request an opinion on the following questions:

"1. Can the Virginia Oil and Gas Conservation Commission order the Oil and Gas Inspector not to issue well work permits which:

(a) conflict with existing regulations or drilling unit orders or

(b) conflict with proposed and procedurally pending orders?

2. If it is the Commission's and the Well Review Board's policy to make the well work permit the final authorization to drill and produce and your answer to 1(b) above is negative, how do you advise we implement the Commission's policy?"
Section 45.1-311 of the Code of Virginia governs the conditions upon which a well work permit will be issued. The application must contain the information required by § 45.1-311 and any additional information required by regulations of the Well Review Board. See § 45.1-311(D)(4). If the conditions of § 45.1-311 and the regulations of the Well Review Board are met and no objections are made under § 45.1-313, the Inspector shall issue the requested permit. See § 45.1-314. If objections are made under § 45.1-313, both the Inspector and the Well Review Board may conduct hearings on the objections. See §§ 45.1-315 and 45.1-325, respectively. The well work permit is, therefore, a function of the Inspector and the Well Review Board. The Oil and Gas Conservation Commission has been granted no authority to act on the well work permit.

The duties of the Commission are limited by § 45.1-296(D) to the following matters:

1. To regulate the spacing of jurisdictional wells to achieve the purposes of Article 2 (§ 45.1-299 et seq.) of this chapter;

2. Upon proper application and notice, to enter spacing and pooling orders and to provide for the unitization of interests;

3. Upon proper application and notice, to establish maximum allowable production rates for jurisdictional wells for the purposes of preventing waste and protecting correlative rights, and to set a penalty, not exceeding $5,000 per violation per day, for production in excess of the maximum allowable production rate. The Inspector may file suit in the appropriate court for collection of penalties.

4. To classify pools as oil or gas or both, and to classify wells as oil or gas wells, for purposes material to the jurisdiction of the Commission under the definitions set out in § 45.1-288 of this Code; and

5. To collect data, make investigations and inspections, examine properties, leases, papers, books and records, provide for the keeping of records and the making of reports and to take such actions as appear reasonably necessary to carry out the provisions of Article 2 of this chapter."

The limited nature of the Commission's authority with respect to a well work permit is bolstered by § 45.1-311(F) which provides that a well work permit prevails over any conservation order issued by the Commission. In such a case, the Commission can require a well operator to return to the Commission to review the conservation order in light of the conflict with the well work permit. Additionally, the Commission may require on its own motion the establishment or modification of a drilling unit covering any pool whenever the Commission believes that a drilling unit is necessary to "prevent waste of oil or gas, to avoid the drilling of unnecessary wells, or to protect correlative rights...." Section 45.1-301(A). Issuance of the notice of hearing to establish or modify drilling units prohibits the commencement for production of any additional wells covered by its notice of hearing. See § 45.1-301(G).

Thus, in answer to your first question, the Commission has no authority over well work permits. The Commission, however, can prohibit commencement of a jurisdictional well if notice of hearing has been given.

Inasmuch as the Well Review Board has ultimate authority over the well work permit, implementation of the Commission's policy to make the well work permit the final authorization to drill and produce cannot be done without the cooperation of the Well Review Board. The Board may condition the issuance of a permit upon review by the Oil and Gas Conservation Commission pursuant to § 45.1-311(C)(11). Otherwise, the Commission's policy cannot be implemented without legislative change.
MOTOR VEHICLES. AVAILABILITY OF BREATH OR BLOOD SAMPLE TEST.

September 20, 1983

The Honorable Kenneth H. Jordan, Jr.
Sheriff of Mathews County

You have asked whether it is necessary to transport a person, who has been arrested for driving under the influence ("DUI") in Mathews County, to a hospital located twenty miles away in Gloucester County to have a blood sample taken for a chemical test when there are no doctors, nurses or other persons authorized by § 18.2-268 of the Code of Virginia to extract a blood sample on duty in Mathews County.

Section 18.2-268(b), Virginia's "implied consent law," provides as follows:

"Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this Commonwealth on and after January 1, 1973, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, if such person is arrested for violation of § 18.2-266 or of a similar ordinance of any county, city or town within two hours of the alleged offense. Any person so arrested shall have the right to elect to have either the breath or blood sample taken, but not both. It shall not be a matter of defense that either test is not available. However, if only one type of test is available, such person shall be required to take the available test without having the right to an election." (Emphasis added.)

It is clear that any person who is arrested for DUI has the right to elect to have either the breath or blood sample taken, if both are available. This right to an election is abrogated, however, when only one type of test is available. The statute merely provides that one who operates a motor vehicle over the highways of Virginia "shall be deemed thereby...to have consented to have a sample of his blood or breath taken" for analysis, if he is arrested for a violation of § 18.2-266 or of a similar ordinance of any county, city or town. See United States v. Gholson, 319 F.Supp. 499 (E.D. Va. 1970), and United States v. Fletcher, 344 F.Supp. 332 (E.D. Va. 1972).

The crux of the question raised by your inquiry is whether the blood sample test is considered "available" under the circumstances you describe. The term "available" is not defined within the provisions of the Code that relate to driving a motor vehicle while intoxicated. In the absence of a statutory definition and where no technical or special meaning is explicitly stated in or necessarily implied from the language and context of a statute, words which the legislature has seen fit to employ are to be given their usual and ordinary meanings. Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 518 (1938); 17 M.J. Statutes § 34 (1951). The word "available" is defined in Black's Law Dictionary 123 (rev. 5th ed. 1979) as "accessible; obtainable; present or ready for immediate use." Similar definitions are given in the American Heritage Dictionary of the English Language and Webster's New Collegiate Dictionary; yet, their import is the same, i.e., that which is present or ready for immediate use.

I also note that whether a blood or breath sample is taken, the alcoholic content of a person's blood diminishes with the passage of time. Therefore, delay in administering one or the other diminishes the probative value of the test.

In light of the foregoing, it is my opinion that in the circumstances which you describe the breath test in question does not meet the legislature's requirement of
availability as contemplated in § 18.2-268(b). Consequently, you are not required to transport the suspect twenty miles to another jurisdiction in order to obtain that test. The suspect would therefore be required to take the breath test without the right to an election.

MOTOR VEHICLES. "BLIND" LICENSE PLATES. CERTAIN EMPLOYEES OF ADMINISTRATIVE STATE AGENCIES WHO EXERCISE LAW ENFORCEMENT AUTHORITY ARE ELIGIBLE FOR "BLIND" LICENSE PLATES.

July 27, 1983

The Honorable Andrew B. Fogarty
Secretary of Transportation

You have inquired whether State owned vehicles may be licensed with plates which do not carry the "Public Use" insignia (blind plates) when those vehicles are operated by State employees who are not law enforcement officers but who nevertheless carry out the police powers of their respective State agencies.

The pertinent portion of § 46.1-49 of the Code of Virginia limits the vehicles for which "blind" license plates may be issued to "cars devoted solely to police work.

Although the phrase "police work" is undefined in Title 46.1, that portion of § 46.1-49 clearly contemplates the use of "blind" plates only by officials traditionally associated with law enforcement responsibilities, e.g., local sheriffs, police officers and other law enforcement officers. Nevertheless, work performed by employees of State agencies, even though not limited strictly to investigating and enforcing criminal laws, may still fall within the scope of "police work." For example, this Office has previously held that inspectors with the Department of Alcoholic Beverage Control have police status and, therefore, perform "police work" within the meaning of § 46.1-49. It was noted in that Opinion that ABC inspectors are recognized as law enforcement officers in several sections of the Virginia Code, and that they are charged with the enforcement of criminal laws as well as laws relating to alcoholic beverages. The fact that ABC inspectors work also includes administrative duties was held not to affect their police status. The rationale is the General Assembly was unlikely to require such persons to change cars when performing strictly those activities traditionally recognized as "police work."

In my opinion, employees of State administrative agencies whose duties include, for the most part, law enforcement obligations comparable to the ABC inspectors discussed above, and who have similar broad law enforcement authority would qualify for "blind" license plates under § 46.1-49. On the other hand, cars used by regulatory agents of the State who do not have the authority to arrest and who do not exercise law enforcement powers in a broad manner, and those whose responsibility is primarily limited to the exercise of administrative duties, are not engaged in "police work" for the purposes of § 46.1-49. Therefore, "blind" vehicle license plates may not be issued for vehicles used by those types of employees.

The authority and duties of each State official seeking to use such plates must be examined on an individual basis in accordance with the guidelines described above.

1There are additional uses authorized by § 46.1-49 but they are not pertinent to your inquiry.
The chiefs of police of cities or counties having a police department and county sheriffs are specifically required by § 46.1-49 to certify that the vehicles using such plates will be used solely for police work.


MOTOR VEHICLES. DRIVING UNDER INFLUENCE. AVAILABILITY OF BLOOD TEST.

June 26, 1984

The Honorable Eddie R. Vaughn, Jr.
Commonwealth's Attorney for Hanover County

You have inquired as to the proper interpretation of § 18.2-268(b) of the Code of Virginia, as amended by Ch. 666, Acts of Assembly of 1984. First, you ask whether the amendment affects the Opinion I rendered to Sheriff Kenneth H. Jordan, Jr. on September 20, 1983. Second, you have stated that the blood test is unavailable in Hanover County and, as a consequence, you ask whether it is necessary to advise the accused of his right to have a blood test administered at his own expense when such a blood test is not available. Finally, you have asked what form of writing the amendment requires to advise the accused of his right to a blood test.

Chapter 666 amends and reenacts §§ 18.2-266 and 18.2-268, relating to driving under the influence. The amendment in question provides that any person arrested under § 18.2-266 for driving under the influence of alcohol shall:

"be required to have either the blood or breath sample taken in the discretion of the arresting officer. This provision shall not serve to prevent such person from having a blood test performed at his own expense in accordance with the provisions of subsection (d). If the arresting officer elects a breath test, then the arresting officer shall advise the accused in writing of his right to have a blood test at his own expense. However, it shall not be a matter of defense if the blood test is not available." Section 18.2-268(b).

In answer to your first question, it is my position that the amendment does nothing to change the Opinion rendered to Sheriff Jordan. In that Opinion, I pointed out the following:

"The term 'available' is not defined within the provisions of the Code that relate to driving a motor vehicle while intoxicated. In the absence of a statutory definition and where no technical or special meaning is explicitly stated in or necessarily implied from the language and context of a statute, words which the legislature has seen fit to employ are to be given their usual and ordinary meanings. Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938); 17 M.J. Statutes § 34 (1951). The word 'available' is defined in Black's Law Dictionary 123 (rev. 5th ed. 1979) as 'accessible; obtainable; present or ready for immediate use.' Similar definitions are given in the American Heritage Dictionary of the English Language and Webster's New Collegiate Dictionary; yet, their import is the same, i.e., that which is present or ready for immediate use.

I also note that whether a blood or breath sample is taken, the alcoholic content of a person's blood diminishes with the passage of time. Therefore, delay in administering one or the other diminishes the probative value of the test."

In that opinion, I concluded that the test of availability was not met where a blood test was available only in another jurisdiction some 20 miles away. The Opinion
demonstrates that whether a blood test is available must be judged on a case-by-case basis. Succinctly stated, consideration must be given to whether the facts demonstrate such a test is "present or ready for immediate use." The amendment to § 18.2-268 does not alter that view. Accordingly, your first question is answered in the negative.

In answer to your second question, I recognize that by reading the penultimate sentence in the amendment in isolation, it appears that the accused must always be advised in writing of his right to a blood test in those situations where the arresting officer elects to administer the breath test. In order to determine legislative intent, however, the statute must be read as a whole. By so doing, it is seen that the last sentence qualifies the previous sentence. The last sentence demonstrates that the General Assembly was aware that a blood test may not always be available. It can be argued, therefore, that it would be unreasonable to interpret the statute as requiring the arresting officer to advise an accused in writing of his right to a blood test if a blood test is unavailable. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

It is important to recognize that the question of unavailability is the linchpin to the issue. If the blood test is available, the accused must be advised in writing of his right to have such a test. This right of the accused cannot be lightly regarded. Consequently, the arresting officer and law enforcement agencies should thoroughly consider the circumstances before determining that a test is unavailable. Furthermore, consideration should be given to whether the accused might know of an available person meeting the standards established for administering the test under § 18.2-268(d). Accordingly, in my opinion, the chance that the accused may have such knowledge warrants the necessity that the arresting officer render the advice concerning the right of the accused to a blood test.

In light of the foregoing and in answer to your third question, it is my opinion that the most propitious manner in which to proceed where the arresting officer has elected to administer the breath test is as follows:

1. If a blood test is "available" then the accused must be advised in writing of his right to such a test at his expense.

2. If law enforcement officials have determined that no blood test is "available," nevertheless, the accused should be advised in writing (a) of his right to a blood test, (b) that none is available to the knowledge of law enforcement officials, and (c) if the accused has knowledge of a person who meets the standards established by § 18.2-268(d) and who is readily available to administer the test in accordance with the provisions of § 18.2-268(d1) through (d4), the accused will be permitted to have the test administered by that person, at the expense of the accused, if he so requests.

1 A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole 2 A C. Sands, Sutherland Statutory Construction, § 46.05 (4th ed. 1974).

2 A suggested form for this writing is now being prepared by this Office for use by the State Police. I will furnish a copy of the form to you as soon as it is completed.

3 A suggested form for this writing is also being prepared for the State Police and, when completed, will be made available to you.
FAILED TO CARRY BURDEN OF PROOF AS TO FIRST CONVICTION IN CRIMINAL PROCEEDING.

March 7, 1984

The Honorable J. R. Zepkin, Judge
Ninth Judicial District

You have asked whether the Commissioner of the Division of Motor Vehicles (the "Commissioner") is collaterally estopped from treating a conviction for driving under the influence ("DUI") as a second offense for purposes of § 46.1-421(a) of the Code of Virginia under the following circumstances:

"The individual was charged with and tried for the offense of DUI, second or subsequent offense (under §§ 18.2-266 and 18.2-270 of the Code of Virginia). At the conclusion of the Commonwealth's evidence, the defendant moved to strike the portion of the Commonwealth's case [which charged] second offense. The basis of the motion was that the Commonwealth had neither offered any evidence of nor asked the court to take judicial notice that the 'first conviction'...was [for a violation of a Tennessee statute...'substantially similar' [to § 18.2-266 as required by § 18.2-270]...."

"The motion to strike was granted and the trial proceeded to conclusion. The defendant was found guilty of DUI, first offense and acquitted of the second offense charge. The question of the prior offense was directly in issue and resolved in favor of the defendant."

In an Opinion of October 21, 1983 to the Honorable J. C. Crumbley, III, I reviewed the statutory framework within which the courts and the Commissioner now deal with license suspension or revocation for DUI. That Opinion relied heavily upon Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939).

In Ellett, the Commissioner had invoked the mandatory revocation provision required by the applicable Code section (forerunner of § 18.2-271) upon receiving records of two convictions of DUI, despite the fact that both cases had been tried as first offenses. There was no reference to a prior conviction in the second warrant or in the judgment of conviction thereon. The Court upheld the action of the Commissioner, stating:

"There is a distinction between the punishment provided by statute to be fixed by a court or jury upon conviction of a specified offense, and the legal consequences affecting the rights and privileges of the offender after his conviction. Principles applicable upon the trial of a criminal offense are not involved in the consideration of the effect of a conviction upon the offender's rights as a citizen."

***

Both logic and common sense applied to the language and intendment of the statute lead to the same conclusion, that is, that the right to drive a vehicle is revoked for one year upon a first conviction for drunken driving, and for three years upon any conviction for a similar offense following thereafter. We ought not to be bound by any rigid or artificial legal concept from giving it such effect." 174 Va. at 415.

Based upon the language of the pertinent statutes and the holding and rationale of the Ellett case, I concluded in the Opinion to Judge Crumbley that the action of the Commissioner is the ministerial function of implementing the statutory mandate of civil revocation, whether pursuant to § 46.1-421(a) or § 18.2-271. I further concluded in the Crumbley Opinion that the fact the trial court acted upon the mistaken impression that the charge and conviction was for a first DUI offense rather than a second offense does
not alter the duty of the Commissioner when he has information that demonstrates the conviction was, in fact, a second one.

You indicate that you are mindful of the Opinion to Judge Crumbley, but you ask whether a different result would obtain when the issue of prior conviction was actually before the trial court and resolved against the Commonwealth. Stated in different terms, your question is whether the Commissioner is estopped from taking the requisite action under § 46.1-421 when his records show the driver has two DUI convictions of offenses similar to § 18.2-266 but when the trial court, at the trial of the second offense, acquitted the driver of a "second" DUI charge and convicted him only of a "first" DUI charge.

Under the concept of collateral estoppel, the parties to the first action and their privies are precluded from relitigating in a second case any issue of fact actually litigated and essential to a valid and final personal judgment in the first case. N.&W. v. Bailey, 221 Va. 638, 272 S.E.2d 217 (1980). Under Virginia law, however, the doctrine of estoppel does not apply to the rights of the State when acting in its sovereign or governmental capacity. Commonwealth v. Wash. Gas Light Co., 221 Va. 315, 269 S.E.2d 820 (1980).

Moreover, the record of an acquittal in a criminal case is not conclusive of the facts on which it is based in any civil action. Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927). Thus, in a forfeiture proceeding for an automobile, the fact that the driver of the car had been acquitted of the crime which was the basis of the alleged forfeiture could not be relied upon as res judicata or collateral estoppel in the subsequent forfeiture proceeding. United States v. One 1953 Oldsmobile, 222 F.2d 668 (4th Cir. 1955). A principal basis for the rule is the difference in the burden of proof prevailing in civil and criminal cases.

Last month in United States v. One Assortment of 89 Firearms, 79 L.Ed.2d 361, 104 S.Ct. (No. 82-1047, February 22, 1984), a unanimous Supreme Court similarly concluded that an earlier criminal acquittal did not estop the government from pursuing civil forfeiture proceedings arising out of the same factual setting. As the Court stated there, the defendant's prior acquittal in the criminal action did not negate the possibility that the government could prove by a preponderance of the evidence that he was engaged in the unlicensed firearms business. Therefore, his acquittal does not estop the government from proving in a civil proceeding that the firearms should be forfeited. (See slip op. at 7.)

Applying these principles to your inquiry, the Commissioner's administrative proceeding under § 46.1-421 is civil in nature, whereas the prosecution under § 18.2-266 or § 18.2-270 is obviously criminal in nature with a far more stringent burden of proof. Moreover, the Commissioner is acting in a governmental capacity. Accordingly, I must conclude that the failure of the Commonwealth's attorney, in a criminal proceeding under § 18.2-270, to prove beyond a reasonable doubt that the defendant has previously been convicted of a DUI charge will not preclude the Commissioner from taking appropriate administrative action under § 46.1-421 if his records show that the defendant has been twice convicted of DUI.\(^2\)

\(^1\)Section 18.2-270 provides, in pertinent part, that: "For the purpose of this section a conviction...under the provisions of § 18.2-266...or the laws of any other state substantially similar to the provisions of §§ 18.2-266 through 18.2-269 of this Code, shall be considered a prior conviction." In Rufty v. Commonwealth, 221 Va. 836, 275 S.E.2d 584 (1981), the Supreme Court of Virginia held that in order to convict for a second
offense under § 18.2-270, the Commonwealth has the burden of proving that a foreign
DUI conviction was obtained under laws substantially similar to § 18.2-266.

I note that in 1983 the General Assembly amended § 46.1-421 to limit the
Commissioner's obligation under that statute in certain situations in which the trial court
enters orders (1) pursuant to § 18.2-271 pertaining to court suspension of a portion of the
revocation period and (2) pursuant to § 18.2-271.1 pertaining to court suspension of the
revocation period because of successful completion of participation in VASAP.

MOTOR VEHICLES. DRIVING UNDER INFLUENCE. IMPLIED CONSENT LAW.
TAKING SUSPECT FOR BLOOD OR BREATH TEST BEFORE TAKING HIM BEFORE
MAGISTRATE NOT VIOLATION OF § 19.2-82.

June 21, 1984

The Honorable G. William Hammer, Judge
Fairfax County General District Court

You have asked two questions concerning blood or breath tests given to individuals
arrested for driving under the influence of alcohol ("DUI") pursuant to the implied
consent law (§ 18.2-268 of the Code of Virginia).

Your first question is whether the practice of taking a DUI suspect to a technician
for a blood or breath test before taking that suspect before a magistrate to obtain a
warrant violates the provisions of § 19.2-82. This section requires that a person arrested
without a warrant "shall be brought forthwith before a magistrate...." (Emphasis added.)

The term "forthwith" is not defined in the Code. The Supreme Court of Virginia,
however, has defined the term in Winston v. Commonwealth, 188 Va. 386, 394, 49 S.E.2d
611 (1948), as follows:

"While this statute requires the arresting officer to bring the prisoner 'forthwith'
before a judicial officer, this does not mean that he must forsake all other duties
and do so immediately upon making the arrest. But this mandate of the statute
must be performed with such reasonable promptness and dispatch as the
circumstances may permit.

Similar statutes requiring that arrested persons be taken promptly before a
committing authority have been adopted by Congress and the legislatures of nearly
all of the States. While these statutes in terms require the officer to perform this
duty 'forthwith,' 'immediately,' or without 'delay,' the courts have uniformly held
that this means that he must do so with reasonable promptness and without
unnecessary delay. See McNabb v. United States, 318 U.S. 332, 342, 63 S.Ct. 608,
614, 87 L. Ed. 819; 6 C.J.S., Arrest, section 17-b, p. 618; 4 Am. Jur., Arrest, section
70, pp 49, 50.

As we said, speaking of a similar mandate, in Sands & Co. v. Norvell, 126 Va. 384,
400, 101 S.E. 569, there must, of course, be a reasonable time allowed for making
such return, and some latitude must be given the officers in keeping a prisoner in
custody after he has been arrested and before he is taken to the justice...."

In Winston, the Supreme Court held that this statutory requirement had been
violated. The arresting officer had usurped the judicial function by having the defendant
committed to jail for five hours before bringing him before a magistrate, thereby
depriving him of his constitutional right to call for evidence in his favor. Two years later
in McHone v. Commonwealth, 190 Va. 435, 57 S.E.2d 109 (1950), the Court emphasized
that it was this deprivation of the right to call for evidence and not the mere delay in bringing the individual before the magistrate which was critical to the Court's decision to reverse the conviction in Winston.

I note that the evidence which the Supreme Court believed might have been available in the Winston case to prove the defendant's innocence was a physical examination which might well have included a blood-alcohol test. In addition, it is important to recognize that the administration of a breath or blood test pursuant to § 18.2-268 is designed specifically to determine the alcohol content of the suspect's blood, that such test must be administered within a reasonably short period of time after the alleged offense in order to have probative value as to the suspect's condition at that time, and that the results of the test may be introduced into evidence by either the prosecution or the defense.

In light of the foregoing, I am of the opinion that if an officer who has arrested a suspect causes a blood or breath test to be administered to him before taking him before a magistrate, the officer has not violated the requirements of § 19.2-82. Far from depriving the individual of evidence of his sobriety, such procedure is designed specifically to obtain such evidence, and the time saved by collecting the evidence prior to bringing the suspect before a magistrate may make the evidence more probative. Moreover, the process of obtaining the blood or breath sample is quite dissimilar to the jailing of the suspect that was criticized in the Winston and McHone cases. The implied consent statute obviously contemplates that such samples will be taken, and there is no requirement therein that the blood or breath test be given after the suspect has been taken before a magistrate, unless the suspect has first refused to take a test.

Inasmuch as the Supreme Court of Virginia has stated that "forthwith" means "with such reasonable promptness and dispatch as the circumstances may permit," I am of the opinion that the delay involved in first obtaining the blood or breath test does not violate the requirement that the suspect be brought forthwith before a magistrate. Accordingly, I answer your first inquiry in the negative.

Your second inquiry is whether the Commonwealth should be precluded from, or limited in, having the results of a blood test admitted in evidence where the second sample, submitted to a laboratory of the defendant's choice pursuant to § 18.2-268(d1), has been lost or destroyed in the mail through no fault of the defendant, so that no test results for the second sample are available.

I also answer this inquiry in the negative. There is no statutory provision or case decision which would require the exclusion of the blood test result in such situation. While the court or jury might consider the fact that the second test result was unavailable, it is my opinion that the test results obtained from the Division of Consolidated Laboratories are not rendered less reliable simply because the other sample cannot be tested. So long as all statutory provisions have been followed, I am of the opinion that the available results are fully admissible.

MOTOR VEHICLES. DRIVING UNDER INFLUENCE. INDIVIDUAL CONVICTED THREE TIMES INELIGIBLE FOR PARTICIPATION IN VASAP EVEN IF FIRST TWO CONVICTIONS FOR VIOLATIONS COMMITTED OUT OF STATE.

October 4, 1983

The Honorable James H. Harvell, III, Judge
Seventh Judicial District
You have asked whether an individual whose driving record shows two prior convictions in North Carolina for driving under the influence of intoxicants ("DUI") and who is subsequently convicted of a violation of § 18.2-266 of the Code of Virginia is eligible to participate in the Virginia Alcohol Safety Action Program (VASAP).

The last sentence of § 18.2-271 provides that "[u]pon a third conviction of a violation of § 18.2-266, such person shall not be eligible for participation in [VASAP] and shall have his license revoked by the Division of Motor Vehicles as provided in § 46.1-421(b)." Standing alone, this language means that the individual would be ineligible for VASAP only if all three of the convictions (for DUI) were for violations of § 18.2-266 rather than for violations of the DUI laws of other states or jurisdictions.

Section 18.2-271, however, also provides that:

"If any person has heretofore been convicted or found not innocent in the case of a juvenile of violating any similar act in the Commonwealth or any other state and thereafter is convicted of violating the provisions of § 18.2-266, such conviction or finding shall for the purpose of this section and § 18.2-270 be a subsequent offense...."

Although this provision speaks of a "subsequent offense" rather than a "third conviction of a violation of § 18.2-266," it is my opinion that it expresses the intention of the General Assembly that prior convictions of violations of laws of other jurisdictions which are similar to § 18.2-266 must be treated as though they were violations of § 18.2-266 for purposes of § 18.2-271. That legislative intent is also expressed in § 46.1-421(b), which provides that:

"Notwithstanding any other provision of law, the Commissioner shall forthwith revoke and not thereafter reissue the operator's or chauffeur's license of any person upon receiving a record of a third conviction of such person for a violation of the provisions of § 18.2-266 pertaining to driving while under the influence of drugs or intoxicants, or a federal law, or law of any other state or a valid ordinance of any city, town, or county of this Commonwealth, similar to § 18.2-266, notwithstanding the length of time between violations...."

I am, therefore, of the opinion that an individual who has been convicted of DUI twice in North Carolina and who is subsequently convicted of DUI in Virginia is not eligible for participation in VASAP.

MOTOR VEHICLES. DRIVING UNDER INFLUENCE. LICENSE REVOCATION. MANDATORY.

October 21, 1983

The Honorable J. C. Crumbley, III, Judge
Campbell County General District Court

You have requested my interpretation of the statutory provisions which relate to the suspension or revocation of driving privileges under §§ 18.2-271, 18.2-271.1, 46.1-417 and 46.1-421 of the Code of Virginia.

The situation posited by you involves an individual who is convicted of operating under the influence of intoxicants (DUI) in violation of § 18.2-266, or a parallel ordinance. He is referred to Virginia Alcohol Safety Action Program (VASAP) as provided in §§ 18.2-271 and 18.2-271.1, with the six-months license suspension either
entirely or partly suspended by the court, or a restricted license granted for that period, conditioned upon the defendant's successful completion of the program. The record at the Division of Motor Vehicles (DMV) indicates, however, that the defendant was previously convicted of DUI, a fact unknown to the trial court. The question then presented is whether DMV must invoke the provisions of § 46.1-421 and revoke the operator's license for a period of three years.

Both the Supreme Court of Virginia and this Office have heretofore addressed questions in opinions which involved the statutes in question. Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939); 1982-1983 Report of the Attorney General at 365. The two statutes, both of which pertain to revocation of operators' licenses upon conviction of one or more violations for DUI, provide in pertinent part as follows:

Section 46.1-421(a): "Except as otherwise ordered as provided in § 18.2-271 or § 18.2-271.1, the Commissioner shall forthwith revoke and not thereafter reissue for three years the operator's or chauffeur's license of any person upon receiving a record of a conviction of such person for a violation of the provisions of § 18.2-266 pertaining to driving under the influence of drugs or intoxicants or...either of such convictions being subsequent to a prior conviction...if the subsequent violation has been committed within ten years from the prior violation." (Emphasis added.)

Section 18.2-271: "Except as provided in § 18.2-271.1, the judgment of conviction if for a first offense under § 18.2-266, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of six months from the date of such judgment. If such conviction is for a second offense committed within ten years of a first offense for which the person was convicted under § 18.2-266 such person's license to operate a motor vehicle, engine or train shall be revoked for a period of three years from the date of the judgment of conviction.... Six months of any license suspension or revocation imposed pursuant to this section for a first offense conviction may be suspended, in whole or in part by the court upon the entry of the person convicted into and the successful completion of a program pursuant to § 18.2-271.1. Upon a second conviction, the court may suspend no more than one year of such license suspension or revocation if such second conviction occurred less than five years after a previous conviction under § 18.2-270, nor more than two years if such second conviction occurred five to ten years after a previous conviction upon such person's entry into and successful completion of a program entered into pursuant to § 18.2-271.1. Upon a third conviction of a violation of § 18.2-266, such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall have his license revoked by the Division of Motor Vehicles as provided in § 46.1-421(b)." (Emphasis added.)

In the Opinion reported in the 1982-1983 Report of the Attorney General, supra, the question was presented whether the three-year revocation mandated in § 46.1-421(a) for a second conviction was superseded by a court order imposing a two-year revocation as provided by § 18.2-271. The conclusion reached in that Opinion was that the legislative intent was to give the court authority to suspend the two-year revocation and grant a restricted license, provided the defendant completed VASAP. Under such circumstances, the mandatory three-year revocation provided in § 46.1-421(a) did not apply. The statutory ambiguity has now been resolved by the amendment to § 18.2-271. That section now provides for a three-year revocation upon a second offense, with the authority in the trial court to suspend portions of the revocation upon successful completion of VASAP.

To summarize, the statutory framework within which the courts and DMV now deal with license suspension or revocation for DUI is as follows:
For first offense - automatic six-month revocation by DMV or the trial court. Sections 18.2-271 and 46.1-417. Under § 18.2-271, the trial court may suspend up to the full six months on condition that the person convicted successfully completes VASAP as provided in § 18.2-271.1.

For second offense - mandatory three-year revocation by DMV pursuant to § 46.1-421(a), except as otherwise provided in §§ 18.2-271 or 18.2-271.1, and three-year revocation by the trial court pursuant to § 18.2-271.

The trial court may suspend up to one year of the revocation if the conviction occurs less than five years after a previous conviction, and may suspend up to two years if the second conviction occurs five to ten years after a previous conviction, provided the person successfully completes VASAP.

For third offense - mandatory revocation by DMV. Sections 46.1-421(b) and 18.2-271. There is no discretion in the trial court to suspend the revocation and the person is not eligible for participation in VASAP. (At the expiration of ten years from the date of revocation, the person may petition the circuit court for restoration of his license.)

It is now manifest that the legislative intention expressed in §§ 18.2-271, 46.1-417 and 46.1-421 is to make uniform the period of license revocation for one or more DUI convictions and to provide authority for trial courts to suspend part or all of the revocation under certain conditions, except in cases of three or more convictions. Whether effected by the court at the time of sentencing or by DMV upon receipt of records of convictions, the periods for license revocation are six months for first offenses, three years for second offenses and not less than ten years for third offenses.

The question remains, however, as to whether DMV is precluded from exercising the mandate to revoke a license pursuant to § 46.1-421(a) when a trial court has permitted the convicted person to enter VASAP and imposed a six-month license suspension upon the mistaken impression that the person had no previous convictions for DUI. For the reasons hereinafter discussed, I am of the opinion that this question must be answered in the negative.

The Supreme Court of Virginia addressed a similar situation in the case of Commonwealth v. Ellett, supra. In that case, the Director of Motor Vehicles had invoked the mandatory revocation provision required by the applicable Code section (forerunner of § 18.2-271) upon receiving records of two convictions of DUI, despite the fact that both cases had been tried as first offenses. There was no reference to a prior conviction in the second warrant or in the judgment of conviction thereon. The Court upheld the action of the Director, stating:

"The loss of the right to operate a vehicle is no part of the judgment of conviction, or the punishment fixed by the court or jury, and no action or order of the court or other officer is required to put it into effect. It is not dependent upon evidence necessary to convict. Evidence of conviction alone is essential.

"The fourth section of the statute preserves the record of each conviction for the information of the Director of Motor Vehicles, the official charged with the duty of issuing permits to those who may be entitled to the right to operate a vehicle. The Director has no power to hear evidence to fix the measure of guilt. Nor has he the right to disregard judgments of conviction.

"The consequence and the effect of conviction is neither legally nor technically a part of the punishment based upon evidence of guilt. It is entirely separate, apart and additional to the punishment fixed for the offense."
"There is a distinction between the punishment provided by statute to be fixed by a court or jury upon conviction of a specified offense, and the legal consequences affecting the rights and privileges of the offender after his conviction. Principles applicable upon the trial of a criminal offense are not involved in the consideration of the effect of a conviction upon the offender's rights as a citizen.

"Both logic and common sense applied to the language and intendment of the statute lead to the same conclusion, that is, that the right to drive a vehicle is revoked for one year upon a first conviction for drunken driving, and for three years upon any conviction for a similar offense following thereafter. We ought not to be bound by any rigid or artificial legal concept from giving it such effect." 174 Va. at 411, 415.

I am of the opinion that the holding and rationale expressed by the Court in Ellett is controlling in the factual situation posited by you. The action of DMV is the ministerial function of implementing the statutory mandate of revocation which is self-executing, whether pursuant to §46.1-421(a) or §18.2-271. The fact that the trial court acted upon the mistaken impression that the conviction was for a first DUI offense does not alter the situation. As was alluded to in the Ellett Opinion, the court does not always have access to the record of prior convictions (although there is now statutory provision for making such records available in §46.1-413.1). Conceivably, a person could be convicted in several jurisdictions on DUI offenses without the trial court being aware of any prior convictions. It is readily apparent that the legislative mandate for license revocation could be circumvented in every case in which the trial court is not advised that the prior convictions exist, unless the central repository for such records, DMV, is given the authority to implement the legislative mandate of revocation for subsequent offenses.

In view of the foregoing, I am of the opinion that DMV is obligated pursuant to §46.1-421(a) to revoke the operator's license of an individual convicted of DUI, despite a court order suspending the license for a six-month period, when it is apparent from the records that the court order is founded on an obvious mistake.

MOTOR VEHICLES. DRIVING UNDER THE INFLUENCE ON PRIVATE PROPERTY.

May 30, 1984

The Honorable Kenneth H. Jordan, Jr.
Sheriff, County of Mathews

You have asked whether it is unlawful, in light of an amendment to §18.2-266 of the Code of Virginia, for a person to drive or operate a motor vehicle, including mopeds, while under the influence of alcohol or any narcotic drug on any location other than a public highway.

Section 18.2-266 provides that it shall be unlawful for any person to drive or operate any motor vehicle while under the influence of alcohol or any narcotic drug. This section is applicable to the operation of motor vehicles whether such operation be on private property or a public highway. Valentine v. Brunswick County, 202 Va. 696, 119 S.E.2d 486 (1961); Williams v. Petersburg & Commonwealth, 216 Va. 297, 217 S.E.2d 893 (1975); see, also, Reports of the Attorney General: 1979-1980 at 246; 1977-1978 at 254.

In 1977, the General Assembly amended §18.2-266. The amendment enlarged the definition of the term "motor vehicle" to include pedal bicycles with helper motors (i.e., mopeds) while operated on the public highways of the Commonwealth. 1 Prior to the
adoption of this amendment, it was not unlawful for a person to operate a moped while under the influence of alcohol or any narcotic drug upon the public highways of the Commonwealth.

Cognizant of the inherent danger to the public safety posed by the operation of mopeds upon the public highways of this Commonwealth by persons under the influence of alcohol or any narcotic drug, the General Assembly deemed it necessary to make such operation unlawful. The added language, however, does not circumscribe the holding of the Williams case which states that a police officer has authority to charge a person with driving or operating a motor vehicle (other than a moped) while under the influence of alcohol or any narcotic drug on private property, provided the officer observes the violation.

Accordingly, I am of the opinion that it is unlawful for any person to drive or operate a motor vehicle while under the influence of alcohol or any narcotic drug whether such operation occurs on private or public property within this Commonwealth. I am also of the opinion that it is unlawful for a person to drive or operate a moped while under the influence of alcohol or any narcotic drug on the public highways of this Commonwealth.

1It should be noted that the 1984 Session of the Virginia General Assembly changed the reference in § 18.2-266 from "pedal bicycles with helper motors" to "mopeds." See, Ch. 666, Acts of Assembly of 1984.

MOTOR VEHICLES. GROSS WEIGHT. TOW TRUCK MUST BE REGISTERED FOR GROSS WEIGHT COVERING BOTH TOWING VEHICLE AND TOWED VEHICLE.

August 26, 1983

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

You have asked the following questions pertaining to weight limitations for tow vehicles.

"1. Must a vehicle designed for towing disabled vehicles, when towing such vehicles, have a licensed gross weight to cover the weight of the towing vehicle in combination with every vehicle being towed?

2. If the answer to question no. 1 is in the negative, what should the licensed gross weight be for a two-axle tow truck? A three-axle tow truck?

3. Are the provisions of § 46.1-339.1 broad enough to cover the towing of an operative vehicle to a location where an operative vehicle must be replaced?"

Section 46.1-159 of the Code of Virginia provides that it is unlawful to operate or permit the operation of a motor vehicle not designed and used for the transportation of passengers, when the "gross weight of the vehicle or of the combination of vehicles of which it is a part, is in excess of the gross weight on the basis of which it is registered and licensed." (Emphasis added.) Thus, a motor vehicle must generally be registered for a gross weight which includes the weight of vehicles used in combination with that motor vehicle. See §§ 46.1-154 through 46.1-157.
The term "combination of vehicles," however, is not defined in the Code, so that it is not clear whether a tow truck and the vehicle it is towing should be considered a combination for purposes of § 46.1-159. In one sense, a towing vehicle must be combined with the towed vehicle in order to move it. I am advised, however, that the Division of Motor Vehicles ("DMV") has interpreted the term "combination of vehicles" to apply only to those configurations in which a motor vehicle is to be operated as a unit with a non-motorized vehicle (trailer or semitrailer) for the purpose of transporting something other than passengers. Under this DMV interpretation, a tow truck would not normally be considered part of a combination because tow trucks are usually used to move disabled motor vehicles rather than trailers or semitrailers, and the tow truck and disabled motor vehicle are operated as a unit only for the limited purpose of removing the disabled vehicle to a repair facility.

Because the interpretation of a law by the agency charged with administering that law is entitled to some weight, I concur in DMV's interpretation of this statute, and answer your first question in the negative.

Turning to your second question, if a vehicle designed for towing disabled vehicles is not to be considered part of a "combination of vehicles," it follows that such vehicle must be registered, pursuant to § 46.1-159, only for its own gross weight. The term "gross weight," as used in § 46.1-159, is defined in § 46.1-161 as "the aggregate weight of a vehicle...and its load." Accordingly, it is my opinion that a tow truck must be registered for the actual weight of the tow truck plus any additional weight that it will carry on its own axles, which additional weight must be considered its load. Thus, if a towed vehicle is supported partly on one or more of the axles of the towing vehicle, that part of the weight of the towed vehicle that is supported by the towing vehicle must be considered part of the weight of the towing vehicle, and the towing vehicle must be registered for a weight which includes that weight, no matter how many axles it may have. As a practical matter, the owner of the tow truck must treat the registration requirement in the same manner as the owner of any truck used to carry cargo. Some loads may be light while others may be heavy. If the owner registers for a lighter weight, then he must be careful not to exceed the registered limit. Your third inquiry concerns the towing of an operative vehicle to replace the inoperative vehicle, a practice which the owner of the vehicles may utilize to lower fuel and other expenses. Section 46.1-339.1 provides that the provisions of § 46.1-339 shall not apply to "a vehicle designed for towing disabled vehicles, when towing such vehicle..." (Emphasis added.) (Note that the exception in § 46.1-339.1 applies only to the weight limitations of § 46.1-339 and not to the weight registration laws referenced in response to your other inquiries; § 46.1-339.1 does not exempt tow trucks from the weight registration laws.) Notwithstanding the shift from the plural to the singular, it appears that the term "such vehicle" refers to the term "disabled vehicles." Accordingly, I am of the opinion that the exception of § 46.1-339.1 applies only when the vehicle being towed is disabled.

MOTOR VEHICLES. HABITUAL OFFENDER. WORDS "SAID OFFENSE" IN § 46.1-387.3 REFER TO LAST CONVICTION WHICH WOULD BRING PERSON WITHIN DEFINITION OF HABITUAL OFFENDER.

December 20, 1983

The Honorable H. P. Anderson, Jr.
Commonwealth's Attorney for Halifax County

You have asked whether the words "said offense" in the second sentence of § 46.1-387.3 of the Code of Virginia refer (1) to the last offense which may bring a person...
within the definition of an habitual offender, or (2) only to the last offense for driving while under the influence of intoxicants or drugs ("DUI").

In resolving the ambiguity created by the words "said offense," it is helpful to examine the operational effect of § 46.1-387.3 in the context of the Habitual Offender Act (the "Act"). The first sentence of § 46.1-387.3 requires the Commissioner of the Division of Motor Vehicles ("DMV") to forward to Commonwealth’s Attorneys the conviction records of any person whose record brings him within the definition of an habitual offender. A conviction for DUI is one of several convictions that may cause a person to come within the definition of an habitual offender according to § 46.1-387.2 of the Act.

The second sentence of § 46.1-387.3 grants a judge the discretion to refuse to adjudge as an habitual offender a person who fits the definition provided in § 46.1-387.2. A court may exercise this discretionary authority if: (1) the DMV certification required in the first sentence of § 46.1-387.3 was made more than five years "after conviction of said offense," and (2) the potential habitual offender is able to satisfy the requirements of § 46.1-387.9:2 for restoration of driving privileges. In order to be eligible for restoration of driving privilege under § 46.1-387.9:2, the offender must (1) have been adjudged an habitual offender, in part, because of a DUI conviction, and (2) be able to establish that he has overcome an alcohol dependency and is not a threat to the safety of the driving public.

Upon review of the words "said offense" in the context of § 46.1-387.3 and of the Act in its entirety, it is my opinion that "said offense" refers to the last offense that may bring a person within the definition of an habitual offender and is not limited to the last DUI offense. In matters of statutory construction, nontechnical words must be construed in accordance with their ordinary and accepted meaning. See, e.g., Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206 (1972). The word "said" as defined by Black's Law Dictionary means "before mentioned" or "aforesaid." According to this definition, the words "said offense" must relate to the offenses referred to in the preceding language of § 46.1-387.3 (offenses cited in § 46.1-387.2) and do not relate to the subsequent reference to § 46.1-387.9:2 (which relates to DUI offenses). Therefore, the time at which a judge may exercise the discretion granted by § 46.1-387.3 depends upon lapse of time after the last conviction cognizable under § 46.1-387.2 of the Act. The subsequent reference to § 46.1-387.9:2 in the second sentence of § 46.1-387.3, merely determines the class of offenders who are eligible for discretionary treatment under the Act.

1The pertinent provisions of § 46.1-387.3 are as follows: "The Commissioner of the Division of Motor Vehicles shall certify, from the Division's records, substantially in the manner provided for in § 46.1-34.1, three transcripts or abstracts of those conviction documents which bring the person named therein within the definition of an habitual offender, as defined in § 46.1-387.2, to the attorney for the Commonwealth....In any proceeding under § 46.1-387.5, the court may refuse to enter any order as provided in § 46.1-387.6 if such certification was made more than five years after conviction of said offense and such person would be otherwise eligible for restoration of his privilege under § 46.1-387.9:2." (Emphasis added.)

October 21, 1983

The Honorable M. Frederick King  
Commonwealth's Attorney for the City of Salem

You have asked whether a local police officer must take and retain in his possession for fifteen days the registration card, license plates and decals of a motor vehicle when the officer discovers that the vehicle is not equipped with the proper equipment or is otherwise unsafe as enumerated in § 46.1-58 of the Code of Virginia.

The word "shall" is a word of command and is customarily "used in an imperative or mandatory sense." Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); see, also, 1A Sands, Sutherland Statutory Construction, § 25.04 (4th ed. 1972). The ordinary meaning of language, however, may be overruled to effectuate the purpose of a statute. And it is always presumed that the legislature was motivated by some purpose in the enactment of the statute, so that if one construction would render it ineffective, the other should manifestly be adopted. 2A Sands, Sutherland Statutory Construction § 57.04 (4th ed 1974). Frequently, the word "shall" is utilized in statutes as a directive, rather than as a mandate. In case of doubt or ambiguity, the courts will apply the construction which best carries into effect the purpose of the statute under consideration.

The obvious purpose of § 46.1-58 is to provide a practical method for removing unsafe vehicles from the highways. The procedure contemplates the police officer taking physical possession of the registration card, license plates and decals of any vehicle which he determines is not equipped with proper brakes or other safety devices required by law, and to authorize the Division of Motor Vehicles (the "Division") to suspend the registration of such motor vehicles. The statute provides that the Division shall suspend the registration of any vehicle which the Division or the Department of State Police (the "Department") "shall determine is not equipped with proper brakes...." Further, the statute provides that any police officer shall...take possession of the registration card, license plates and decals of any such vehicle and retain the same in his possession for a period of 15 days unless the owner of said vehicle corrects the defects...."

If the statute is interpreted literally, the Division would be required to suspend the registration of any motor vehicle which the Division or the Department determines is not properly equipped. Additionally, any police officer observing any of the defects mentioned in the statute would be under an obligation to physically take possession of the registration card, license plates and decals which would mean that it would be unlawful to operate the vehicle on the highway, even to a service station to replace the defective equipment. Taken to logical extremes, such an interpretation would mean that a police officer would be required to mandate the removal of a vehicle from the highway and take possession of the registration card, license plates and decals, even if the defects observed are improper mirror or windshield wiper. In my opinion, such an absurd result would not serve the legislative purpose and was not intended by the General Assembly. Accordingly, I am of the opinion that the provision in § 46.1-58 for taking possession of the registration card, license plates and decals of any vehicle observed with defective equipment must be construed as directive only, authorizing the police officer to take possession of the items mentioned and hold the same until the defects are corrected or for a period of 15 days, whichever event first occurs. The officer could thus exercise his discretion in determining if the defect is such as to warrant immediate removal of the vehicle from the highway.

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1Section 46.1-58 of the Code of Virginia provides: "The Division shall suspend the registration of any motor vehicle, trailer or semitrailer which the Division or the
Department of State Police shall determine if a motor vehicle is not equipped with proper brakes, proper lights, proper horn or warning device, or proper electrical or mechanical signalling device or safety glass when required by law, or proper mirror, proper muffler, proper windshield wiper, or proper steering gear adequate to insure the safe movement of the vehicle as required by this title or when such vehicle is equipped with a smoke screen device or cutout or when such motor vehicle, trailer or semitrailer is otherwise unsafe to be operated. Any police officer shall when he observes any defect in a motor vehicle as described above, take possession of the registration card, license plates and decals of any such vehicle and retain the same in his possession for a period of fifteen days unless the owner of said vehicle corrects the defects or obtains a new inspection sticker from an authorized inspection station. When the defect or defects are corrected as indicated above the registration card, license plates and decals shall be returned to said owner."

(Emphasis added.)

MOTOR VEHICLES. LOCAL LICENSE. LOCALITY MAY ADOPT SHORT TAX YEAR WITHOUT PRORATION, SUBJECT TO CEILING ON AMOUNT OF TAX.

August 24, 1983

The Honorable Curtis L. Mlsna
Treasurer for the City of Manassas

You have asked whether a city which intends to shorten its local motor vehicle license tax year by fifteen days must prorate the schedule of motor vehicle taxes. The facts presented show that the short tax year is needed to implement a change in the beginning and ending dates of such license tax year. Apparently, the change is being made to conform the city's tax year to that of surrounding jurisdictions and for citizen convenience. You question whether a proration is required because of the mandate for proration of personal property tax set forth in § 58-835.1 of the Code of Virginia or other general law.

The authority for the imposition of the local motor vehicle tax is found in § 46.1-65. Section 46.1-65(a) permits counties, cities and towns to impose a license tax on motor vehicles, trailers or semitrailers. In pertinent part it reads:

"Such license fees and taxes shall be imposed in such manner, on such basis, for such periods, and subject to proration for fractional periods of years, as the proper authorities of such counties, cities or towns may determine." (Emphasis added.)

The proration requirement of this section applies only where a license is issued on a vehicle other than at the beginning of the license year. See 1974-1975 Report of the Attorney General at 289. The amount of the tax is subject to a ceiling equal to the license tax imposed by the State on like vehicles. Section 46.1-65(a).

In the facts you have presented, the City of Manassas plans to change its license tax year from the current annual period, May first through April thirtieth of the next calendar year, to April sixteenth through April fifteenth of the following calendar year. A short license tax year consisting of 11 months and 15 days will result in the first year of such a change.

Such a short tax year does not fall within the proration requirements of § 46.1-65 described previously. Additionally, § 58-835.1 would have no bearing on your inquiry because it deals solely with the proration of local tangible personal property taxes on certain vehicles. I am aware of no other general law which would require the proration of local motor vehicle license taxes in the fact situation presented.
It is, accordingly, my opinion that the City of Manassas is not required to prorate the schedule of motor vehicle license taxes if it adopts a short tax year in order to obtain the desired change in its local motor vehicle license tax year. Please note, however, that the amount of the tax may not exceed the ceiling set forth in § 46.1-65 on an annualized basis.

MOTOR VEHICLES. LOCAL LICENSES. LOCALITY MAY NOT IMPOSE LEGAL LICENSE /FEE IF COMMONWEALTH IMPOSES NO LICENSE FEE.

April 9, 1984

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You have asked whether a county may impose a local license fee or tax upon a farm vehicle which is exempt from state motor vehicle registration requirements pursuant to § 46.1-45 of the Code of Virginia.

Counties are authorized to levy local taxes and license fees upon motor vehicles pursuant to § 46.1-65(a), which provides, in part, that: "[e]xcept as provided in § 46.1-66, counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers...." As you point out in your letter, there is nothing in § 46.1-66 which would exempt farm vehicles.

The second sentence of § 46.1-65(a) provides, however, that: "[t]he amount of the license fee or tax imposed by any county, city or town upon any motor vehicle, trailer, or semitrailer shall not be greater than the amount of the license tax imposed by the Commonwealth on such motor vehicle, trailer or semitrailer." In my opinion, this provision indicates a legislative determination that local governments should not be permitted to impose a larger fee or tax on a motor vehicle, trailer or semitrailer than the Commonwealth imposes on that same vehicle. See 1981-1982 Report of the Attorney General at 264. Accordingly, I am of the opinion that if the Commonwealth cannot impose a license tax or fee on a vehicle, neither may a locality impose such tax or fee on the vehicle.

In stating this opinion, I am mindful that the second sentence of § 46.1-65(a) (quoted above) refers only to the "license tax imposed by the Commonwealth" and not to a registration or license fee imposed by the Commonwealth. It is my opinion, however, that this reference to a license tax imposed by the Commonwealth is meant to include registration and license fees because the Commonwealth does not impose a license tax, other than the registration fee, on motor vehicles. If this reference does not include registration fees imposed by the Commonwealth, the second sentence of § 46.1-65(a) would mean that localities could never impose a local license tax or fee on any vehicle, inasmuch as the Commonwealth does not impose a license tax.

In light of the foregoing, I answer your inquiry in the negative.

MOTOR VEHICLES. LOCAL LICENSES. SECTION 46.1-65(C) NOT SELF EXECUTING; POWERS OF LOCAL OFFICIALS DEPEND ON LOCAL ORDINANCES ADOPTED PURSUANT TO § 46.1-65.
The Honorable Geraldine M. Whiting  
Commissioner of the Revenue for Arlington County

You have asked two questions relating to local licenses for motor vehicles, trailers and semitrailers.

"1. Does the Treasurer or other local official responsible for issuance of local automobile decals have the authority to refuse issuance of the decal if personal property taxes for the vehicle are not paid?"

Section 46.1-65(c) of the Code of Virginia provides that:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid and satisfactory evidence that any delinquent motor vehicle, trailer, or semitrailer personal property taxes owing have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."

The above quoted statute is not self-executing but merely grants to the localities the authority to require proof of payment of personal property taxes. If a locality wishes to exercise that authority, it must act, by ordinance or other official pronouncement, to implement those provisions of § 46.1-65(c) that it wishes to adopt. Accordingly, it is my opinion that your first question can be answered only by reference to any ordinances on the subject that have been adopted by the locality with which you are concerned.

Your second question reads as follows:

"2. If no local decal is issued for failure to pay the personal property tax, is the taxpayer subject to a fine for failure to display a decal?"

No penalty for failure to display a local license decal is provided in § 46.1-65 or in any other section of the Code. This Office has previously opined, however, that, pursuant to §§ 15.1-13, 15.1-505 and 15.1-901, localities may adopt and enforce ordinances making it unlawful to operate a motor vehicle on the public highways without having first obtained the required local license. See 1977-1978 Report of the Attorney General at 282. Accordingly, it is my opinion that, once again, the answer to your second question will depend on whether the locality in question has adopted the appropriate ordinance.

The Honorable Charles R. Hawkins  
Member, House of Delegates

You have asked whether it is legal under § 46.1-336(A) of the Code of Virginia for a tandem wheeled dump truck to draw a dump trailer when the connection between the two vehicles is approximately fifteen feet long.
It is, accordingly, my opinion that the City of Manassas is not required to prorate the schedule of motor vehicle license taxes if it adopts a short tax year in order to obtain the desired change in its local motor vehicle license tax year. Please note, however, that the amount of the tax may not exceed the ceiling set forth in § 46.1-65 on an annualized basis.

MOTOR VEHICLES. LOCAL LICENSES. LOCALITY MAY NOT IMPOSE LEGAL LICENSE FEE IF COMMONWEALTH IMPOSES NO LICENSE FEE.

April 9, 1984

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You have asked whether a county may impose a local license fee or tax upon a farm vehicle which is exempt from state motor vehicle registration requirements pursuant to § 46.1-45 of the Code of Virginia.

Counties are authorized to levy local taxes and license fees upon motor vehicles pursuant to § 46.1-65(a), which provides, in part, that: "[e]xcept as provided in § 46.1-66, counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers...." As you point out in your letter, there is nothing in § 46.1-66 which would exempt farm vehicles.

The second sentence of § 46.1-65(a) provides, however, that: "[t]he amount of the license fee or tax imposed by any county, city or town upon any motor vehicle, trailer, or semitrailer shall not be greater than the amount of the license tax imposed by the Commonwealth on such motor vehicle, trailer or semitrailer." In my opinion, this provision indicates a legislative determination that local governments should not be permitted to impose a larger fee or tax on a motor vehicle, trailer or semitrailer than the Commonwealth imposes on that same vehicle. See 1981-1982 Report of the Attorney General at 264. Accordingly, I am of the opinion that if the Commonwealth cannot impose a license tax or fee on a vehicle, neither may a locality impose such tax or fee on the vehicle.

In stating this opinion, I am mindful that the second sentence of § 46.1-65(a) (quoted above) refers only to the "license tax imposed by the Commonwealth" and not to a registration or license fee imposed by the Commonwealth. It is my opinion, however, that this reference to a license tax imposed by the Commonwealth is meant to include registration and license fees because the Commonwealth does not impose a license tax, other than the registration fee, on motor vehicles. If this reference does not include registration fees imposed by the Commonwealth, the second sentence of § 46.1-65(a) would mean that localities could never impose a local license tax or fee on any vehicle, inasmuch as the Commonwealth does not impose a license tax.

In light of the foregoing, I answer your inquiry in the negative.

MOTOR VEHICLES. LOCAL LICENSES. SECTION 46.1-65(C) NOT SELF EXECUTING; POWERS OF LOCAL OFFICIALS DEPEND ON LOCAL ORDINANCES ADOPTED PURSUANT TO § 46.1-65.
September 2, 1983

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

You have asked two questions relating to local licenses for motor vehicles, trailers and semitrailers.

"1. Does the Treasurer or other local official responsible for issuance of local automobile decals have the authority to refuse issuance of the decal if personal property taxes for the vehicle are not paid?"

Section 46.1-65(c) of the Code of Virginia provides that:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid and satisfactory evidence that any delinquent motor vehicle, trailer, or semitrailer personal property taxes owing have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."

The above quoted statute is not self-executing but merely grants to the localities the authority to require proof of payment of personal property taxes. If a locality wishes to exercise that authority, it must act, by ordinance or other official proclamation, to implement those provisions of § 46.1-65(c) that it wishes to adopt. Accordingly, it is my opinion that your first question can be answered only by reference to any ordinances on the subject that have been adopted by the locality with which you are concerned.

Your second question reads as follows:

"2. If no local decal is issued for failure to pay the personal property tax, is the taxpayer subject to a fine for failure to display a decal?"

No penalty for failure to display a local license decal is provided in § 46.1-65 or in any other section of the Code. This Office has previously opined, however, that, pursuant to §§ 15.1-13, 15.1-505 and 15.1-901, localities may adopt and enforce ordinances making it unlawful to operate a motor vehicle on the public highways without having first obtained the required local license. See 1977-1978 Report of the Attorney General at 282. Accordingly, it is my opinion that, once again, the answer to your second question will depend on whether the locality in question has adopted the appropriate ordinance.

May 11, 1984

The Honorable Charles R. Hawkins
Member, House of Delegates

You have asked whether it is legal under § 46.1-336(A) of the Code of Virginia for a tandem wheeled dump truck to draw a dump trailer when the connection between the two vehicles is approximately fifteen feet long.
Section 46.1-336(A) specifies that the connection between any two vehicles, one of which is towing or drawing the other on a highway, "shall consist of a fifth wheel, drawbar or other similar device not to exceed ten feet in length from one vehicle to the other...." This language mandates that the connection be a rigid type of coupling which will control the vehicle being drawn and that the length of the connection not exceed ten feet.

In 1982 the General Assembly adopted § 46.1-336(B) which provides an exception to § 46.1-336(A) for farm tractors when towing farm equipment. Moreover, § 46.1-337 provides an exception to the requirements of § 46.1-336(A) in the case of a bona fide emergency resulting from mechanical breakdown or an accident. In any such case, "such connection may consist solely of a chain, rope or cable not over fifteen feet in length between vehicles..." provided that a licensed operator is at the controls of the towed vehicle.

Your inquiry relates to a non-farming situation in which there is no emergency. Because the General Assembly has specifically mandated that the connection between any two vehicles, one of which is drawing the other on a highway, shall not exceed ten feet in length and there is no applicable exception, I am of the opinion that § 46.1-336(A) would apply to a tandem wheeled dump truck pulling a dump trailer. Accordingly, I must conclude that it would be unlawful for a tandem wheeled dump truck to draw a dump trailer upon the highway in a nonemergency situation when the connection between the two vehicles exceeds ten feet.

Section 46.1-336(A) provides: "The connection between any two vehicles one of which is towing or drawing the other on a highway shall consist of a fifth wheel, drawbar or other similar device not to exceed ten feet in length from one vehicle to the other and such two vehicles shall in addition to such drawbar or other similar device be equipped at all time when so operated on the highway with an emergency chain.

B. The provisions of subsection A of this section shall not apply to any farm tractor, as defined in subsection (7) of § 46.1-1, when such farm tractor is towing any farm implement or farm machinery by means of a drawbar coupled with a safety hitch pin or manufacturer's coupling device." (Emphasis added.)

MOTOR VEHICLES. TRAFFIC OFFENSES. BIFURCATED TRIAL REQUIRED IN JURY TRIAL OF TRAFFIC OFFENSE WHERE DEFENDANT'S PRIOR RECORD TO BE ADMITTED PRIOR TO SENTENCING.

July 27, 1983

The Honorable Glenn L. Berger
Commonwealth's Attorney for Pittsylvania County

You have asked whether § 46.1-347.2 of the Code of Virginia mandates a bifurcated (divided into two parts) proceeding in a jury trial of a traffic violation where there is a motion for the admission into evidence of the defendant's prior traffic record.

Section 46.1-347.2 provides that: "[w]hen any person is found guilty of a traffic offense, the court or jury trying the case may consider the prior traffic record of the defendant before imposing sentence as provided by law. After the prior traffic record of the defendant has been introduced, the defendant shall be afforded an opportunity to present evidence limited to showing the nature of his prior convictions, suspensions and revocations."
In my opinion a bifurcated proceeding is clearly contemplated under this statute. The traffic record may be considered after the defendant is found guilty but before sentence is imposed. The defendant's prior traffic record would be inadmissible prior to the finding of guilt or innocence, because its only relevance would be to show conforming conduct. Section 46.1-347.2, however, provides that the prior record may be considered after the finding of guilt so that it can be considered by the judge or jury in imposing sentence. This is a classic bifurcated hearing process.

A bifurcated hearing is not necessary unless the judge decides, after a finding of guilt, to admit the prior traffic record into evidence for the court's or jury's consideration. Whether the judge makes such a decision is a matter vested in the judge's sound discretion. Of course, as indicated above, if the judge decides to admit the record under this statute, it may be done only in a bifurcated hearing.

MOTOR VEHICLES. USE OF FLASHING RED LIGHTS WITHOUT SIREN PERMISSIBLE WHEN RESCUE VEHICLE BEING OPERATED UNDER EMERGENCY CONDITIONS.

March 12, 1984

The Honorable R. Beasley Jones
Member, House of Delegates

You have requested my opinion on the applicability of § 46.1-226 of the Code of Virginia to the operation of a rescue squad vehicle under the following circumstances:

"It has been the policy of the Dinwiddie Volunteer Ambulance and Rescue Squad to require its members to display the red lights in all rescue transports. In many instances the rescue squad operators, upon realizing there is no life or death emergency present, will activate the vehicle's red lights and proceed expeditiously, but lawfully, to the hospital, but no siren is sounded. Under the above cited operation, if an accident occurred as a sole result of a motorist attempting to yield to the red lights, would this leave the squad driver vulnerable to a violation under Title 46.1?"

The General Assembly has recognized the important contributions which these dedicated rescue squad drivers make to Virginia and her citizens. The General Assembly has also recognized the need of these drivers to be protected from prosecution of certain traffic infractions which might occur during emergency operations.

Section 46.1-267 specifies that ambulances and similar emergency vehicles may be equipped with "flashing, blinking or alternating red emergency lights...." Section 46.1-268 provides that such vehicles "shall display such lights at all times when engaged in emergency calls...." Thus, it appears that use of such lights is not only authorized but required during emergency calls. There is no requirement that the emergency be of the "life or death" variety.

Section 46.1-226 sets forth certain exemptions from the motor vehicle laws of this Commonwealth for rescue vehicles operated under emergency conditions. These exemptions apply, however, only if the operator displays a flashing, blinking or alternating red light and sounds a siren, exhaust whistle, or air horn designed to give automatically intermittent signals, "as may be reasonably necessary...."

In light of the foregoing, it is my opinion that if the rescue squad operator does not intend to avail himself of the exemptions provided in § 46.1-226(a)(1) through (4), he need only display a flashing, blinking or alternating red light when operating his vehicle under
emergency conditions, as required by § 46.1-268. In the event of an accident under the circumstances you describe, I can see no reason why the volunteer would be considered in violation of any provision of Title 46.1, unless he has operated his vehicle in a manner which constitutes reckless disregard for the safety of persons and property, or unless he has attempted to avail himself of the exemptions provided in § 46.1-226(a)(1) through (4) without sounding his siren "as may be reasonably necessary."

1Section 46.1-226(a) provides in relevant part as follows: "The operator of...any ambulance or rescue or life-saving vehicle designed or utilized for the principal purposes of supplying resuscitation or emergency relief where human life is endangered when such vehicle is being used in the performance of public services, and when such vehicle is operated under emergency conditions, may, without subjecting himself to criminal prosecution:

(1) Proceed past red signal, light, stop sign or device indicating moving traffic shall stop if the speed and movement of the vehicle is reduced and controlled so that it can pass a signal, light or device with due regard to the safety of persons and property.

(2) Park or stand notwithstanding the provisions of this chapter.

(3) Disregard regulations governing a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property.

(4) Pass or overtake, with due regard to the safety of persons and property, another vehicle at any intersection.

(5) Pass or overtake with due regard to the safety of persons and property, while en route to an emergency, other stopped or slow-moving vehicles, by going off the paved or main traveled portion of the roadway on the right. Notwithstanding subsection (b) hereof, vehicles exempted in this instance will not be required to sound a siren or any device to give automatically intermittent signals."

2Note that the exemptions provided in § 46.1-226, do not protect the operator of any such vehicle from criminal prosecution for conduct constituting reckless disregard for the safety of persons and property, or from civil liability for failure to use reasonable care in such operation.

MOTOR VEHICLES. VASAP. FEES COLLECTED FROM VASAP PARTICIPANTS PURSUANT TO § 18.2-271.1 MAY BE EXPENDED ONLY ON ALCOHOL REHABILITATION PROGRAMS.

May 8, 1984

The Honorable Glenn B. McLanan
Member, House of Delegates

You have asked whether surplus funds accumulated by the Tidewater Virginia Alcohol Safety Action Program (VASAP) may be used by the Community Services Board for a computer system for the police department of Virginia Beach.

I assume that the surplus funds which have been accumulated by the Tidewater VASAP have come from the fees which are assessed against all VASAP participants who are referred to the VASAP program pursuant to § 18.2-271.1 of the Code of Virginia. Section 18.2-271.1(a1) provides:

"The court shall require the person entering such program [VASAP] under the provisions of this section to pay a fee of $250, a reasonable portion of which as may be determined by the Director of the Department of Transportation Safety, but not to exceed twenty dollars, shall be forwarded to be deposited with the State
Treasurer for expenditure by the Department of Transportation Safety for administration of driver alcohol rehabilitation programs, and the balance shall be held in a separate fund for local administration of driver alcohol rehabilitation programs. Upon a positive finding that the defendant is indigent, the court may reduce or waive the fee. In addition to the costs of the proceeding, fees as may reasonably be required of defendants referred for extended treatment under any such program may be charged." (Emphasis added.)

In my opinion, the fees which are collected from VASAP participants pursuant to § 18.2-271.1(al) may be expended only as directed by the General Assembly. Accordingly, if such fees are the source of the "surplus funds" accumulated by the Tidewater VASAP, then such surplus funds must "be held in a separate fund for local administration of driver alcohol rehabilitation programs.

In my opinion the purchase of a computer system for the police department would not constitute a proper expenditure of funds which have been designated by the General Assembly for "local administration of driver alcohol rehabilitation programs." While a police computer system might well aid in the enforcement of drunk driving laws, I am unaware of any connection between such a computer and an alcohol rehabilitation program. Accordingly, I must answer your inquiry in the negative.

MOTOR VEHICLES. WEIGHT LAWS. DEPARTMENT OF HIGHWAYS AND TRANSPORTATION. ADMINISTRATIVE AUTHORITY TO APPLY FEDERAL BRIDGE FORMULA.

December 20, 1983

The Honorable Harold C. King, Commissioner
Virginia Department of Highways and Transportation

You have inquired whether the Virginia Department of Highways and Transportation (the "Department") has the authority to adopt administrative procedures to allow use of the federal "Bridge Formula" in calculating allowable axle spacings in excess of eight feet.

The Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2123 (1983), amended 23 U.S.C. § 127 to provide uniform weight requirements for commercial motor vehicles using the Interstate System of Highways. These requirements include certain maximum single axle (20,000 lbs.), tandem axle (34,000 lbs.) and overall (80,000 lbs.) gross weights for such vehicles. The statute also provides for application of the federal "Bridge Formula," as set out in that statute, for maximum gross weight on any group of two or more consecutive axles. I am advised that the Federal Highway Administration, in a memorandum of September 29, 1983, to its Division Administrators, has instructed that the axle weight for any spacing greater than 8 feet (96 inches) shall be in accordance with the "Bridge Formula."

"When Federal and state statutes conflict, the Supremacy Clause of the United States Constitution, Art. VI, provides that the state statute must give way." United States v. Connecticut, 566 F.Supp. 571, 574 (D. Conn. 1983) (holding state statute banning twin trailers from Connecticut highways unconstitutional). At least as to the weights on the Interstate Highway System as regulated by 23 U.S.C. § 127, the federal requirements are pre-emptive for both gross weight and axle weight. Administrative determinations by the Highway and Transportation Department for axle spacings in excess of eight feet should be in accord with the federal "Bridge Formula" on the Interstate Highway System.
The federal laws regulating weight are silent as to other roads in the Commonwealth. The 1982 session of the Virginia General Assembly, however, enacted Chapter 515 in response to the federal weight, length and width mandates. That legislation, inter alia, amended § 46.1-339 of the Code of Virginia, which governs the weight of vehicles in Virginia. The amendment included elimination of the triaxle definition and addition of a weight table in subsection (d) that exactly mirrors the federal weight requirements on a foot-by-foot delineation. These weight requirements were uniformly applied to all roads in the Commonwealth. This action by the General Assembly is to be contrasted with other action in Chapter 515 which limits the use of wider and larger trucks and combinations of vehicles authorized by federal law to only the Interstate System and designated primary highways, rather than to all highways in the Commonwealth.

Based on the above, it appears that the 1983 Virginia General Assembly clearly intended to apply federal weight mandates to all highways in the Commonwealth and the effect of such an action would lead to the inescapable conclusion that the "Bridge Formula" be applied to axle spacing determinations on all State highways. Because this result was clearly intended by the General Assembly through use of the weight table, notwithstanding the lack of a specific reference to the term "federal Bridge Formula," the Department would be acting in conformity with legislative intent if it administratively applies the "Bridge Formula" axle weights to all roads in the Commonwealth. Inasmuch as § 46.1-339 speaks in terms of action taken by the State Highway and Transportation Commission, however, ultimate authority to administer the weight laws rests with the Commission and the Department should act in this regard only upon the direction of the Commission.

Having determined that such authority exists and that the action contemplated is in conformity with federal and State law, I turn now to your suggestion of rounding upward to the next highest foot for axle weights delineated in the weight table. Subsection (d) of § 46.1-339 currently contains language referring to a rounding of weights "to the nearest foot." In accordance with the applicable principle of statutory construction, if these words were left in the amended statute by inadvertence, they may be disregarded in order to carry out the clear legislative intent of the amendment. See Looney v. Commonwealth, 145 Va. 825, 133 S.E. 753 (1926); 2A Sands, Sutherland Statutory Construction § 47.37 (4th ed. 1973); 1977-1978 Report of the Attorney General at 275. These words were first enacted at a time when the statutory weight table did not mirror the federal requirements; to allow their operation at this time would be contrary to legislative intent, particularly in determining weights for three axle vehicles with groups of axles between 8 and 9 feet. Therefore, I am of the opinion that the Department, in administratively calculating allowable axle spacings in excess of 8 feet, may round upward so long as such action remains in conformity with the federal "Bridge Formula", the legislative intent outlined above and the action of the Commission.

MOTOR VEHICLES. WEIGHT LAWS. PICKUP-FARM TRAILER COMBINATION. PICKUP MUST BE LICENSED TO COVER WEIGHTS OF PICKUP-TRAILER COMBINATION UNDER CERTAIN CIRCUMSTANCES.

December 19, 1983

The Honorable R. Beasley Jones
Member, House of Delegates

You have asked two questions concerning the licensing requirements of a pickup truck towing a trailer.
Your first question is whether the licensed weight of the pickup must be sufficient to cover the weight of a pickup-trailer combination when the pickup is towing a trailer hauling peanuts or a farm trailer that is not required to be licensed.

Section § 46.1-45(a) of the Code of Virginia specifically exempts trailers used exclusively for agricultural or horticultural purposes or for hauling farm produce or livestock along a public highway from licensing and registration requirements, subject to a ten-mile limitation in hauling distance. In addition, § 46.1-45(h) specifically exempts peanut trailers from the same requirements; by previous opinion, this Office has applied the ten-mile limitation to subsection (h), as well. See 1982-1983 Report of the Attorney General at 362. The clear legislative intent expressed by § 46.1-45 is to exempt qualifying trailers from any registration requirements, including gross weight registration.

With these concepts in mind, I refer you to § 46.1-159(a)(2) which provides in pertinent part:

"In any case where a pickup truck is used in combination with another vehicle, operation shall be unlawful only if the combined gross weight exceeds the combined gross weight on the basis of which each vehicle is registered and licensed." (Emphasis added.)

Inasmuch as peanut and farm trailers are exempted from licensure or registration for trips less than ten miles under § 46.1-45, it is my opinion that the pickup truck does not have to be licensed for a gross weight which includes the weight of the farm or peanut trailers for trips of less than ten miles. To decide otherwise would allow the indirect imposition of a fee on such trailers which would fly in the face of obvious legislative intent.

Your second question is, if the owner of a pickup truck chooses to license the pickup for weights in excess of 7,500 pounds, must the licensed weight of the pickup be sufficient to cover the weights of a truck-trailer combination when the trailer is not required to be licensed.

When a pickup truck is licensed in excess of 7,500 pounds, it is defined as a truck and is subject to the provisions of § 46.1-154. That section requires the licensed weight of the truck to be the total of the truck and any combination of truck and other vehicle. This is further confirmed by § 46.1-157(a).\(^1\)

The truck and trailer clearly constitute what is known as a truck-trailer combination. The license fee is based on the total gross weight of the combination of vehicles which are subject to registration and licensing. Operation of the combination of vehicles is unlawful only if the combined gross weight exceeds the combined gross weight on the basis of which it is registered and licensed. See § 46.1-159(a)(2).\(^2\) Thus, if the owner of a pickup truck chooses to license the vehicle for weights in excess of 7,500 pounds, the licensed weight of the truck must be sufficient to cover the weights of a truck-trailer combination when the trailer fails to be used exclusively for agricultural or horticultural purposes or if so used is operated over the public highways of the Commonwealth for distances in excess of ten miles.

I am, accordingly, of the opinion that any other interpretation would be contrary to legislative intent that the licensed weight of a pickup or a truck must be sufficient to cover the weights of a pickup-trailer combination or truck-trailer combination when the trailer is not used exclusively for agricultural and horticultural purposes or if so used is operated over the public highways of the Commonwealth for distances in excess of ten miles.
Section 46.1-157(a) provides: "In the of a combination of a truck or tractor truck and a trailer or semitrailer, each vehicle constituting a part of such combination shall be registered as a separate vehicle, and separate vehicle license plates shall be issued therefor, but, for the purpose of determining the gross weight group into which any such vehicle falls pursuant to § 46.1-154, the combination of vehicles of which such vehicle constitutes a part shall be considered a unit, and the aggregate gross weight of the entire combination shall determine such gross weight group. The fee for the registration certificate and license plates for a trailer or semitrailer constituting a part of such combination shall be seventeen dollars. Provided, however, if such trailer or semitrailer exceeds a gross weight of 4,000 pounds such fee shall be $22." (Emphasis added.)

Moreover, § 46.1-157(b) further provides: "In determining the fee to be paid for the registration certificate and license plates for a truck or tractor truck constituting a part of such combination the fee shall be assessed on the total gross weight and the fee per 1,000 pounds applicable to the gross weight of the combination when loaded to the maximum capacity for which it is registered and licensed. However, there shall be no deduction from this fee for the registration fee of the trailer or semitrailer in the combination." (Emphasis added.)

Section 46.1-159 provides, in pertinent part, that: (a) It shall be unlawful for any person to operate or to permit the operation of any motor vehicle, trailer or semitrailer for which the fee for registration and license plates is prescribed by § 46.1-154 on any highway of this State, under any of the following circumstances....(2) If, at the time of such operation, the gross weight of the vehicle or of the combination of vehicles of which it is a part, is in excess of the gross weight on the basis of which it is registered and licensed."

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**NOTARIES. VIRGINIA NOTARY PUBLIC MAY ACKNOWLEDGE WRITINGS IN ANOTHER STATE WHEN THOSE WRITINGS TO BE FILED IN ACTION IN VIRGINIA COURT OF RECORD.**

April 4, 1984

The Honorable Laurie Naismith
Secretary of the Commonwealth

You have requested my opinion on the meaning of "other writing" as used in § 47.1-13 of the Code of Virginia. That section reads in pertinent part as follows: "Any notary commissioned pursuant to chapter 2 (§ 47.1-3 et seq.) of this title may likewise perform notarial acts outside the Commonwealth, where such notarial acts are performed in connection with a deed or other writing to be admitted to record in the Commonwealth of Virginia."

You specifically wish to know if the foregoing provision authorizes a Virginia notary public to acknowledge affidavits and depositions of witnesses in Maryland, to be filed in a divorce action in a court of record in Virginia.

Manifestly, the authority in § 47.1-13 is not limited to performing notarial acts in connection with deeds. The words, when given their ordinary meaning, extend to any writing to be admitted to record in the Commonwealth. The papers of a case, when filed under a Virginia statute, become a part of the record, just as a deed becomes a part of the record when recorded in the clerk's office. See Craddock's Adm'r v. Craddock's Adm'r, 158 Va. 58, 163 S.E. 387 (1932).
1983-1984 REPORT OF THE ATTORNEY GENERAL

I, therefore, am of the opinion that § 47.1-13 authorizes a Virginia notary public to exercise the powers conferred by § 47.1-12 in other states, with respect to any writing which is to be placed to record in a Virginia court. Accordingly, your inquiry is answered in the affirmative.

ORDINANCES. ZONING. ADVERTISING. REGULATION OF SIGNS. TERMINATION OF NONCONFORMING USE. ORDINANCE REQUIRING AMORTIZATION OF NONCONFORMING ADVERTISING SIGNS, IF AUTHORIZED BY STATUTE, VALID IF REASONABLY APPLIED.

September 16, 1983

The Honorable Shirley F. Cooper
Member, House of Delegates

This is in reply to your request for my opinion concerning proposed legislation to allow the City of Williamsburg to require "amortization" and removal of advertising signs which become nonconforming under the city's sign ordinance. The photocopied inquiry to you, which you supplied with your letter, poses the following questions on the subject:

1. Could advertising signs be amortized if the necessary state statutes were amended?

2. If #1 is affirmative, could advertising signs be amortized over a period of time depending on their value? For example:

<table>
<thead>
<tr>
<th>Sign Value</th>
<th>Amortization Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-$1500</td>
<td>1 year to remove sign</td>
</tr>
<tr>
<td>$1501-3000</td>
<td>2 years</td>
</tr>
<tr>
<td>$3001-4500</td>
<td>3 years</td>
</tr>
<tr>
<td>$4501-6000</td>
<td>4 years</td>
</tr>
<tr>
<td>$6001-7500</td>
<td>5 years</td>
</tr>
</tbody>
</table>

3. Could such amortization be limited to the City of Williamsburg only?

4. Could a penalty be imposed if removal does not comply with approved amortization schedule?

I begin my reply with the assumption stated in your letter that the appropriate State statutes will be amended to permit a locality to require amortization of advertising signs. Turning then to your first question, the constitutional objection to amortization statutes is premised upon provisions which prohibit the taking of private property for public purposes without just compensation. The great weight of authority in other states considering this question is that amortization provisions are valid if they are reasonable in their application. The determinative factors in this regard are whether the public gain derived from the elimination of the non-conforming use outweighs the loss suffered by the landowner and whether the length of time allowed prior to elimination of the use is reasonable.

While the Supreme Court of Virginia has not ruled on this specific issue, it has consistently recognized a rule of reasonableness in reviewing the validity of zoning provisions. See, e.g., Loudoun County v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980). In a leading early case, the court also recognized that the public welfare and public convenience underlying the exercise of a locality's police power permit the exercise of
that power to adjust to meet new conditions. West Brothers Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937). In the West Brothers case, the court also recognized that vested interests will not defeat the reasonable exercise of the police power except in a case of a clear and plain conflict with constitutional guarantees. Cf. Fairfax County v. Cities Service, 213 Va. 359, 193 S.E.2d 1 (1972); and Fairfax County v. Medical Structures, 213 Va. 355, 192 S.E.2d 799 (1972).

In an Opinion found in 1964-1965 Report of the Attorney General at 360, this Office noted that there was "a decided lack of accord as to the power to terminate a lawful non-conforming use" and, for that reason, questioned the wisdom of a proposed ordinance which would accomplish that result. More recently, in an Opinion found in 1981-1982 Report of the Attorney General at 465, my predecessor concluded that it is not constitutional to require removal of a non-conforming use. That Opinion, however, did not discuss or even consider the evolving case law referred to in footnote 2 above which now clearly supports the position that such amortization ordinances are valid if reasonably applied. Because the Opinion failed to consider the evolving case law on the majority rule, I am unable to join in its unqualified conclusion.

Because the Virginia Supreme Court has not considered such an ordinance, I am unable to predict with confidence how the issue would be decided if it were presented to the Court. As indicated, case law fully supports the existence of such ordinances in many other states. Moreover, it is certainly possible that Williamsburg could present a compelling justification for such an ordinance based upon the preservation efforts which have been undertaken in that city.

Turning to your third question, I answer that question in the affirmative. Art. VII, § 2 of the Constitution of Virginia (1971) permits the General Assembly to provide by special act for the organization, government and powers of any county, city, town or regional government. I also note that municipal charters conferring powers different from those conferred by general statutes have uniformly been upheld. See City of Colonial Heights v. Loper, 208 Va. 580, 159 S.E.2d 843 (1968); II A. Howard, Commentaries on the Constitution of Virginia, 805 (1974). Thus, by charter amendment or otherwise, the General Assembly may authorize the City of Williamsburg to include in its zoning ordinance a provision which it has not authorized other localities to adopt.

Finally, with respect to question number four, I also answer that question in the affirmative. See § 15.1-13 which states, in part, that "[t]he governing bodies of cities and towns, for the purpose of carrying into effect the enumerated powers conferred upon them may make ordinances and prescribe fines and other punishment for violation thereof...."

1See former § 15-843 of the Code of Virginia which authorized localities to adopt reasonable regulations for the gradual elimination of non-conforming uses under zoning ordinances. That section has since been superseded by § 15.1-492.


PARK AUTHORITIES. VOTE OF MAJORITY OF MEMBERS OF PARK AUTHORITY NECESSARY TO TAKE ACTION.

August 31, 1983

The Honorable Frank W. Nolen
Member, Senate of Virginia

This is in reply to your request for my opinion whether § 15.1-1231 of the Code of Virginia permits a park authority created under the Park Authorities Act to take action on a question before it by majority vote of a legally constituted quorum. Section 15.1-1231 provides, in pertinent part, as follows:

"A majority of the 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." (Emphasis added.)

The general rule at common law is that a majority of the governing board of a body is a quorum and a majority of a quorum can act, but where a statute so provides, a majority vote of the entire board membership is required for any action to be taken.1 This concept is recognized in Virginia. See Hammer v. Commonwealth, 169 Va. 355, 193 S.E. 496 (1937); Smiley v. Commonwealth, 116 Va. 979, 83 S.E. 406 (1914). In my opinion, the wording of § 15.1-1231, quoted above, requires a majority vote of all the members of a park authority to take action on a question before it, and not just a majority of a quorum.2 There can be no doubt but that the General Assembly, in the words emphasized at the beginning of the above sentence quoted from the statute, intended that a numerical majority of the members of an authority must be present in order for a quorum to exist. The same meaning should be given to the nearly identical phrase used later in the same sentence. Compare Albemarle County v. Marshall, 215 Va. 756, 761, 214 S.E.2d 146 (1975) and Postal Telegraph Co. v. Farmville, &c. R. Co., 96 Va. 661, 664, 32 S.E. 468 (1899) (the same meaning will be attributed to the same word used in different sections of a statute unless there is some indication that the legislature intended different meanings). Had the General Assembly intended that a majority of a quorum is sufficient for an authority to act, it could have stated as much in unambiguous terms.3 Thus, in answer to the question posed in your example, if an authority has fifteen members, eight members present would constitute a quorum. The affirmative vote of eight members also would be required to approve a properly presented proposal. On the other hand, if eleven members of that same fifteen member authority were present, an approval vote of six would be insufficient, even though the six would constitute a majority of those present.

2Compare, e.g., cases annotated in 43 A.L.R.2d 69 (1955) for decisions reaching the same result based upon similar statutory language.
3See, e.g., for comparison purposes, the following statutes specifying quorum and voting requirements for various boards: § 15.1-440 (local planning commissions); § 15.1-540 (county boards of supervisors); § 15.1-1353 (transportation district commissions); § 15.1-1377 (industrial development authorities).

PARLIAMENTARY PROCEDURE. LOCAL WETLANDS BOARD MAY ADOPT PROCEDURES NOT INCONSISTENT WITH LOCAL ORDINANCES OR STATE LAW.
February 27, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

You have requested my opinion on the Virginia Beach Wetlands Board's proposed procedure for acting on permit applications under Chapter 2.1 (§ 62.1-13.1 et seq.) of Title 62.1 of the Code of Virginia (the "Wetlands Act").

Virginia Beach has adopted the wetlands ordinance found in § 62.1-13.5 and has recently expanded its wetlands board to seven members as authorized by § 62.1-13.6. Section 62.1-13.5(4)(a) provides that anyone wishing to use or develop wetlands for purposes not otherwise permitted must file an application for a permit with the local wetlands board. Section 62.1-13.5(6) requires the wetlands board to hold a public hearing within 60 days of receipt of the application. Section 62.1-13.7 provides that a quorum of four members of a seven-member board is required for conducting a hearing or "taking of any action." Section 62.1-13.5(7) provides that:

"In acting on any application for a permit, the board shall grant the application upon the concurring vote of...four members of a seven-member board.... The board shall make its determination within thirty days from the hearing. If the board fails to act within such time, the application shall be deemed approved." (Emphasis added.)

Before considering the proposed procedure, it is helpful to consider the legislature's policy in the Wetlands Act. Section 62.1-13.1 sets forth this policy as one of preserving an irreplaceable resource and accommodating necessary development in a manner consistent with such preservation. To ensure this protection, the legislature required a majority vote of the whole board rather than just a majority vote of a quorum, for permits to alter wetlands. At the same time, the legislature wished to protect wetlands owners from indefinite procedural delays, by providing in § 62.1-13.5(7) for the automatic approval of applications not acted on within thirty days after the hearing. With the legislative intent in mind, I turn to the proposal.

As I understand the proposed procedure enclosed with your request, the chairman of the Virginia Beach Wetlands Board will call for a vote on an application after all persons have been heard and all deliberations completed. If four members of the seven-member board vote favorably, the application is approved, and the permit will issue. If less than four members vote favorably, even if there should be a 3-2 or a 3-1 majority for approval, or a 3-3 or 2-2 tie, the application will be deemed to be denied because of the lack of the statutorily required four concurring votes.

The taking of a vote on the application will be considered "acting" on the application, and the resulting approval or non-approval will be considered the "determination" of the board. If the application receives less than four concurring votes, this will be considered a board determination to deny the permit, and the board will so notify the applicant within forty-eight hours of its determination as required by § 62.1-13.5(7). The vote on the application must, of course, be taken when there is a quorum present and must be taken within the applicable time limits.

Section 62.1-13.7 provides in part that "the board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the county, city or town and general laws of the Commonwealth, including this chapter." Inasmuch as this section specifies that wetlands boards may make their own rules, the procedures selected by the Virginia Beach Wetlands Board will comply with statutory requirements if they are consistent with local ordinances, general laws of the Commonwealth and Chapter 2.1 of Title 62.1. The procedures are not inconsistent with any requirements of local
ordinances or general law of which I am familiar. They are also consistent with the requirements of the Wetlands Act.

The procedures meet the requirement of § 62.1-13.5(7) that the board grant the application upon the concurring votes of four members of the seven-member board. Even if there is no such concurring vote, the procedures are sufficient to comply with the § 62.1-13.5(7) requirement of taking action or making a determination within thirty days of the public hearing. The "action" is the board's vote. The "determination" required by that section is the action of granting or denying the application.

Section 62.1-13.5(7) contains no language expressly referring to the denial of an application. Nevertheless, I think it is clear that an application which is not approved by at least four concurring votes is necessarily denied. There is a third possibility, however, and that is when the board does not bring an application to a vote with a quorum present within the time limit. In that case the board has not taken any action, and the application is deemed approved 30 days after the hearing.

I am, therefore, of the opinion that the procedure proposed by the Virginia Beach Wetlands Board is consistent with its authority to form its own procedures and complies with the general laws of the Commonwealth including the Wetlands Act.

PHYSICIANS. PROVISIONS OF § 54-317(12) DO NOT PROHIBIT PHYSICIAN FROM OWNING STOCK IN CORPORATION WHICH SELLS OPTICAL GOODS.

February 28, 1984

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked whether it is illegal, unethical or unprofessional for an ophthalmologist or any physician to own stock in a corporation that sells optical items. I assume for purposes of this opinion that you refer to a physician who is merely a stockholder of a corporation selling optical items, whether privately or publicly held, and not to a physician who is actively engaged in the operation of the corporation. I also understand your reference to "optical items" to mean eyeglasses or contact lenses.

The only provision of law in Virginia dealing with this subject is § 54-317(12) of the Code of Virginia, which provides, in pertinent part:

"Any practitioner of medicine...shall be considered guilty of unprofessional conduct if he:

(12)...engages in selling...eyeglasses, or medical appliances or devices to persons who are not his own patients, or sells such articles to his own patients either for his own convenience, or for the purpose of supplementing his income; provided, however, that the dispensing of contact lenses by a practitioner to his patients shall not be deemed to be for the practitioner's own convenience or for the purpose of supplementing his income...."

Physicians who are engaged in unprofessional conduct as defined in § 54-317 are subject to disciplinary action by the State Board of Medicine.

In a recent opinion, I ruled that this statute is not an absolute prohibition on the sale of eyeglasses or contact lenses by physicians. Rather, such sales are prohibited only where the purpose of the sale or dispensing is for the convenience of the physician or for
supplementation of the physician's income. See Opinion to the Honorable William F. Parkerson, Jr., dated December 2, 1983.

Section 54-317(12) prohibits only the selling and dispensing by a physician of the medical appliances listed for certain proscribed purposes. As the mere holder of stock in a corporation, however, a physician would not be considered to be engaged in the selling or dispensing of medical appliances because a corporation is an entity separate and apart from its stockholders. Brown v. Margrande Compania Naviera, S.A., 281 F.Supp. 1004 (E.D. Va. 1968). See, also, 4B M.J. Corporations § 5 (1974).

Accordingly, in my opinion, § 54-317(12) would not prohibit a physician from owning stock in a corporation that sells optical items. This opinion is limited to the facts as assumed. If the physician actually practices as a practitioner of medicine, whether as a sole practitioner, or as part of a firm or professional corporation, then the proscription in § 54-317(12) applies as explained in the Parkerson Opinion.

PHYSICIANS. PSYCHIATRISTS MAY LAWFULLY ADMINISTER, SCORE AND/OR INTERPRET PSYCHOLOGICAL TESTS.

June 28, 1984

Lucile E. Michie, Chairperson
Virginia Board of Psychology

You have asked whether psychiatrists may lawfully administer, score and/or interpret psychological tests.

With certain exceptions, the law clearly precludes an unlicensed lay person from administering, scoring and/or interpreting psychological tests.¹ See, generally, Ch. 28 of Title 54 of the Code of Virginia. With respect to the authority of psychiatrists to administer, score and interpret such tests, your question presents more complex issues. As § 54-923 states, many professions offering services in the behavioral sciences fields "overlap and intertwine to a substantial degree."

Several sources suggest that the average psychologist is more experienced in the use and interpretation of psychological tests than the average psychiatrist. See, e.g., The Lawyer's Medical Cyclopedia, 3d ed., Vol. 3A, § 17.29, which states: "Although some psychiatrists may be skilled in the simpler psychological tests, services of a clinical psychologist are usually sought to accomplish complete psychological evaluation." See, also, J. Ziskin, Coping with Psychiatric and Psychological Testimony, 3d ed., Vol. II, at 20: "It is unlikely that the psychiatrist will have had training and experience with [psychological] tests comparable to that of the average psychologist; therefore, this procedure [i.e., the psychiatrist administering psychological tests] is highly questionable."

Nonetheless, your question turns upon the legal authority conferred upon psychiatrists, and not the extent of their general training in psychology. Thus, in determining whether a psychiatrist may administer psychological testing in his practice of psychiatry, it is necessary to examine the authority conferred upon psychiatrists.

In Virginia, a psychiatrist is a physician, licensed to practice medicine, who specializes in the study, treatment, and prevention of disorders of the mind. As a physician, a psychiatrist has general authority in "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method." (Emphasis added.) See definition of "practice of medicine" in § 54-273(3).
Because of the breadth of this definition and the absence of any clear limitation on the means or methods by which a psychiatrist may diagnose mental ailments, I must conclude that a psychiatrist, licensed to practice medicine, may lawfully administer, score and/or interpret psychological tests.

There is also judicial support for this conclusion. Although the case did not turn on this issue, it is of interest that in Portewig v. Ryder, 208 Va. 791, 160 S.E.2d 789 (1968), the Supreme Court referred to testimony of a psychiatrist who had "administered psychological tests in order to determine [his client's] mental condition." (Emphasis added.) This answer does not imply that all psychiatrists are necessarily competent to use psychological tests. Different psychiatrists have different training and different experience. Each psychiatrist must weigh his capability when deciding whether to refer a patient for psychological testing, or do the testing himself. Of course, the same observation may be made with respect to other specialties in the practice of medicine. For example, an internist may not necessarily be competent to perform orthopedic surgery.

In reaching the foregoing conclusion, I am mindful of § 54-939.1 which provides that in order to practice psychology, it shall be necessary to hold "a requisite valid license." I do not believe it was the intent of the legislature, however, that this requirement be read as a limitation on the authority conferred upon a physician by his license to use "any means or method" to diagnose mental ailments. See § 54-273(3). Under familiar rules of statutory construction, it is necessary to read the two sections harmoniously, if possible, and to give effect to each. If the legislature had intended § 54-939.1 to act as a limit upon § 54-273(3), it undoubtedly would have provided "any means or method except those means or methods for which a separate license is required."

In summary, I am of the opinion that, based on the statutes as they currently exist, and the language of the Supreme Court in Portewig v. Ryder, supra, psychiatrists, licensed in the practice of medicine, may lawfully administer, score and interpret psychological tests as a diagnostic tool in ascertaining mental ailments.

1Among those specifically exempted by statute from obtaining a license under the chapter pertaining to behavioral science professions are (1) personnel managers in private industry provided they limit their dealings to employees of their employer, (2) employees and volunteers of federal, state and local governments, and (3) persons who do not hold themselves out as being licensed and who do not charge a fee for performing psychological services. See § 54-944 of the Code of Virginia.

POWER OF ATTORNEY. RECORDATION. POWER OF ATTORNEY CARRYING SIGNATURE AND SEAL OF LUXEMBOURG NOTARY AS WELL AS BEING AUTHENTICATED PURSUANT TO TERMS OF HAGUE CONVENTION MAY BE ADMITTED TO RECORD IN DEED BOOK AS PROPERLY ACKNOWLEDGED DOCUMENT IN ACCORDANCE WITH UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, §§ 55-118.1 TO 55-118.9.

January 17, 1984

The Honorable Rosemary F. Davis, Clerk
Circuit Court of Nelson County
This is in response to your recent letter in which you request my opinion as to whether a power of attorney executed in a foreign country may be admitted to record in the deed book as a properly acknowledged document.

Recognition of documents executed in foreign countries is accorded by governments which were signatories to the Hague Convention of October 5, 1961.

The power of attorney which you have submitted for review is a document which carries the seal of a notary from Luxembourg. The United States and Luxembourg were parties to the Hague Convention. Therefore, a document from Luxembourg is accorded consideration by the United States pursuant to the terms of the Convention.

The Uniform Recognition of Acknowledgments Act, §§ 55-118.1 through 55-118.9 of the Code of Virginia, is the law which governs acknowledgment of documents in the Commonwealth. Section 55-118.1 states:

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

(1) A notary public authorized to perform notarial acts in the place in which the act is performed...."

The seal, statement and signature of Frank Baden, notary, on the face of the document in question conforms to S 55-118.1(1). Section 55-118.2 relates to the proof necessary to establish the authority of the person performing the notarial act. Subsection (b) provides in pertinent part:

"If the notarial act is performed by a person authorized by the laws or regulations of a foreign country to perform the act, there is sufficient proof of the authority of that person to act if...(2) The official seal of the person performing the notarial act is affixed to the document...."

The document which you have submitted has the notarial seal on its face, and an official attestation seal and signature pursuant to the terms of the Hague Convention on its reverse side. Moreover, subsection (d) provides that the signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine. See Reports of the Attorney General: 1982-1983 at 3 and 1971-1972 at 61. It is, therefore, my opinion that the power of attorney may be admitted to record in the deed book as a properly acknowledged document.

PRISONS. CORRECTIONS. ONLY VIRGINIA CONVICTIONS CONSIDERED TO DETERMINE INMATE ELIGIBILITY FOR PAROLE UNDER § 53.1-151(B1).

October 11, 1983

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

You have asked my opinion on the correct interpretation of subsection (B1) of § 53.1-151 of the Code of Virginia, which provides as follows:
"Any person convicted of three separate felony offenses of murder, rape or armed robbery when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole."

You question whether the "offenses" referred to in the statute must be Virginia convictions or may be from other jurisdictions.

Section 53.1-151 begins with the proviso that the statute relates only to sentences and commitments "under the laws of this Commonwealth..." This language has recently been held to qualify "all later language in the statute...and clearly sets forth the legislative determination that commitments 'under the laws of this Commonwealth' are the only commitments to be taken into account in this connection." Don F. Wood v. Raymond K. Proenier, et al., Civil Action No. 83-0041-H (W.D. Va. August 24, 1983) (Michael, J.).

Based upon the clear language of the statute and its recent judicial constructions, I am of the opinion that only Virginia convictions can be considered by the Department of Corrections to determine whether an inmate has been convicted of "three separate felony offenses of murder, rape or armed robbery" in the context of § 53.1-151(B1).1

1A copy of Judge Michael's Memorandum Opinion is enclosed.

2I note further, however, that convictions from jurisdictions other than Virginia may be considered by the Virginia Parole Board in deciding whether an inmate, otherwise eligible for discretionary parole under § 53.1-151, should be released.

PRIVACY ACT. DOES NOT, IN ITSELF, RENDER PERSONAL INFORMATION CONFIDENTIAL.

July 27, 1983

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

This is in reply to your recent letter requesting an opinion whether it would violate any federal or State law for the county's data processing department to use employees' social security numbers as the access key to retrieve personnel and finance records. This procedure would result in printed reports disclosing employees' social security numbers and the reports would be available to county staff members who have access to the files.

The Virginia Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386 of the Code of Virginia (the "Act"), requires that certain procedural steps be taken in the collection, maintenance, use and dissemination of personal information.2 It does not, in itself, render personal information confidential. The Act's only specific limitation regarding the use of social security numbers is found in § 2.1-385.3

As a general rule, an individual's social security number would be considered "personal information" for the purposes of the Act and would, therefore, be subject to the procedural requirements of the Act. As defined in § 2.1-379(2), however, "[t]he term does not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject...."

Based upon the foregoing, I am of the opinion that the use of social security numbers for the purpose of administering an employee management system such as you
have described would not be prohibited or restricted by the Act. Additionally, based on
the assumption that you do not contemplate that the social security numbers will be
available to the public, but rather only to authorized staff members, I am unaware of any
other statute, State or federal, which would prohibit or restrict such use of social
security numbers.

2Id.
3Section 2.1-385 prohibits a government agency from requiring that an individual
disclose his social security number unless such disclosure is specifically required by
federal or State law.

PRIVACY ACT. FEDERAL IDENTIFICATION NUMBERS "PERSONAL INFORMATION"
FOR PURPOSES OF ACT. FEDERAL IDENTIFICATION NUMBERS AND SOCIAL
SECURITY NUMBERS MAY BE REQUIRED WHEN SUCH DISCLOSURE SPECIFICALLY
REQUIRED BY FEDERAL OR STATE LAW.

June 22, 1984

The Honorable C. J. Boehm
Treasurer of Virginia

This is in response to your request for my opinion whether State agencies may be
required to include vendors' federal identification numbers and/or social security
numbers on payment requests submitted to the Department of Accounts, and also
whether State agencies may require vendors to supply such numbers when purchases are
made. You indicate that under § 55-210.12 of the Code of Virginia, which outlines
reporting requirements for unpresented checks, social security numbers are reportable
when they are known.

The applicable law involved in your inquiry is the Privacy Protection Act of 1976,
§§ 2.1-377 through 2.1-386 (the "Privacy Act"). An individual's social security number
(SSN) is "personal information" within the meaning of the Privacy Act. See 1981-1982
Report of the Attorney General at 383. For purposes of this opinion, a federal
identification number (FIN) is analogous to a SSN. Thus, a FIN is "personal
information." Because these numbers are "personal information," the procedures of the
Privacy Act for dissemination are applicable. Section 2.1-385 of the Privacy Act states:

"On or after July one, nineteen hundred seventy-seven, it shall be unlawful for any
agency to require an individual to disclose or furnish his social security account
number not previously disclosed or furnished, for any purpose in connection with
any activity or to refuse any service, privilege or right to an individual wholly or
partly because such individual does not disclose or furnish such number, unless the
dislosure or furnishing of such number is specifically required by federal or State
law." (Emphasis added.)

Pursuant to § 2.1-385, it would be proper for an agency to require an individual to
disclose his SSN only if such disclosure is required by State or federal law. I am not
aware, however, of any State or federal law which would require disclosure of SSN or FIN
on vendors' payment requests. If no such law requiring disclosure exists, then the agency
cannot require that such numbers be provided, nor can the agency be required to provide
such numbers to the Department of Accounts. Section 55-210.12 states that the SSN
shall be reported to the State Treasurer if it is known. This does not give the agency authority to require that such SSN be reported to it.

PRIVACY ACT. REQUEST TO INSPECT RECORDS. WHEN TO BE IN WRITING. TIME REQUIREMENT REGARDING COMPLIANCE WITH DISCLOSURE OF DATA.

March 23, 1984

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

This is in response to your request for my Opinion regarding certain procedural aspects of the Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386 of the Code of Virginia (the "Act"). You pose two specific questions. First, you inquire whether a local school board may, pursuant to the Act, deny a teacher immediate access to review records pertaining to the teacher when the teacher makes an oral request, and instead, require a written request prior to allowing access to such records. Second, you inquire whether the school board may further require the teacher to wait up to fourteen days before permitting access to such records.

Assuming that the records in question are the teacher's personnel file, or properly fall within the definition of "personal information" in § 2.1-379, the teacher is entitled to the access rights provided in § 2.1-342(b)(3) and § 2.1-382. Section 2.1-382(A) states that: "Any agency maintaining personal information shall...3. Upon request and proper identification of any data subject, or of his authorized agent, grant such subject or agent the right to inspect, in a form comprehensible to such individual or agent..." certain materials and records. Minimum conditions with regard to agencies complying with disclosure requirements to data subjects are set out in § 2.1-382(A)(4)(a)-(c).

You refer to § 2.1-382(A)(4)(a) and (b) in your inquiry. The "normr' business hour" provision in § 2.1-382(A)(4)(a) requires that an agency make its disclosure to data subjects during its normal business day. Section 2.1-382(A)(4)(b) provides two methods of disclosure. Disclosure to a data subject must be made either "in person" if the data subject appears in person and displays proper identification; or "by mail" if a written request (with proper identification) has been made.

The Act is silent as to the method by which agencies must comply with the required disclosure. It is reasonable to assume that internal policies which are not inconsistent with the Act may be employed to further the proper and efficient administration of the office. See 1982-1983 Report of the Attorney General at 727 (construing Virginia Freedom of Information Act). The agency must comply with § 2.1-382(A)(4); however, this section is general in nature. It is my opinion that, if a teacher appears in person with proper identification, a local school board cannot require that the teacher make the request in writing, unless the board has an established policy which is uniformly applied to all data subjects, which policy is reasonable in furthering the efficient administration of the office.

With regard to your second inquiry, there is no fourteen-day maximum time requirement in the Act. Unlike the Freedom of Information Act (§§ 2.1-340 through 2.1-346.1) there is no specific response time requirement in the Act. The purpose of the Act should not be frustrated by delayed disclosure to a data subject; however, because the Act is silent as to any maximum time regarding disclosure, § 2.1-382(A)(4)(b) should be viewed in terms of a reasonableness standard. If information is readily available and it can be easily retrieved by the board, the information should be provided as soon as possible.
PRIVACY ACT. SALARY OF COUNTY EMPLOYEE "PERSONAL INFORMATION" UNDER ACT.

August 25, 1983

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

This is in reply to your recent letter requesting an opinion whether payroll information provided by the county to a private accounting firm for the purpose of establishing and maintaining a centralized accounting system, including payroll functions, constitutes "personal information" under § 2.1-379(2) of the Code of Virginia and, therefore, subject to the provisions of the Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386 (the "Act"). You have informed me that the payroll information involved includes, among other things, data on the salary, address, tax and insurance status of employees.

This Office has held that the salary of a county employee is "personal information" under the Act. 1976-1977 Report of the Attorney General at 317. The dissemination of this information is subject to the provisions of the Act. The procedures which the county must follow are governed by the Act.

The Act requires a governmental unit, such as the county, to "[m]aintain a list of all persons or organizations having regular access to personal information in the information system." Section 2.1-380(6). The Act requires the governmental unit to provide notice to individuals of the possible dissemination of personal information to "another agency, nongovernmental organization or system not having regular access authority...." (Emphasis added.) Section 2.1-382(2). Clearly, the notice requirement does not apply if dissemination of personal information is limited to an agency or system having regular access authority to such information and if such agency or system is identified on the list required by § 2.1-380(6).

The Act itself, in the definition of "agency" recognizes that governmental bodies may enter into contracts with private entities to perform a governmental function. The performance of the function may involve the use of personal information. Section 2.1-379(6). The situation you describe fits this category. The release of the payroll information from the county to its agent, the private accounting firm, pursuant to a contractual relationship to perform a function of the county, is not dissemination of personal information which requires notice to the individual if the organization is designated as one having regular access to personnel information in the information system pursuant to § 2.1-380(6). The private accounting firm, as well as the county, of course, must observe the requirements of the Act, including disclosure, security, administration of the system, rights of data subjects, in any further dissemination of personal information. Section 2.1-379(6).

PRIVACY ACT. VIRGINIA FREEDOM OF INFORMATION ACT. INVESTIGATION BY LOCAL GOVERNING BODY.

March 16, 1984

The Honorable Dorothy S. McDiarmid
Member, House of Delegates
This is in response to your request for my opinion with regard to release of certain records in light of the decision rendered by the Supreme Court of Virginia in Hinderliter v. Humphries, 224 Va. 439, 297 S.E.2d 684 (1982). Specifically, the question which you have posed is:

"In the event the local governing body after conducting an investigation, takes disciplinary action for cause, in the form of suspension, demotion or dismissal of a police officer or other town employee, is the information gathered pertinent to the cause for such action, subject to public release under the Freedom of Information Act 2.1-340 et seq., or is such information protected from disclosure under the Privacy Protection Act 2.1-377 et seq. of the Virginia Code."

To answer your question, the Freedom of Information Act and the Privacy Act must be applied to your hypothetical situation. The two Acts are not mutually exclusive.

The type of information you describe comes within the definition of "official records" under the Freedom of Information Act. Section 2.1-342(a). As such, it must be disclosed unless specifically excepted. The only exception to mandatory disclosure which may be applicable to your hypothetical situation would be that of "personnel records." This type of record is not required to be disclosed under the Act; however, an agency has the discretion to disclose such records. See 1977-1978 Report of the Attorney General at 489.

The Freedom of Information Act does not define the term "personnel records." Normally, personnel records include those records maintained by a public agency which identify an employee, his rank or classification, rate of pay, performance and/or job history. Therefore, the Freedom of Information Act would not mandate disclosure of your hypothetical investigative information if it were properly part of "personnel records."

The Privacy Protection Act defines "personal information" in § 2.1-379(2) as follows:

"all information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual...."

Manifestly, the definition of "personal information" is not the same as "personnel records." The Supreme Court of Virginia in Hinderliter v. Humphries, supra, related that the investigative report at issue was placed in the police officer's personnel file; however, that case involved the application of the Privacy Act, not the application of the Freedom of Information Act and, therefore, the Court did not discuss what constitutes a "personnel record." The Court did conclude that the contents of the report were properly considered "personal information" as that term is defined in the Privacy Act. Further, the Court found that pursuant to police department policy, the personnel file, of which the report became a part, was an "information system" for purposes of the Privacy Act.

The Court concluded that the release of the report, therefore, could be done only in accordance with procedures set out in the Privacy Act. Applying the decision in Hinderliter to the facts in your hypothetical investigation, I am of the opinion that the information is subject to public release by the local governing body only if:

(1) the information is not part of the employee's "personnel record," and (2) the information is not "personal information" as defined in § 2.1-379(2). If the
information is "personal information" kept by the agency in an "information system," the governing body may not release it except in strict compliance with the Act.

1Because you indicated that the investigation has been concluded, the exception for an active administrative investigation, § 2.1-342(b)(5), is not applicable.

2224 Va. at 445.

2224 Va. at 447. The Court did not indicate that maintaining a separate file was essential in every case to constitute a "personnel file."

PROCESS. FEES. SHERIFF MAY NOT RECEIVE FEE PURSUANT TO § 14.1-105 FOR SERVICE OF PROCESS ORIGINATING FROM GENERAL DISTRICT COURT.

July 26, 1983

The Honorable A. S. White
Sheriff of York County

You ask whether a service of process fee for a notice of lien of fieri facias issued by a private party based upon a judgment of a general district court is included in those papers for which fees may be charged pursuant to § 14.1-105 of the Code of Virginia. The last sentence of the section provides: "Such fees shall be allowable only for services provided by such officers in the circuit courts."

Prior to the addition of the last sentence of that provision in Ch. 591, Acts of Assembly of 1975, the schedule for service of process fees for the various documents was applicable to both the circuit and general district courts. The 1975 addition restricted those fees to process served in circuit court actions.

The notice of lien of fieri facias is provided by § 8.01-502 to give notice of both the underlying judgment and the execution lien to any creditors of the judgment debtor. Unlike most other forms of post-judgment execution, this notice is issued by the judgment creditor or his counsel, not by a clerk of the court.

In view of the fact that service of this notice was not a service provided in the circuit court, it is my opinion that the schedule of service of process of fees provided in § 14.1-105 is expressly inapplicable in this instance.

PROCESS. SECRETARY OF THE COMMONWEALTH. MILITARY PERSONNEL. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. ACT DOES NOT AFFECT STATUTORY RESPONSIBILITY, UNDER § 8.01-329, OF SECRETARY OF THE COMMONWEALTH. ACT DOES NOT PROHIBIT SERVICE OF PROCESS ON MILITARY PERSONNEL.

February 7, 1984

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in response to your request for my opinion of the effect of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 501, et seq. (the "Relief Act") with
regard to serving process, pursuant to § 8.01-329 of the Code of Virginia, upon military personnel on active duty.

Section 8.01-329 states, in pertinent part, with regard to service of process upon the Secretary of the Commonwealth:

"Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit...and the fee...in the office of the Secretary in the city of Richmond, Virginia. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the person or persons to be served at the last known post-office address of such person, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action." Section 8.01-329(B).

The Secretary of the Commonwealth is designated the statutory agent for the person being constructively served. The Virginia provision does not provide exceptions for service of process upon military personnel.

The Relief Act is a federal law created to provide a procedure for suspension of enforcement of civil liability in certain instances with regard to persons in the military service of the United States. The purpose of suspending such enforcement of civil liability is to enable military personnel to devote all of their energy to the defense needs of the nation. The provisions of the Relief Act are designed to support such a purpose, and are created so that legal proceedings and transactions which could prejudice the civil rights of persons in the service of their country may be temporarily suspended. See 50 U.S.C. § 510. The Relief Act is liberally construed to protect those who abandon their own personal affairs in order to serve the nation in the military. See Boone v. Lightner, 319 U.S. 561, (1943), reh. den. 320 U.S. 809. The Relief Act does not contemplate conferring any privileges not enjoyed by civilians upon military personnel. It merely attempts to secure the legal rights of an individual in the military until he can return and properly defend those rights. See Tolmas v. Streiffer, 21 So.2d 387 (La. App. 1945).

The Relief Act does not automatically bar proceedings against military personnel, but merely provides a basis for temporarily suspending them. Section 520 of the Relief Act further preserves the rights of military personnel by providing for a means of protecting against default judgments in their absence. Section 521 of the Relief Act authorizes a trial court, on its own motion, to grant a stay to military personnel in active service and mandates the granting of the stay upon application by the individual serving in the military, unless the court is of the opinion that the party, whether plaintiff or defendant, is not materially affected by reason of military service. See Lackey v. Lackey, 222 Va. 49, 278 S.E.2d 811 (1981).

The Relief Act does not affect the statutory responsibility of the Secretary of the Commonwealth under § 8.01-329. Service of process is not prohibited by the Relief Act. Such a conclusion is clearly supported by the foregoing analysis of the purpose of the Relief Act. The Secretary of the Commonwealth must comply with § 8.01-329, even though the person thus served is in active military service.
April 12, 1984

The Honorable Joan H. Munford
Member, House of Delegates

You have asked whether a licensed professional counselor may perform testing to determine eligibility for educational services in a school system. Your question concerns the lawfulness of such a licensed professional counselor administering and interpreting tests, the results of which will be used to determine which specialized education programs within the school system are available to students.

Section 54-932(d) of the Code of Virginia defines the "practice of counseling" as:

"rendering or offering to render to individuals, groups, organizations, or the general public any service involving the application of principles, methods or procedures of the counseling profession, to include:

***(2) 'Appraisal activities' which mean selecting, administering, scoring and interpreting instruments designed to assess an individual's aptitudes, attitudes, abilities, achievements and interests, and shall not include the use of projective techniques in the assessment of personality."

This definition encompasses testing by a licensed professional counselor to determine eligibility for specialized educational services.

I am, therefore, of the opinion that § 54-932(d)(2) authorizes a licensed professional counselor to engage in testing generally, including testing to determine eligibility for educational services in a school system, with the exception that he may not use projective techniques in the assessment of personality.

PROFESSIONS AND OCCUPATIONS. LICENSES. JUNK DEALERS. LOCALITY HAS DISCRETION IN DETERMINING WHAT CONSTITUTES SATISFACTORY EVIDENCE OF GOOD CHARACTER.

September 26, 1983

The Honorable Stanley E. Lewis
Commissioner of the Revenue for Middlesex County

You have asked for advice on the construction of § 54-826 of the Code of Virginia, regarding standards for issuance by the county of a license to conduct business as a junk dealer. You wish to know what factors may be utilized to determine evidence of good character and whether other criteria, such as impact on adjacent landowners and potential nuisance, may be considered.

Section 54-826 provides:

"The governing body of any city, or any county, may grant a license to any citizen of the United States who shall produce to it satisfactory evidence of his good character to carry on the business of a junk dealer, which license shall designate the premises on which such person shall exercise or carry on such business."

This license requirement is in the nature of a regulatory measure, and is not a taxing statute as is § 58-266.1. See 1982-1983 Report of the Attorney General at 368.
The requirement that a license applicant furnish "evidence of his good character" is not further defined in the Code. Therefore, the governing body may exercise discretion as to what it will accept as such evidence. "Usually, in legal parlance, where reference is made to the character of [a person], 'character' is used as a synonym for 'reputation.'" Zirkle v. Commonwealth, 189 Va. 862, 871, 55 S.E.2d 24, 29 (1949). One example of the type of evidence contemplated by such a requirement is found in § 4-31, which sets out standards for the granting of a retail liquor license by the Alcoholic Beverage Control Commission (the "Commission"). This section allows the Commission to refuse a license to an applicant who is "not a person of good moral character and repute," has been convicted of a felony or any crime involving moral turpitude, has demonstrated, by police record or record as a former licensee, a lack of respect for law and order, has a reputation for drinking to excess or is addicted to narcotic drugs. To determine the applicant's compliance, the Commission reviews the applicant's police record and contacts the local sheriff or Commonwealth's attorney. See, also, § 54-859.23 (requires a local law enforcement officer to deny a permit to a dealer in precious metals if he has been convicted of a felony or crime of moral turpitude within seven years of the application); § 9-23 (license to promote professional wrestling or boxing to be denied if applicant not of good moral character or if convicted of felony or misdemeanor involving moral turpitude).

Using these statutes as a guide, the locality may wish to require written consent from the applicant to permit a review of his criminal record. Because "[a] person called on to prove his character is compelled to turn to the people who know him," references from officials or other reputable persons who know the applicant may also be required. See Konigsberg v. State Bar, 353 U.S. 252 (1957).

Denial of a license must be based on a rational use of the information submitted by the applicant as to his good character.

As indicated above, the only stated standard for granting the permit set forth in § 54-826 is the requirement that the applicant produce satisfactory evidence of his good character. That section also refers, however, to the premises on which the business is to be conducted.

It is logical to assume that a board of supervisors will not issue a permit designating a location which is inconsistent with the county's zoning ordinance or other laws and regulations of the county. In the case of Middlesex, however, the board of supervisors has elected not to adopt a zoning ordinance. Thus, there are no zoning prohibitions on the use of land. It follows that a landowner is free to use his land in any lawful manner which does not constitute a nuisance.

The procedure for abating a public nuisance is prescribed in Ch. 1, Title 48. A junk yard is not a nuisance per se, however, and may become one only when operated in such a manner as to constitute a nuisance. If it is clear that the junk yard, as actually operated, will constitute a nuisance, then the board would be within its prerogative if it determined not to issue the permit. Nevertheless, disapproving the issuance of the permit on that basis will impose a burden on the permit office to prove that the operation will constitute a public nuisance.
The Honorable William F. Parkerson, Jr.
Member, Senate of Virginia

You have asked for my opinion on several questions concerning the sale of contact lenses and other products by physicians. You are interested in knowing the proper interpretation of § 54-317(12) of the Code of Virginia. That section provides in pertinent part that it is unprofessional conduct for a physician to sell:

"eyeglasses, or medical appliances or devices to persons who are not his own patients, or [to] sell[s] such articles to his own patients either for his own convenience, or for The purpose of supplementing his income; provided, however, that the dispensing of contact lenses by a practitioner to his patients shall not be deemed to be for the practitioner's own convenience or for the purpose of supplementing his income...." 1 (Emphasis added.)

You have also provided a copy of a letter dated August 23, 1983, addressed to a doctor from George J. Carroll, M.D., Secretary-Treasurer of the Virginia State Board of Medicine (the "Board") and you have asked whether that letter properly interprets § 54-317(12). That letter advises:

"State law provides that a physician may not sell eyeglasses or hearing aids to persons who are not his patients, nor may he sell such items to his own patients, either for his own convenience or for the purpose of supplementing his income."


The letter continues, however, and notes that sales of eyeglasses and hearing aids are prohibited in situations "where the sale is made at a profit for the physician." This leads to your second question in which you ask whether the statutory phrase "for the purpose of supplementing his income" is synonymous with Dr. Carroll's phrase "at a profit." I must conclude that the two are not synonymous, because the former requires a determination of purpose or intent while the second ignores that portion of the statute and focuses only on whether the sale is at a profit.

The General Assembly has required that one must look at the purpose behind the sale to determine whether it is prohibited by the statute. If the purpose is the physician's convenience, it is prohibited. Likewise, if the purpose is supplementation of income it is prohibited. In determining purpose, however, the Board is entitled to infer purpose from objective evidence such as cost of goods sold, percentage of income generated by sales of medical devices and profit margin, but it must also consider other relevant information bearing upon the physician's purpose. If based on all of these factors, the Board reasonably concludes that the purpose behind the sale is supplementation of income, then such sale is prohibited.

I also note disagreement with a portion of the letter concerning sales of contact lenses. That portion of the letter states:

"The law does not prohibit the dispensing of contact lenses by a physician, even if such sales are made for the physician's convenience or for the purpose of supplementing his income."

With regard to the sale of contact lenses, § 54-317(12) provides that such sales by a physician "to his patients" are not considered to be for the practitioner's own convenience or for the purpose of supplementing his income. Therefore, to the extent
the Board's interpretation of § 54-317(12) quoted above could be construed to authorize the sale of contact lenses by physicians to persons who are not his own patients, that interpretation would be incorrect. Sales of contact lenses are not deemed to be for the convenience of the practitioner or for the purpose of supplementing his income only when sold to the physician's patients.

You next ask my opinion of the legality of § 54-317(12) in light of Virginia and federal antitrust statutes. Despite the potential for anticompetitive effect, the prohibition of sales of eyeglasses and other enumerated items by physicians contained in § 54-317(12) would not be subject to federal antitrust action, due to the state action immunity doctrine. That doctrine provides that a state policy displacing competition which is clearly articulated, affirmatively expressed and actively supervised by the state is not subject to the federal antitrust laws. California Liquor Dealers v. Mildeal Aluminum, Inc., 445 U.S. 97 (1980).

Section 54-317(12) is a clear directive from the General Assembly prohibiting the sale of certain items by physicians under certain conditions. Accordingly, § 54-317(12), while having a potential for anticompetitive effect, is nonetheless exempt from scrutiny under the Sherman Antitrust Act.

Likewise, the potential anticompetitive impact of § 54-317(12) is not prohibited by the Virginia Antitrust Act. See § 59.1-9.1 et seq. In relevant part, § 59.1-9.4(b) provides that nothing contained in this chapter shall make unlawful conduct that is authorized, regulated or approved (1) by a statute of this State.... Consequently, the Virginia Antitrust Act is not applicable to § 54-317(12).

Finally, you ask whether the Board has authority to set the price at which a physician may charge his patient for medical treatment or items associated with that medical treatment. I find nothing in the Code which so authorizes the Board.

1Section 54-317(12) is not applicable to a physician who is a holder of a certificate of registration to practice pharmacy. Therefore, when referring to physicians herein, it is assumed that such physicians are not holders of certificates of registration to practice pharmacy.

PROPERTY AND CONVEYANCES. COMMUNITY ANTENNA TELEVISION SYSTEMS. FRANCHISE. LANDLORD MAY CREATE CABLE TELEVISION COMPANY.

November 7, 1983

The Honorable John G. Dicks, III
Member, House of Delegates

You have inquired as to the constitutionality of § 55-248.13:2 of the Code of Virginia in light of the decision of the United States Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that case, the Supreme Court reviewed a New York statute which provided that a landlord must permit a cable television company to install its cable facilities upon his property but that the landlord could not demand payment from any tenant or the cable television company for permitting access to cable television in excess of an amount which the State Commission on Cable Television determined by regulation to be reasonable. The court reversed the decision of the New York Court of Appeals and held that "a permanent physical occupation authorized by government is a taking without
regard to the public interests that it may serve," for which just compensation was due under the Fifth and Fourteenth Amendments of the Constitution. 102 S.Ct. at 3171, 73 L.Ed.2d at 876. (Emphasis added.)

Section 55-248.13:2 which was adopted by the 1982 session of the General Assembly and became effective July 1, 1982, provides, in pertinent part:

"No landlord shall demand or accept payment of any fee, charge or other thing of value from any provider of cable television service, satellite master antenna television service, direct broadcast satellite television service, subscription television service or service of any other television programming system in exchange for giving the tenants of such landlord access to such service; and no landlord shall demand or accept any such payment from any tenants in exchange therefor unless the landlord is itself the provider of the service. Nor shall any landlord discriminate in rental charges between tenants who receive any such service and those who do not."

Although § 55-248.13:2 is similar to the New York statute reviewed in Loretto, there is one striking difference. Under the Virginia statute, landlords are not required to permit access to cable television companies. The New York statute provided that a landlord could not interfere with the installation of cable television facilities on his property creating, in effect, a governmental restriction on the use of the property and authorizing a permanent physical occupation thereof. There is no similar provision in § 55-248.13:2. Accordingly, a Virginia landlord remains free to exclude any cable television facility from his property. No governmental restriction on the use of property has been imposed, and no physical occupation authorized.

In Loretto, the Supreme Court emphasized the importance of this distinction by stating that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." 102 S.Ct. at 3176, 73 L.Ed.2d at 882. (Citation omitted.) Additionally, the Court indicated that the "permanent physical occupation of property forever denies the owner any power to control the use of the property..." Id. Under § 55-248.13:2 a landlord retains the right to negotiate with a cable television company about the placement of the equipment and to grant permission to install it, a right not preserved under the New York statute. The retention of these rights by landlords, particularly the right to exclude cable television companies entirely, leads me to the conclusion that § 55-248.13:2 does not constitute a government authorized taking of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution.

You have also asked whether a landlord may lawfully create his own cable television company to provide cable television services to his property and sell those services to other landlords. Section 15.1-23.1 provides that the governing body of any county, city or town may grant a license or franchise, or issue a certificate of public convenience, to a community antenna television system, otherwise known as CATV or cable television. Additional licenses, franchises or certificates of public convenience may be issued if, after public hearing, the governing body finds that the public welfare will be enhanced thereby. Section 15.1-23.1 excludes from regulation "any system which serves only the residents of one or more contiguous apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such dwellings." Landlords who fall within the stated exemption would therefore be able to form their own cable television companies without local regulation. Those wishing to form their own companies to provide cable television services to noncontiguous properties under their ownership, or to sell these services to other landlords, would be able to do so if they were granted the requisite license, franchise or certificate of convenience.
Any agreement between landlords would be governed by the provisions of § 55-248.13:2.

PROPERTY AND CONVEYANCES. CONDOMINIUM ACT. LEASES FOR UP TO THREE YEARS AND RELOCATION ASSISTANCE MAY BE REQUIRED FOR ELDERLY AND DISABLED TENANTS OF CONDOMINIUM CONVERSIONS. MAY ALSO RECEIVE RELOCATION ALLOWANCE.

November 8, 1983

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

This is in reply to your recent letter concerning the proper interpretation of the phrase "displaced by the conversion" found in § 55-79.94(g) of the Code of Virginia.

You point out that § 55-79.94(f) permits the governing body of any county, city or town to enact an ordinance requiring that elderly or disabled tenants of apartments in rental buildings being converted to condominiums be offered leases or extensions of leases on the apartments they are occupying at the time of the issuance of formal notice of the conversion. No such ordinance may, however, require that such leases or extensions extend beyond three years from the date of the notice. Section 55-79.94(g) permits certain counties, cities and towns to require by ordinance that the declarant of any residential condominium converted from multi-family rental use shall reimburse any tenant "displaced by the conversion" for amounts actually expended to relocate as a result of such dislocation.

You ask whether the term "displaced by the conversion" may be interpreted to include elderly or disabled tenants who have previously received leases or extensions of leases on the apartments they occupy for terms up to three years from the date of receipt of the notice of conversion.

I find no evidence that §§ 55-79.94(f) and 55-79.94(g) were intended by the General Assembly to be interpreted to be mutually exclusive remedies for elderly or disabled persons required to move from their residences as a result of condominium conversions. Neither § 55-79.94(f) nor § 55-79.94(g) requires elderly or disabled tenants to elect the type of aid sought when their rental units are converted to a condominium. Section 55-79.94(f) authorizes the protection of a special class of citizens, the elderly and the disabled, who are authorized to receive leases or extensions of leases for up to three years from the receipt of general notice of the conversion. Section 55-79.94(g), on the other hand, empowers certain local governments to mandate relocation reimbursement to any displaced renter in a condominium conversion without regard to the age or functional abilities of that resident. These provisions of the Code are statutes in pari materia, that is, related to the same subject. They were both enacted at the 1982 session of the General Assembly. As such, they are to be construed together. Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961); 1982-1983 Report of the Attorney General at 484.

I am of the opinion that an elderly or disabled tenant is "displaced by the conversion" of his or her rental unit to a condominium if that tenant must move from his or her residence regardless of whether the tenant has been offered and has accepted a lease or extension of lease on the apartment for up to three years from the date of the receipt of general notice from the condominium conversion. If during the additional lease period the tenant is required to move from the unit as a result of the conversion,
that person has been "displaced by the conversion" of the apartment to a condominium unit. The fact that displacement has occurred is not altered by the fact that it has been delayed for up to three years.

I am, therefore, of the opinion that under the Code of Virginia a declarant of a conversion of multi-family rental property to a condominium may be required to reimburse any elderly or disabled tenant, displaced by the conversion of his or her apartment unit to a condominium, regardless of the receipt by that tenant of a lease for up to three years from the date of receipt of general notice of the conversion.

PUBLIC CONTRACTS. PURCHASING. PUBLIC PROCUREMENT ACT. ANTITRUST.

January 19, 1984

The Honorable Joseph B. Benedetti
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion as to whether contracts between the Commonwealth's institutions of higher education and private business entities for the operation of bookstores on campus are subject to the competitive procurement procedures of the Virginia Public Procurement Act, § 11-35 et seq. of the Code of Virginia. Attached to your letter were copies of contracts currently in effect between bookstore operators and two community colleges.

It appears from the attached contracts that the primary purpose for having these bookstores on campus is to provide students a supply of required textbooks and related materials. Both contracts require the bookstore operators to provide specific texts and materials as designated by the college and give the operators an exclusive right to operate a bookstore on campus. One contract is denominated a lease with the lessee to pay 6% of net sales plus $1.25 per square foot of bookstore space per year. The other is not called a lease, but provides for payments to the college of an escalating percentage of net sales, beginning with 4% on the first $100,000. The college is to provide sales and storage space in return.

Section 11-41(A) requires that, unless otherwise authorized by law, all public contracts with non-governmental contractors for the purchase of goods or services shall be awarded after competitive sealed bidding or competitive negotiation in accordance with the remainder of § 11-41.1. A contract between a community college or other institution of higher learning and a bookstore operator is a public contract with a non-governmental contractor. Determining that the contract is a public contract does not end the inquiry, however. One must still determine whether the contract is for the purchase or lease of goods or services.

Routine leases generally do not involve the purchase of goods or services, and, therefore, are not subject to the Act. The mere fact that the contract involves the use of real property does not exclude it from the Act, however. One must examine the substance of the contract to determine whether, in actuality, it is one for the purchase of goods and services or merely one for the lease of real property.

The particular contracts which you have furnished obligate the bookstore operators to acquire for their inventory certain books to be designated by the college and then to offer them for sale to students within certain designated price ranges. It appears that the predominant purpose of the contracts is to acquire the service of a bookstore operator, who operating within certain tightly regulated limits, will sell goods to
students. Under the circumstances of these contracts, I must conclude that the colleges are procuring goods and services and, therefore, these practices are subject to the Act.

1One of the factors usually included in competitive bidding is price or, in the context of these contracts, the amount of money which the bookstore operator pays to the college. While you have not raised the question of the applicability of § 59.1-9.7(c), a portion of the Virginia Antitrust Act, I note that, if the college in contracting with the bookstore is operating as an intermediary on behalf of the student purchasers, then the college will be limited in the factors to be included in the competitive process so that the benefit of competition flows to the students and not to the college. See Reports of the Attorney General: 1982-1983 at 411 and 1976-1977 at 229.

PUBLIC CONTRACTS. VIRGINIA PUBLIC PROCUREMENT ACT. SOLE SOURCE EXCEPTION TO COMPETITIVE BIDDING PURSUANT TO § 11-41(D).

September 14, 1983

The Honorable James W. Robinson
Member, House of Delegates

You have inquired whether the Cumberland Airport Commission must follow the competitive procurement process contained in the Virginia Public Procurement Act, §§ 11-35 et seq. of the Code of Virginia to accomplish the removal of a knob located adjacent to the airport's runway and to permit mining of the coal under the knob. You have informed me that the Commission wishes to negotiate a contract to perform these services with Paramount Coal Company.

You state that the Cumberland Airport Commission (the "Commission") owns the surface rights and mineral rights to the depth of the Clintwood coal seam under the knob. Paramount owns all mineral rights below the Clintwood seam. Paramount would replace fill to the same elevation as the present runway after removing the knob and the underlying coal and would pay the Commission a small royalty for the Commission's coal which is excavated. You further state that if the Airport Commission is required to competitively bid this work, you feel that there would be no other party interested in bidding, but that if bids were received, the Commission would actually have to pay for the removal of the knob, because any bidder other than Paramount would have to pay royalties to Paramount for removal of its coal. The Commission therefore desires to negotiate a contract with Paramount without first going through competitive procurement procedures.

Establishment of the Cumberland Airport Commission was authorized by Ch. 439, Acts of Assembly of 1958. Clearly, it falls within the definition of a "public body" found in § 11-37 (a part of the Virginia Public Procurement Act). Section 11-41(A) therefore requires that a contract for removal of the knob, whether it is regarded as a service contract or a construction contract, be awarded only after competitive sealed bidding or competitive negotiation, unless otherwise authorized by law. Of the several exceptions to the requirement of competitive purchasing procedures found in the Act, § 11-41(D) may be most applicable to the situation which you have described. Under that subsection, if the Commission were to make a determination in writing that "there is only one source practicably available..." for the removal of the knob, a contract could be negotiated and awarded to Paramount without competitive sealed bidding or competitive negotiation. The Commission's written determination must document the basis for its decision.
The issue at hand, therefore, is whether Paramont is, in fact, the only source practicably available for the service of removing the knob. The word "practicable" is synonymous with "feasible" or "possible." Nevertheless, it does not appear that the intent of the statute was to require a finding of utter impossibility, regardless of expense, time, or inconvenience, before making a determination that there is only one source practicably available. Rather, § 11-41(D) should be read from the point of view of a reasonable person acting in light of the policy expressed by the General Assembly in § 11-35(G) as follows:

"G. 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 light of the foregoing, if the Commission determines as a factual matter that (1) it can actually obtain significant royalty revenues from the coal extracted by dealing with Paramont, and (2) it determines with reasonable certainty no other person would bid on the proposal or that if they did so bid they would request a significant cash outlay to perform the same services now offered by Paramont, then in my opinion it would not be unreasonable or arbitrary and capricious in light of the policies expressed in § 11-35(G) for the Commission to make a determination under § 11-41(D) that Paramont is the only source practicably available for services to remove the knob.

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1Section 11-41(A) reads as follows: "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."

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PUBLIC OFFICERS. CITIES. COUNCILS. MEMBER OF PORTSMOUTH CITY COUNCIL MAY NOT BE APPOINTED TO EASTERN VIRGINIA MEDICAL AUTHORITY; MEMBERSHIP ON AUTHORITY IS PUBLIC OFFICE FOR PURPOSES OF ART. VII, § 6 AND § 15.1-800.

July 26, 1983

The Honorable Willard J. Moody
Member, Senate of Virginia

This is in reply to your request for my opinion whether a member of the Portsmouth City Council may be appointed to serve as that city's representative on the Eastern Virginia Medical Authority (the "Authority"), in light of the prohibitions contained in Art. VII, § 6 of the Constitution of Virginia (1971) and in § 15.1-800 of the Code of Virginia.
Article VII, § 6 states, in pertinent part, as follows:

"No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law."

Section 15.1-800 provides that "[n]o member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment."

Under both of the above restrictions a member of an elected city council may not be appointed, during his tenure as councilman, to any office to be filled by a city council, unless such an appointment is expressly authorized by law. See Reports of the Attorney General: 1981-1982 at 299; 1976-1977 at 214. The questions for consideration, then, are (a) whether membership on the Authority constitutes an "office;" and (b) whether city council makes the appointment to such membership.

The criteria for determining whether a position is a public office have been stated to be that the position is created by the Constitution or statutes, it is filled by election or appointment, with a designation or title, and duties concerning the public, which are assigned by law. A frequent characteristic of such a post is a fixed term of service. See, e.g., Reports of the Attorney General: 1981-1982 at 305; 1977-1978 at 322. The Authority was created by an act of the General Assembly as a "public body politic and corporate" with certain public powers. See Ch. 471, Acts of Assembly of 1964, as amended by Ch. 396, Acts of Assembly of 1975; Ch. 217, Acts of Assembly of 1979; and Ch. 121, Acts of Assembly of 1981. It is "deemed to be a public instrumentality, exercising public and essential governmental functions to provide for the public health and welfare...." Chapter 471, Acts of Assembly of 1964, § 3. Its members are appointed for fixed terms of office. Id., § 2. I conclude that membership on the Authority must be considered a public office for purposes of Art. VII, § 6 and § 15.1-800.

As for the appointments to its membership, § 2 of Ch. 471, Acts of Assembly of 1964, as amended, supra, provides, in pertinent part, that members "shall be appointed by their respective city councils as follows...one member for the city of Portsmouth...." Section 2 goes on to provide that each city council shall have the right to remove any member appointed by it, for cause, and that vacancies shall be filled by appointment of the council for unexpired terms.

Thus, membership on the Authority is an office filled by city council, and, in accordance with Art. VII, § 6 and § 15.1-800, no member of an appointing city council is eligible to be appointed to the Authority unless such appointment is expressly authorized by law. I am unaware of any provision of law which expressly authorizes such an appointment, and, accordingly, I am of the opinion that a member of Portsmouth's City Council may not be appointed as that city's representative on the Authority. In light of this conclusion, it is unnecessary to address your second question of whether such an appointee would be permitted to vote on the city's budget, when such budget contains a line item contribution to the Authority.

1 See, also, § 23-14, in which the Authority is declared to be a public body and constituted as a governmental instrumentality for the dissemination of education.

PUBLIC OFFICERS, MAGISTRATES, TRUSTEES IN BANKRUPTCY, STATE EMPLOYEES. SECTION 2.1-30. FULL TIME VIRGINIA MAGISTRATE SERVING SIMULTANEOUSLY AS TRUSTEE IN BANKRUPTCY IN VIOLATION OF § 2.1-30.

March 6, 1984

The Honorable Robert N. Baldwin
Executive Secretary
Supreme Court of Virginia

This is in response to your request for my opinion of the applicability of § 2.1-30 of the Code of Virginia to a situation involving a Virginia magistrate serving as a trustee in federal bankruptcy proceedings pursuant to 11 U.S.C. § 1 et seq.

Section 2.1-30 states, in pertinent part:

"No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever...."

Further, any individual who does accept such a position with the federal government must vacate his position with the Commonwealth or any county, city or town of the Commonwealth. Limited exceptions exist to the mandate of § 2.1-30. These exceptions are very specific. In addition to the active military service and the selective service exceptions, some additional exceptions are outlined in § 2.1-33. The exceptions to § 2.1-30 are to be strictly construed. See 1969-1970 Report of the Attorney General at 218.

In order for § 2.1-30 to be applicable to the situation which you present, the individual involved must be holding an office "of honor, profit or trust under the Constitution of Virginia." That individual must simultaneously hold an "office or post of profit, trust, or emolument...under the government of the United States" or be employed by the United States, or receive in any way, emolument from such government.

This Office has previously held that an employee of the federal government may not hold the office of special magistrate or justice of the peace at the same time. See Reports of the Attorney General: 1980-1981 at 280, 1975-1976 at 212, 1974-1975 at 255, 1967-1968 at 215.

In the situation which you present, the first consideration is whether a Virginia magistrate who is serving as a trustee in federal bankruptcy proceedings has the requisite State and federal connections to render § 2.1-30 applicable. If such connections exist, then the individual is in violation of the statute unless one of the exceptions applies.

A full-time magistrate for the Commonwealth is an officer under the Constitution of Virginia and, for purposes of retirement, is considered a State employee. See § 51-111.10(5); see, also, 1974-1975 Report of the Attorney General at 252. Thus, it is my opinion that for purposes of § 2.1-30, a full-time magistrate possesses the requisite State connection.

With respect to whether a trustee in bankruptcy has the necessary federal connection, in a previous Opinion, this Office concluded that a city sergeant was prohibited from serving as a trustee in bankruptcy because "[a] trustee in bankruptcy is an officer of the court and thus holds an office or post of trust in the judicial department of the United States" for purposes of applying the predecessor to § 2.1-30.
The position of federal bankruptcy trustee is a creature of federal statute. The position of trustee is created under 11 U.S.C. S 1 et seq. The duties are described in 11 U.S.C. §§ 704, 1302(b) and 13704 and the trustee is regarded as a statutory officer of the court. In re Town Crier Bottling Co., 123 F.Supp. 588, 592 (E.D. Mo. 1953). The trustee is required by statute to post bond payable to the United States. While the trustee's compensation is derived from the estate, the rate of compensation is strictly controlled by federal statute.

A federal bankruptcy trustee is not a federal employee; however, he does hold a post of trust. Among his duties are the obligation to collect and hold money and property due the estate, to examine the financial affairs of the debtor, to examine proofs of claims against the debtor and to object to those claims which the trustee believes to be improper and to file various reports and accountings with the court.

The Supreme Court of Virginia described the purpose of the forerunner of § 2.1-30 as being to prevent a conflict situation with regard to one who "serves" both the federal and State governments. Joy, Dranheim and Cox v. Green, 194 Va. 1003, 1009, 76 S.E.2d 178 (1953). Clearly, whether he is an officer or in a position of trust, the federal bankruptcy trustee is "serving" the federal government.

It is my opinion, that for purposes of § 2.1-30, a trustee in bankruptcy holds an office or post of trust under the government of the United States. The existence of this federal connection while he is employed as a full-time Virginia magistrate is, therefore, in violation of § 2.1-30. Further, it does not appear that any of the exceptions to § 2.1-30 would apply to this situation.

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1See 1966-1967 Report of the Attorney General at 265. In the 1971 revision of the Constitution of Virginia, the office of sergeant was deleted from the required elected officials. Cities, like counties, now elect a sheriff as provided in Art. VII, § 4 of the Constitution.

REAL ESTATE. TIME-SHARE ACT. FACTS OUTLINED IN CERTAIN CAMPGROUND PROJECT DO NOT CONSTITUTE TIME-SHARE PROGRAM UNDER § 55-362(21).

March 6, 1984

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

In your recent letter you ask whether the offering and sale of undivided real estate interests in a campground project which you describe constitutes a "time-share program" as defined in § 55-362 of the Code of Virginia. The project you describe is unusual and the facts you give are detailed. For these reasons, these extensive facts will be recited, as I understand them, from your letter.

The developer holds title to real estate in Virginia which he plans to develop as a campground. In the first five acre multi-campsite phase of this project, the developer proposes to sell approximately five hundred undivided interests in fee simple. Your letter indicates that statistically there will be ten undivided interests per campsite. None of these interests is to be allocated on a campsite-by-campsite basis. Purchasers of these undivided interests will receive a general warranty deed for their interests. Ownership of an undivided interest will entitle the purchaser to the temporary use of a randomly selected campsite as well as the recreational and common facilities within the
All campsites will be available to holders of undivided interests on a first come, first served, space available basis. You have stated that these conditions will be in accordance with duly recorded declarations of covenants and restrictions applicable to the project and the rules and regulations promulgated thereunder. You do not say whether there will be other disclosures to a purchaser. These recorded covenants and restrictions will state that the holders of undivided interests may not request a particular campsite; that no owner may occupy a specific campsite for more than thirty (30) consecutive days; that no campsite may be used as a primary and principal residence of its occupant; and that owners who have occupied a campsite for thirty (30) consecutive days may not utilize any campsite for a period five (5) days after the expiration of the thirty-day period. Subject to the limitation of the thirty days "on," five days "off" the property, there is no ceiling on the number of days that owners may occupy campsites within the campground.

The developer of the campground intends to offer purchasers several financing alternatives. Purchasers may pay all cash or they may pay some cash and execute a promissory note and deed of trust for the balance of the purchase price at the time the sales contract is signed. Deferred payment purchasers will receive their general warranty deeds upon the payment of a down payment of 20% or, if a down payment of less than 20% has been made, upon the timely payment of six consecutive monthly installments on the deferred purchase money note. In all cases, you state, purchasers will receive their deeds within 180 days of the date they execute the purchase contract. In addition to the initial purchase price, purchasers will be assessed an annual maintenance fee. This fee may be increased.

Section 55-361 provides that the Virginia Real Estate Time-Share Act applies to time-share projects created in the Commonwealth after July 1, 1981. A "time-share project" is defined as "real property that is subject to a time-share program." Section 55-362(22). A "time-share program" is defined as:

"[A]ny arrangement for time-shares in a time-share project whereby the use, occupancy, or possession of real property has been made subject to either a time-share estate or time-share use in which such use, occupancy, or possession circulates among owners of the time-shares according to a fixed or floating time schedule on a periodic basis occurring over any period of time in excess of five years." Section 55-362(21). (Emphasis added.)

Your letter is quite clear that the project under consideration does not contemplate a program that offers fixed time schedules for occupancy.

The term "floating time schedule" is not defined in the Code, nor has the Virginia Real Estate Commission yet defined the term by regulation. According to Mark E. Henze, a floating time period describes as an arrangement where

"the interest holder is entitled to use a certain amount of time at a specific resort (and possibly a specific unit). Use of this time must be in accordance with prior reservations, however, the time need not always be used consecutively and may be allowed to be carried over to the next year."

The Law and Business of Time-Share Resorts (Clark Boardman Company, Ltd., 1984) p. GL-2. Because this definition refers to a certain amount of time, the definition appears to envision arrangements much more specific than those in the project you have described which do not entitle an interest holder to use any specific amount of time. In fact, I note that it is possible that an interest holder could be denied the right to use any campsite at any time because none is available when he wants one. Accordingly, it is my opinion that the project you have described does not constitute a time-share program as defined in § 55-362(21).
Although I have concluded that the project is not a time-share program, the following laws should be examined closely to determine their applicability to the project: the Virginia Subdivided Land Sales Act, § 55-336 et seq.; the Wet Settlement Act, § 6.1-2.10 et seq.; the Virginia Consumer Protection Act, § 59.1-196 et seq.; the Securities Act, § 13.1-501 et seq.; and local zoning and land use ordinances.

REAL PROPERTY. INDIVIDUAL PROPERTY OWNER RESPONSIBLE FOR SOLID WASTE ON HIS PROPERTY, UNLESS OTHERWISE INDICATED BY LOCAL ORDINANCE OR STATE LAW.

May 11, 1984

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in response to your request for my opinion on several questions involving the legal responsibility for clean up of trash, garbage, refuse and litter deposited on private property without the consent of the owner, and on highway rights-of-way in Washington County.

You indicate that Washington County has not adopted an ordinance as authorized in § 15.1-11 of the Code of Virginia. Section 15.1-11 permits any county, city or town, by ordinance, to require owners of property to remove all trash, garbage, refuse, litter or other substances which might endanger the health or safety of the citizenry. That section also provides an alternative method whereby the locality may remove trash from private property and charge the cost to the property owner. You further indicate that pursuant to § 15.1-510, Washington County has adopted an ordinance which prohibits the dumping of trash and garbage in the county, and prohibits residents from accumulating refuse, trash or rubbish which is potentially injurious to the health or safety of the public.1

In addition to the local ordinance prohibiting the dumping and accumulating of the various forms of waste, § 32.1-180(A)(3) provides that it shall be unlawful for any person to own, operate or allow to be operated on his property an "open dump" unless such person possesses a proper permit. The term "open dump" is defined as "a site on which any solid waste or hazardous waste is placed, discharged, deposited, injected, dumped or spilled so as to create a nuisance or so as to pose a substantial present or potential hazard to human health or the environment, including the pollution of air, land, surface water or groundwater." See § 32.1-177(7).

In your questions, you inquire whether it is the responsibility of the owner of the private property to clean up trash dumped upon his property or whether the county may enter the property and expend public funds for removal of such trash. In the absence of an ordinance adopted pursuant to § 15.1-11, I am unaware of any authority for the county to enter the property and expend public funds to remove the debris in question.2 The owner is responsible for maintenance of his property.3

You also inquire as to the responsibility of the Virginia Department of Highways and Transportation (the "Department") to remove garbage and trash which is dumped on the right-of-way of a highway located in the county. It is a criminal offense for anyone to dump trash on any highway, right-of-way, property adjacent to the right-of-way, or private property. Section 33.1-346. There is no statute, however, which requires the Department to remove trash illegally dumped on the right-of-way. The Commonwealth's
responsibility for such clean up is in conjunction with its responsibility for maintenance of the public highways. See 1982-1983 Report of the Attorney General at 272.

1Section 32.1-34 supplements § 15.1-510 and provides that no city, county or town may adopt a health ordinance which is less stringent than those regulations created by the State Board of Health. See Regulations of the Virginia Department of Health Governing Disposal of Solid Wastes, effective April 1, 1971.

2This conclusion should not be construed as applying to situations such as life threatening nuisances, emergencies or those involving unsafe buildings. This applies only to the question presented which involves the clean up of trash, garbage, refuse and litter deposited on private property.

3Section 33.1-346(a) makes it a misdemeanor for anyone to dump or otherwise dispose of trash, garbage, refuse or other unsightly matter on private property without the written consent of the owner of the property or his agent. Thus, this law exists as a method of holding an individual, who is not the property owner or a person authorized by the property owner, liable for dumping on private property.

REAL PROPERTY. LIBRARY BOARD. POWER TO ALIENATE PROPERTY.

March 28, 1984

The Honorable John H. Foote
County Attorney for Prince William County

You ask whether the Library Board of Prince William County has the authority to sell real property which was donated to it, and if it does, what procedural requirements must be followed in the sale.

You indicate that the library board is established pursuant to § 42.1-35 of the Code of Virginia and that the board, in 1960, accepted a gift of a parcel of real property located in what is now the City of Manassas.1 The land in question is not suitable for the operation of a library and is not presently developed in any manner which would bring significant income to the library board. The board, therefore, wishes to sell the property.

Section 42.1-35, concerning library boards, states in relevant part:

"They shall have control of the expenditures of all moneys credited to the library fund. The board shall have the right to accept donations and bequests of money, personal property, or real estate for the establishment and maintenance of such free public library systems or endowments for same."


While it is clear that the library board has the authority and the responsibility for the establishment and maintenance of the public library system, it does not follow that the board is vested with the authority to sell, or otherwise alienate, the real property over which it exercises such jurisdiction. There is no general statutory authority authorizing the alienation of property which is accepted as a donation. The General Assembly has expressly authorized library boards to convey property it owns under certain circumstances. Section 42.1-45 authorizes a transfer to the governing body of the political subdivision in which a public free library is located.2 Had the General
Assembly intended to confer a general power of alienation upon the library boards, the enactment of § 42.1-45 would have been unnecessary.

Similarly, § 15.1-22 expressly authorizes the governing body of any county, city or town to convey to the Commonwealth land which is not required for the purposes of such county, city or town to be used for the establishment of a branch of a state-supported college or university. In prior Opinions, this Office has reached the conclusion that in the absence of such statutory authority, towns have no authority to convey real estate. See Reports of the Attorney General: 1972-1973 at 462; 1960-1961 at 327.

On the other hand, counties have been granted a general power to convey property. By enacting § 15.1-262, the General Assembly has granted the governing body of a county the authority to convey real estate of the county, a power which it otherwise would not possess. I do not believe a component part of the county, city or town, such as the library board, would have a power which exceeded that of the political subdivision of which it is a part.

In absence of express authority to do so, I am of the opinion that the Library Board of Prince William County has no authority to sell the real property which it accepted as a donation. In view of the foregoing, it is unnecessary to respond to your second question.

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1 I assume for the purpose of this Opinion that the property involved is held in the name of the Trustees of the Prince William County Library and that there is no restriction in the deed of gift which would control the alienation of the property.

2 Section 42.1-45 was cited as authority to transfer the property acquired by the Trustees of the Virginia Beach-Princess Anne Library to the consolidated city of Virginia Beach. See Ch. 509, Act of Assembly of 1972.

RECORDATION. FEE FOR RECORDATION OF PLATS RECORDED IN PLAT BOOK PRESCRIBED BY § 14.1-112(3).

August 1, 1983

The Honorable N. G. Hutcheson, Clerk
Circuit Court of Mecklenburg County

This is in reply to your letter of July 12, 1983, requesting an opinion whether the ten dollar ($10) fee provided for in § 14.1-112(3) of the Code of Virginia is to be charged for all plats admitted to record. If the answer is in the negative, you have asked what fee should be charged for a plat to be recorded in the deed book.

Section 14.1-112 provides:

"A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees, to wit: * * *

(2) For recording and indexing in the proper book any writing and all matters therewith, except plats, or for recording and indexing anything not otherwise provided for, provided that no additional charge shall be made for recording less than one-half of a page, a minimum of nine dollars for up to three and one-half pages and one dollar for each page over three and one-half pages.... * * *
(3) For recording a plat, or copy thereof which is to be recorded in the plat book, ten dollars." (Emphasis added.)

Reading paragraphs (2) and (3) of § 14.1-112 together, it is apparent that paragraph (2) prescribes a base fee of nine dollars for recording and indexing writings (with attachments) in the proper book, e.g., deeds and deeds of trust in the deed book, wills in the will book. There is an exception for the recordation of plats, however. Paragraph (3) specifically relates to the fee for recording a plat in the proper book and prescribes a ten dollar fee for recording a plat in the plat book. If a clerk of a circuit court maintains a plat book as authorized by § 17-681 and a plat is recorded separately in the plat book, I am of the opinion that the fee for doing so is ten dollars as provided in § 14.1-112(3).

If, however, the plat is attached to a writing which is properly recorded in another of the clerk's books, I am of the opinion that the fee prescribed in § 14.1-112(2) would apply. Further, if a plat is maintained singly, as in a cabinet or on microfilm aperture cards, as provided in § 17-68, I am of the opinion that a ten dollar recordation fee may be charged in accordance with paragraph (23) of § 14.1-112.2.

1Section 17-68 provides in part: "All plats and maps may in the discretion of the clerks of the several circuit courts be recorded in a book to be known as the plat book."
2Section 14.1-112(23) authorizes a fee of ten dollars "[f]or all services rendered by the clerk in any court proceeding for which no specific fee is provided by law...."

REGISTRAR. COUNTIES, CITIES AND TOWNS. CITY GENERAL REGISTRAR IS CITY EMPLOYEE FOR PURPOSES OF ACCRUAL OF EMPLOYMENT BENEFITS.

August 25, 1983

The Honorable Jay W. DeBoer
Member, House of Delegates

This is in reply to your letter in which you request my opinion on the following question:

"For the purposes of accrual of employment benefits, including, but not limited to, annual and sick leave, and health and hospitalization benefits, is a General Registrar of a county or city an employee of the Commonwealth of Virginia or of the locality in which he or she serves?"

Prior Opinions of this Office, rendered by successive Attorneys General over a period of many years, hold local election officials, including a general registrar, to be officers and employees of the county or city in which they serve. See Opinion to the Honorable Susan H. Fitz-Hugh, Secretary, State Board of Elections, dated May 9, 1983, and opinions therein cited. In an Opinion found in 1972-1973 Report of the Attorney General at 325, for example, it is held that the Petersburg General Registrar is an employee of the municipality and is subject to all rules and regulations of the municipality which do not conflict with requirements imposed by State law. Prior opinions of this Office held that both § 15.1-7.1 of the Code of Virginia, which requires a local governing body to establish a uniform pay plan for its employees, and § 51-112 authorize local governments to provide the kinds of employee benefits about which you inquire. See Reports of the Attorney General: 1978-1979 at 212; 1977-1978 at 189. See, also, § 15.1-7.3 (local governing bodies may provide for their officers and employees group life, accident and health insurance programs). I am of the opinion that a general

With regard to annual vacation and sick leave, the general registrar may take such leave within the guidelines established by the city for its employees, provided that the normal days of service and office hours are maintained for registration as prescribed by the State Board of Elections and the city electoral board, but he may not accumulate such leave if the result of such accumulation is that he receives more compensation than that set forth in the Appropriations Act for any one year.

Note that, because Art. II, § 8 of the Constitution of Virginia (1971) specifically provides that local electoral boards shall appoint registrars, a registrar is excluded from the Virginia Personnel Act, applicable to State employees, pursuant to § 2.1-116(1).

Section 51-112 provides, in part, that the governing body of each county, city and town may provide for group life insurance and group accident and sickness insurance covering its officers and employees and their dependents.

Note from the materials provided with your letter that the registrar in question participated in the insurance programs available to city employees, premiums for which were deducted regularly from his paycheck.


Section 24.1-43 provides, in pertinent part, as follows: "General registrars shall receive as annual compensation for their services a sum in accordance with the compensation plan set forth in the Appropriations Act.

No other additional compensation shall be paid to the general registrar by the local governing body."

SANITATION DISTRICTS. RESIDENCE. MEMBERS OF SANITATION COMMISSION MUST RESIDE WITHIN DISTRICT BOUNDARY.

August 25, 1983

The Honorable John C. Singleton
Commonwealth's Attorney for Bath County

This is in reply to your request for my opinion whether persons who reside outside the boundary of the Warm Springs Sanitation District may be members of the Warm Springs Sanitation Commission. The district was created under the Sanitation Districts Law of Nineteen Hundred and Forty-Six, which is codified as § 21-224 et seq. of the Code of Virginia. Section 21-237 provides in pertinent part as follows, with regard to the commission and its members:

"In and for each district heretofore or hereafter created pursuant to this chapter or pursuant to a special act of the General Assembly, a commission is hereby created as a body corporate, invested with the rights, powers and authority and charged with the duties set forth in this chapter. The commission shall be known by the name of the district, except that the word, 'commission' shall be substituted for the word 'district.' Except as a special act creating the district shall otherwise provide, the commission shall consist of seven members, residents of the district, appointed by the State Health Commissioner, in the manner hereinafter provided, who shall notify each governing body immediately after such appointments." (Emphasis added.)
I am unaware of any special act, or of any other statute, which provides an exception to the express mandate quoted and emphasized above. Accordingly, I am of the opinion that persons who reside outside the sanitation district's boundary may not be members of the Warm Springs Sanitation Commission.

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SCHOOL BOARDS. MAY TRANSFER FUNDS AMONG CLASSIFICATIONS WHEN LUMP SUM APPROPRIATION IS MADE BY BOARD OF SUPERVISORS.

July 28, 1983

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

You ask my opinion on the following question concerning funds appropriated to a school board:

"If the governing body makes a lump sum appropriation, is the school board then free to transfer funds from one major classification to another as the need arises during the fiscal year?"

A local governing body may appropriate funds to the school board by total amount (i.e., lump sum) or by major classifications prescribed by the State Board of Education. See § 22.1-94 of the Code of Virginia. Section 22.1-89 further provides:

"Each school board shall manage and control the funds made available to the school board for public schools and may incur costs and expenses. If funds are appropriated to the school board by major classification as provided in § 22.1-94, no funds shall be expended by the school board except in accordance with such classifications without the consent of the governing body appropriating the funds." (Emphasis added.)

Accordingly, if an appropriation is made by major classification, the school board's expenditure must be consistent with the classification. On the other hand, if the appropriation is by total or lump sum, the statute does not restrict the school board in transfer of the funds.1

Accordingly, it is my opinion that, on the basis of § 22.1-89, your question is answered in the affirmative.

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1See 1982-1983 Report of the Attorney General at 409, which discusses in more detail the procedure for local appropriations to school boards.
SCHOOL BOARDS. POWER TO ALLOW NON-PUPIL USE OF SCHOOL BUSES.

February 7, 1984

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

You ask whether a local school board may allow a civic, eleemosynary, charitable or similar group to use school buses for transportation related to the group's functions if the group reimburses the school board for the proportionate share of the costs of operating the buses. You ask specifically whether § 22.1-182 of the Code of Virginia, prohibits such an arrangement.

Section 22.1-182 provides:

"The school board of any school division may enter into agreements with the governing body of any county, city or town in the school division, any State agency or any agency established or identified pursuant to United States Public Law 89-73 or any law amendatory or supplemental thereto providing for the use of the school buses of such school division by such agency or by departments, boards, commissions or officers of such county, city or town for public purposes, including transportation for the elderly. Each such agreement shall provide for reimbursing the school board in full for the proportionate share of any and all costs, both fixed and variable, of such buses incurred by such school board attributable to the use of such buses pursuant to such agreement. The governing body, State agency or agency established or identified pursuant to United States Public Law 89-73 or any law amendatory or supplemental thereto shall indemnify and hold harmless the school board from any and all liability of the school board by virtue of use of such buses pursuant to an agreement authorized herein." (Emphasis added.)

Section 22.1-182 is a reenactment of former § 22-151.2 which was enacted by the General Assembly in 1975 after a legislative study commission, in a report on "The Use of School Buses for Non-Pupil Transportation," recommended:

"I. School buses should not be used to serve the general public. Regularly scheduled service, on fixed routes, open to any fare-paying citizens would overstress equipment needed for pupil transportation. It would also tend to diminish the motoring public's reaction to school bus safety laws since the vehicle traditionally used to transport children would frequently be seen serving another function. To constantly expect the motoring public to distinguish between the yellow vehicle's role at a particular moment and act accordingly would eventually compromise overall highway safety. In addition, costs, administrative complexity, insurance and other issues would place a burden on local school boards that they are not responsible for. Finally, the school bus is not primarily designed for use by the general public and, therefore, should not be considered to be a substitute for a general transit vehicle.

II. Investigation has indicated, however, that there is a need for transportation, especially in rural areas, that the school bus may help to meet. There are presently numerous public agencies whose function it is to provide a wide-range of community service to a variety of eligible citizens. As has been pointed out, transportation from where clients of social service agencies reside to where the service is provided is often one of the more troublesome problems to overcome. Also, it is usually true that those people who are served by these agencies are most in need of some form of public transportation. It is, therefore, recommended that localities be given the opportunity to utilize the school bus, within established guidelines, to help solve a locally perceived problem. Again, such expanded use
should be limited to governmental agencies or for programs sponsored by a governmental agency and would be a voluntary decision made by local officials. If access to desirable social programs can be improved, their success and ultimate worth will be enhanced." (Emphasis in original.) See H. Doc. No. 2, 1975 House & Senate Documents, Vol. 1 at 46.

By its terms § 22.1-182 authorizes non-school use of school buses "for public purposes, including transportation for the elderly." The section authorizes non-school use of school buses by the departments, boards, commissions or officers of a local government pursuant to an agreement with the school division. It also authorizes such agreements with State agencies. Finally, it authorizes agreements with any agency "established or identified" pursuant to United States Public Law 89-73. Such agencies are generally known as "area and State agencies on aging." It does not authorize agreements directly with other civic, eleemosynary or charitable groups for their own functions.

It is a basic tenet of statutory construction that where a statute creates a specific grant of authority, that power exists only to the extent plainly granted by the statute. See 1978-1979 Report of the Attorney General at 243. The specific grant of authority in § 22.1-182, leads to the result that any other general provisions concerning agreements for the use of school board property do not apply to contract's for the use of school buses, because a school board's authority to enter into agreements for the use of its school buses is expressly limited to those agreements authorized by that section.4

It is my opinion, therefore, that a school board may enter into agreements for "public purpose" uses (including transportation of the elderly) of school buses for non-school purposes with the governing bodies of counties, cities and towns, with State agencies, and with area and State agencies on aging.5 A school board lacks the authority, aside from the instances specifically set forth in § 22.1-182, and referred to above, to permit the use of its school buses by a civic, eleemosynary or charitable group for transportation to the group's functions.6

1Public Law 89-73 refers to the federal "Older Americans Act of 1965" which, although it has been amended frequently since passage, provides basically for grants to states and communities for area or state agencies on aging. Such grants may be used for social services, training and employment services, and nutrition services for the elderly. See 42 U.S.C. §§ 3001-3057(g). Federal funds for transportation for the elderly are now provided pursuant to 42 U.S.C. § 3028(c) through area and State agencies on aging.

2Section 22.1-131 provides general authority for a school board to "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." In view of the specific limitations upon the use of school buses contained in § 22.1-182, it is my opinion that § 22.1-131 cannot be read to give a school board general authority to permit civic, eleemosynary or charitable groups to use school buses.

3I am mindful that § 46.1-287.1 provides: "Any private individual, corporation or civic, charitable or eleemosynary organization, for the purpose of transporting children to or from school, camp or any other place during any part of the year, may contract to hire motor vehicles identified as regular school buses, having a seating capacity of more than fifteen persons, which are painted yellow, and if such motor vehicles are used for such purpose they shall be equipped and operated in the same manner as are regular school buses pursuant to the provisions of chapter 4 (§ 46.1-168 et seq.) of this title relating thereto." (Emphasis added.) This section authorizes the use, pursuant to contract, of school buses only for transporting children. See 1971-1972 Report of the Attorney General at 283. It vests no specific or general authority in a school board to contract for the non-pupil use of a school board's buses. In view of the statutory history
SCHOOLS. COMPULSORY SCHOOL ATTENDANCE REQUIREMENTS SATISFIED BY APPROVED HOME INSTRUCTION.

May 29, 1984

The Honorable Stephen E. Gordy
Member, House of Delegates

You have requested my opinion on the applicability of Ch. 436, Acts of Assembly of 1984, (House Bill 535) to parents whose children are exempted or excused from compulsory school attendance.

Section 22.1-254 of the Code of Virginia sets forth the basic requirement of compulsory school attendance for all children in Virginia between the ages of five and seventeen. See Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982). Compulsory school attendance may be satisfied by a child's attendance at public school, private school or instruction by an approved, qualified tutor. See § 22.1-254. Prior to the passage of Ch. 436, home instruction by an unapproved tutor or teacher would not meet the requirements of the compulsory education statutes. See Grigg v. Commonwealth, supra.

Chapter 436 amends § 22.1-254 to provide an additional means of meeting compulsory school attendance. In general, it permits home instruction of a child by the child's parent, even though the parent is not a certified tutor teacher under prescribed criteria. Children who are taught at home by their parents in accordance with the legislatively mandated conditions will not be in violation of the compulsory school attendance law. See Report of the Joint Subcommittee Studying Home Education, S.Doc. No. 14 (1984).

You specifically ask whether parents having an exemption from school attendance for their children due to religious belief are bound by Ch. 436. Chapter 436 does not prohibit parents from seeking school board excuse of their children from the compulsory school attendance requirements by reason of bona fide religious training or belief, as provided in § 22.1-257(A)(2). Specifically, § 22.1-254.1, a new section added by Ch. 436, provides in part:

"Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-257 of this Code."

The General Assembly, through the enactment of Ch. 436, has determined that approved home instruction is an acceptable equivalent to school attendance for purposes of meeting the compulsory school attendance law in Virginia. Therefore, parents seeking excuse for religious reasons from school attendance must be prepared to show to the school board that school attendance and its statutory equivalents, such as home
instruction, do not accommodate their bona fide religious beliefs. The decision on such requests has been vested in the school board. Thus, in reply to your first question, Ch. 436 does not affect parents whose children may be exempted from school attendance due to religious beliefs.

Your second question is whether parents who have exemption from school attendance for their children due to reasons other than religious are bound by Ch. 436.

Section 22.1-256 lists six acceptable reasons for seeking excusal from compulsory school attendance. Parents whose children properly fall under any of the exemptions set forth in § 22.1-256 are not obligated to provide home instruction in accordance with the provisions of Ch. 436. The legislature has explicitly provided that the provisions of Art. 1, of Ch. 14, Title 22.1 (compulsory attendance) are inapplicable to such exempted or excused children. See § 22.1-256(A). Accordingly, your second question is answered in the negative.

The foregoing, of course, assumes that the child and his or her parents have, in fact, met the criteria for the exemption. Also, I note that the exemptions provided in §§ 22.1-256 and 22.1-257 are not permanent exemptions, but are subject at least to annual scrutiny by the local superintendent of schools. See § 22.1-261. Moreover, some of the exemptions listed in § 22.1-256 are limited in duration by their very nature. (See, for example, § 22.1-256(1) which exempts children while they have a contagious disease.)

Section 22.1-257 provides in pertinent part: "A. A school board: ***

2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school; ***

C. As used in paragraph A.2. of this section, the term 'bona fide religious training or belief' does not include essentially political, sociological or philosophical views or a merely personal moral code." (Emphasis added.)

SCHOOLS. HANDICAPPED. FOSTER CARE. HANDICAPPED CHILDREN RESIDING IN PERMANENT FOSTER CARE HOMES TO BE PROVIDED FREE APPROPRIATE PUBLIC EDUCATION BY SCHOOL DIVISION WHEREIN FOSTER HOME LOCATED.

October 11, 1983

The Honorable A. Victor Thomas
Member, House of Delegates

You ask whether the Roanoke City Department of Social Services or the Roanoke City School Board is responsible for the educational costs of a handicapped child under the following facts: (1) the city school division has available appropriate facilities to meet the child's individualized educational program, as defined in § 22.1-213 of the Code of Virginia; (2) however, the City's Department of Social Services has placed the child in a foster home outside the city for reasons unrelated to the educational needs of the child.

You did not indicate whether the foster care placement was a permanent or temporary foster care placement. A permanent foster care placement is defined as "the place of residence in which a child resides and in which he or she has been placed... with
the expectation and agreement...that the child shall remain in the placement until he or
she reaches the age of majority...." See § 63.1-195. Under a permanent foster care
placement, the foster care parents are acting in loco parentis. See § 63.1-206.1(B).
Thus, for the purposes of § 22.1-3, the school district in which the foster home is located
becomes the school district of residence of the child (assuming the placement is bona
fide; not contrived to attend the schools of that locality). See 1980-1981 Report of the
Attorney General at 306. As the school division of residence, the school division in which
the "permanent" foster home is located is responsible for providing special education and
related services to the child pursuant to § 22.1-215.

If the foster care placement is not under a permanent entrustment arrangement
pursuant to §§ 63.1-56 and 63.1-206.1, the child resides temporarily in the foster home.
(See definition of "foster care" § 63.1-195.) With temporary foster care placements, the
residence of the child for the purposes of § 2.1-215 is in the city where the local agency

The school division wherein the child temporarily resides in foster care also has
some responsibility for the education of the child; it has long been the manifest
legislative intent that the local school division admit the child and provide the services
necessary for an appropriate education. See 1940-1941 Report of the Attorney General
at 150. See also the discussion in the "Report of the Joint Subcommittee Studying the
9. The school division of temporary residence acts as contractor for the services
mandated in the child's individualized education program (I.E.P.). Nonetheless, the
school division of temporary residence does not bear the financial responsibility. See
101 and P.L. 94-142, State and federal funds follow the child to the foster care
jurisdiction. If the costs for providing the special educational services is in excess of
these transfer funds, the school district providing the educational services may request
payment from the jurisdiction of legal residence.

Assuming that the placement situation which gave rise to this inquiry is a
temporary foster care placement outside the city, then the receiving school division
would not be responsible for the excess costs for special education services. Regarding
the determination of whether the Roanoke City Department of Social Services or the
Roanoke City School Board has ultimate financial responsibility, it will depend upon the
interagency agreement between the two agencies. If the agreement is silent, the school
board is not financially responsible if it has available an appropriate education and/or it
has not agreed to the alternative placement. Both P.L. 94-142 and the corresponding
Virginia laws only impose a duty on local school boards to make available to each
handicapped child an appropriate education; they do not require a local school to bear the
costs for placements not mandated by the child's individualized education program
(I.E.P.).

This matter is directly addressed by legislation effective July 1, 1984. See §§ 2.1-
700 et seq. An interagency assistance fund for non-educational placements of
handicapped children will be established. This fund will pay for the educational and
required related services and the living expenses of handicapped children placed by local
social service agencies or the Department of Corrections in public schools located in
other jurisdictions.

SCHOOLS. INCREASE IN SCHOOL BUDGET DOES NOT MODIFY CONTRACT OF
EMPLOYMENT BETWEEN SCHOOL BOARD AND DIVISION SUPERINTENDENT.
You ask two questions pertaining to the contract of employment between a division superintendent and the School Board of the City of Manassas Park. You first ask whether the division superintendent's salary may be increased by simply providing for an increase in the line item of the school budget. You state that the division superintendent has an employment contract setting a level of compensation.

A mere increase in the budget for the school board would not operate to modify an employment contract with the division superintendent until the funds are appropriated and the incorporation of the increase into the contract is agreed to by both the school board and the superintendent. The Constitution of Virginia places the supervision of the schools in each school division within the jurisdiction of the school board. See Art. VIII, § 7 of the Constitution of Virginia (1971). Under § 22.1-67 of the Code of Virginia, a school board may provide for a salary for the division superintendent in excess of the minimum established by the State Board of Education. In so establishing a salary, a school board may condition contracts on an annual school board appropriation. See Reports of the Attorney General: 1980-1981 at 9; 1979-1980 at 308; 1976-1977 at 228. If, as you indicated in your letter, the employment contract provides for a specific annual salary for each year of the contract, the contract by its very terms is not conditioned on the school board appropriations. Under the above described situation, the school board must agree to modify the contract to reflect the increase in salary appropriated for the division superintendent.

You also ask whether the division superintendent may pay himself an "allowance" for the use of a personal car in lieu of having a car provided for his use as specified in his employment contract. I interpret an "allowance" to be a stipulated payment for use of a personal car not related to mileage. I assume from your question that the payment of the allowance is not authorized by the employment contract. Under § 22.1-67, the school board must provide for the necessary traveling expenses of the division superintendent. Other sections of the Code specify the manner in which this obligation is to be met. See §§ 14.1-5 through 14.1-10; 1979-1980 Report of the Attorney General at 299. A superintendent has no authority independently to determine the manner of compensation or to unilaterally modify his contract of employment. Therefore, your question is answered in the negative.

SCHOOLS. LOCAL SCHOOL BOARDS MAY AWARD CREDIT FOR EXPERIMENTAL PROGRAMS ONLY IF CERTIFIED INSTRUCTIONAL STAFF UTILIZED OR IF APPROVAL OBTAINED BY DEPARTMENT OF EDUCATION.

January 23, 1984

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

You ask whether a local school system may offer attendance credit to a student for participating in the "Alternative to Home Suspension Program" (the "Program") while on disciplinary suspension from school and secondly, whether the student's attendance in the Program would comport with § 22.1-254 of the Code of Virginia.

According to the materials accompanying your inquiry, you indicate that the Program would be operated by the Juvenile Justice Resource Unit of the City of
Alexandria and operate during regular school hours. Criteria for admission to the Program would be established by the local school principals, and a complete lesson plan would be prepared for each student.

Local school boards are vested with broad authority to regulate the conduct and discipline of students. See §§ 22.1-78 and 22.1-277; Pleasant v. Commonwealth, 214 Va. 646, 649, 203 S.E.2d 114 (1974). Such authority encompasses establishing programmatic alternatives for students not in regular attendance as a result of disciplinary action. See Reports of the Attorney General: 1982-1983 at 448; 1981-1982 at 144. The broad authority to discipline, however, is not plenary. It may not be construed to empower local school boards to award academic or attendance credit for participation in programs which are otherwise inconsistent with regulations promulgated by the Board of Education. See § 22.1-79.

The Board of Education requires that all school programs to which credit is awarded must utilize certified instructional personnel. See Standards for Accrediting Schools in Virginia (1983), at 10.

If certified instructional personnel are utilized, the Program would meet the requirements for "Alternative Programs" if approval for the Program had been obtained by the Alexandria Public School Board. See Regulations of the Board of Education, "Alternative Education" at 5. Accordingly, credit could be offered for participation in the Program. If certified instructional personnel are not utilized, however, credit can be awarded only if approval for the Program by the Department of Education is obtained. The Board of Education has granted the Department of Education the authority to approve innovative or experimental programs which do not meet the standards for accreditation. See Standards at 7.

In answer to your first question, therefore, I am of the opinion that credit for attendance in the Program may be awarded if either the Program utilizes certified instructional personnel and is approved by the local school board, or if the Department of Education approves the Program as an experimental or innovative program under the Standards for Accrediting Schools in Virginia.

Regarding your second question, pursuant to § 22.1-254, parents are generally required to send their school age child to a public or private school or have their child taught by a qualified teacher. As long as the Program operates as an approved extension of the regular school program through either of the two methods described above, the parents would be in compliance with § 22.1-254. I, therefore, answer your second question in the affirmative.

1Section 22.1-254 is the Commonwealth's compulsory school attendance law.
same school division; (2) whether principals and supervisors having continuing contract status have the same due process rights as teachers with regard to disciplinary probation, suspension or dismissal; and (3) whether principals who do not abrogate their teacher continuing contract status have access to teacher grievance rights as outlined in § 22.1-308 of the Code.

Section 22.1-294, which designates the administrative school personnel entitled to receive continuing contract status, reads in pertinent part:

"A person employed as a principal, assistant principal or supervisor, including a person who has previously achieved continuing contract status as a teacher, shall serve three years in such position in the same school division before acquiring continuing contract status as principal, assistant principal or supervisor."

In answer to your first question, therefore, it is my opinion that, under § 22.1-294, a principal, assistant principal or supervisor has "continuing contract status" in the respective position after serving a three-year probationary period in such position in the same school division.¹

Concerning your second question about the due process procedures to be observed upon placing continuing contract status principals and supervisors on probation, or suspending or dismissing them from their positions, the courts have made it abundantly clear that due process is not a rigid concept. Rather, that process which is due may vary to some degree depending upon the "right" at issue. The procedures set forth in §§ 22.1-306 through 22.1-315 which are applicable to the suspension or dismissal of "teachers" embody the necessary components of due process which must be accorded an employee having a property interest in his or her position. While those statutory procedures do not mention principals or supervisors, the State Board of Education, by regulation, has defined the term "teacher" for grievance procedure purposes to include "all regularly certified professional public school personnel employed under a written contract as provided by § 22.1-302...as a teacher or supervisor of classroom teachers but excluding superintendents." See Bylaws and Regulations of the State Board of Education (1980), Ch. 1, Procedure for Adjusting Grievances, Part II, Definitions. See, also, 1977-1978 Report of the Attorney General at 361.

It is my opinion, therefore, in answer to your second question, that principals and supervisors who meet the State Board's above-described definition of "teacher," have the same grievance procedure rights with regard to disciplinary probation, dismissal or suspension as outlined for teachers in § 22.1-308 of the Code.² These procedures meet the requirements of due process.

In view of the answer to your second question, it is unnecessary to respond to your third question.

¹"Continuing contract status" is not identical to common-law tenure because it is a right established and limited by statute. See 1974-1975 Report of the Attorney General at 376; 1972-1973 Report of the Attorney General at 354. Under § 22.1-294 a school board has the right to reassign a principal to a teaching position, with a reduction in salary, without cause, as long as notice is given to the principal of the reassignment by April 15th. See Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981), concerning § 22-217.3, predecessor to current § 22.1-294.

²Section 22.1-294 provides the process to be utilized in the case of reassignment and salary reduction of principals, assistant principals and supervisors to instructional positions.
The Honorable Madison E. Marye
Member, Senate of Virginia

You ask whether the composition of the Montgomery County School Board violates the "one man-one vote" principle articulated by the Supreme Court of the United States.

Montgomery County operates as a traditional county board form of government with a county administrator pursuant to §§ 15.1-115 through 15.1-130 of the Code of Virginia. All of Montgomery County constitutes a single operating school division; the towns of Christiansburg and Blacksburg, which are geographically within Montgomery County, have no separately operating school divisions.

Montgomery County has seven election districts. The school board has nine members; one for each election district and two "at large" members. The letter enclosed with your request expresses concern that the at-large members are appointed from the two towns.

Section 22.1-44, which I have been advised is the basis for the membership composition of the Montgomery County School Board, provides that the members of the school board are appointed by the governing body of the county. That statute specifically states:

"The school board shall consist of the same number of members from each magisterial or election district as is provided in § 22.1-36. The governing body of the county may appoint no more than two additional members from the county at large." (Emphasis added.)

There is nothing in the foregoing statute which mandates the appointment of the at-large members from the two towns within the county. If the governing body so elects, it can appoint the two at-large members from any of the seven election districts. Such representation does not dilute anyone's vote; hence, does not give rise to the "one man-one vote" protection of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution enunciated by the Supreme Court in Wesberry v. Sanders, 376 U.S. 1 (1964). The Court stated that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7. (Emphasis added.) Subsequent decisions of the Supreme Court have clearly limited the principle to elections. For example, it does not apply to members of a county school board where the members of the board are not chosen by popular election. See Sailors v. Kent Board of Education, 387 U.S. 105 (1967). See, also, 1977-1978 Report of the Attorney General at 358. An "election" is a necessary precondition to the operation of the "one man-one vote" rule. See Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968). It is my opinion, therefore, that the composition of members of the Montgomery County School Board does not violate the "one man-one vote" rule.
The Honorable Douglas G. Campbell  
County Attorney for Tazewell County

You ask what statutory procedures govern the appointment of at-large members to the Tazewell County School Board. As background to your inquiry, you state that Tazewell County has adopted the alternate method of selecting school board members by the local governing body as provided in §§ 22.1-41 et seq. of the Code of Virginia. The county school board currently consists of one member from each of the three magisterial districts. You further state that you have rendered an opinion to the board of supervisors that it may appoint up to two at-large members to the school board for four-year terms and the only procedural requirement is that such appointments be made at a public meeting.

Section 22.1-44 provides that the governing body may appoint "no more than two additional members from the county at large" to serve on the school board. The same statute governs the procedure to be utilized. In pertinent part, it provides:

"Appointments of school board members...shall be made at public meetings. The terms of office of the members of the county school board shall continue to be four years. Vacancies in the office of members of the county school board occurring other than by expiration of term shall be filled by appointment by the governing body for the unexpired terms."

Accordingly, the procedure to be followed in the appointment of at-large members to the Tazewell County School Board is the same procedure as that followed for the appointment of other members to the school board, that is, the appointments must be made by the board of supervisors at public meetings for a term of four years.

SCHOOLS. SCHOOL BOARDS. EMPLOYEES. POLITICAL ACTIVITIES. SCHOOL BOARDS HAVE POWER TO REGULATE EMPLOYEE INVOLVEMENT IN POLITICAL ACTIVITIES.

February 22, 1984

The Honorable Charles G. Flinn  
County Attorney for Arlington County

This is in reply to your request for my opinion whether the Arlington County School Board has the authority to adopt regulations governing employee conduct including the extent of permissible involvement in political activities. In particular, you ask whether the Board may impose certain restrictions on political activity by its employees, including prohibitions against (1) becoming a candidate for public office, (2) becoming actively involved in management of or fund raising for a political party or in a campaign on behalf of a candidate, and (3) engaging in any identifiable political activity while on duty as an employee on school board property or while using school board property as an employee. I understand your inquiry to focus on the power of the school board under Virginia law to adopt personnel regulations and not on the issue of the validity of the regulations themselves.

Prior Opinions of this office consistently held that, under the Constitution and applicable statutes, the power to operate, maintain and supervise the public schools in a school division rests with the local school board and includes the authority to adopt and apply policies which determine the conditions of employment for its employees, not

In a recent Opinion found in the 1982-1983 Report of the Attorney General at 223, I pointed out that employees of a county school system are specifically excluded from the Hatch Political Activity Act by 5 U.S.C.A. § 1502(a)(3).

In a more recent Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated August 31, 1983, I concluded that the Prince William County Board of Supervisors, under the statutes giving it the power to appoint suspend and remove county officers and employees, may determine whether particular employee activities, including certain types of political activity, would interfere with the proper performance of work for the county. Upon the basis of a reasonable determination to that effect, the board could adopt restrictions on such activity and prescribe punishment for violations thereof. Similarly, in this instance, it is my opinion that the school board has the power under Virginia law to adopt employee regulations defining the parameters of permissible employee involvement in political activities. In order to avoid infringing upon constitutionally protected rights of association and speech, the Board will be limited in the scope of its action by the necessity of first finding that the conduct to be prohibited, if engaged in by its employees, would materially interfere with the proper functioning of the schools in its division.

1 You relate that the school board is considering adopting for its employees some or all of the restrictions applicable to county employees and contained in § 6-23 of the Arlington County Code, a photocopy of which you supplied with your letter. I express no opinion on the validity of any of those restrictions. See fn. 5, infra.

2 Article VIII, § 7, of the Constitution of Virginia (1971) provides that "[t]he supervision of schools in each school division shall be vested in a school board...."

3 See, e.g., § 22.1-28 of the Code of Virginia (supervision of schools in each division vested in school board); § 22.1-78 (a school board may adopt bylaws and regulations, not inconsistent with State statutes and Board of Education regulations, for supervision of schools); § 22.1-79 (local school board power and duty to operate and maintain public schools in its division); § 22.1-293 et seq. (terms of employment, grievances, dismissal of teachers and other employees); in particular, see § 22.1-306(1) which states that "[e]ach school board shall have the exclusive right to manage the affairs and operations of the school division" and § 22.1-313(A) which states that "[t]he school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals, suspensions and placing on probation."

4 See §§ 15.1-598, 15.1-599.

5 As indicated above, I do not express any opinion on the issue of the validity of the proposed regulations under the First Amendment of the Constitution of the United States. In this regard, it would be particularly difficult to formulate an opinion in the absence of a developed record concerning the need and justification of the proposed regulations. I do note, however, that restrictions similar to those contained in § 6-23 of the county code have survived constitutional attacks on their facial validity, including allegations of overbreadth and vagueness, particularly since the decisions of Broadrick v. Oklahoma, 413 U.S. 601 (1973) and CSC v. Letter Carriers, 413 U.S. 548 (1973). See, e.g., Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983), cert. denied, 52 U.S.L.W. 3440 (U.S. December 6, 1983) (No. 83-617); Otten v. Schicker, 655 F.2d 142 (8th Cir. 1981); Bruno v. Garsaud, 594 F.2d 1062 (5th Cir. 1979); Perry v. St. Pierre, 518 F.2d 184 (2d Cir. 1975); Smith v. Ehrlich, 430 F.Supp. 818 (D.D.C. 1976); Connealy v. Walsh, 412
SCHOOLS. SCHOOL BOARDS. RELEASE BY SCHOOL BOARD OF FACT-FINDER'S AWARD IN TEACHER GRIEVANCE MAY VIOLATE TEACHER'S RIGHT TO PRIVATE HEARING; VIOLATES NEITHER VIRGINIA FREEDOM OF INFORMATION ACT NOR PRIVACY PROTECTION ACT OF 1976.

September 6, 1983

The Honorable Warren G. Stambaugh
Member, House of Delegates

You ask several questions involving the following fact situation, which I quote from your letter.

"During the early part of this year the Arlington School Board upheld a fact-finder's decision sustaining the grievances of two Arlington teachers. The following morning a reporter requested and was given, by the clerk of the School Board, a copy of the fact-finder's award. The two teachers subsequently filed grievances concerning the release of this document and those grievances were denied."

You have confirmed that the fact-finder's award contained all of the facts and details upon which the award was based. I will answer your questions in the order raised.

"1. Are all or any of the written documents which are a part of the grievance procedure outlined in sections 22.1-306 through 22.1-314 of the Code of Virginia personnel records and/or personal information as defined in the Virginia Freedom of Information Act (§ 2.1-340 et seq.) and the Privacy Protection Act of 1976 (§ 2.1-377 et seq.)?"

The Virginia Freedom of Information Act does not define the term "personnel records." Normally, personnel records include those records maintained by a public agency which identify an employee, his rank or classification, rate of pay, performance and/or job history. The Privacy Protection Act of 1976 defines "personal information" in § 2.1-379(2) as follows:

"all information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual...."

Obviously, not all documents introduced at a grievance hearing would fall into these definitions. Necessarily, your question can be answered only by examining the specific document. Nonetheless, simply because an exhibit is introduced into the hearing does not transform it into a "personnel record" or "personal information."
Your second question reads as follows:

"2. Does either the Virginia Freedom of Information Act or the Privacy Protection Act of 1976, or both, prohibit the disclosure of grievance procedure documents which are either personnel records and/or personal information without the permission of the grievant?"

Your question is answered in the negative. Although personnel records are expressly exempt from mandatory public disclosure under the Virginia Freedom of Information Act (§ 2.1-342(b)(3)), disclosure is permitted if the custodian of the records chooses to disclose them. Moreover, the Privacy Protection Act of 1976 does not prohibit the dissemination of records containing personal information where dissemination is otherwise permitted or required by law. See 1977-1978 Report of the Attorney General at 481. See also, Hinderliter v. Humphries, 224 Va. 439, 297 S.E.2d 684 (1982); Reports of the Attorney General: 1980-1981 at 298; 1978-1979 at 317.

Your third question reads as follows:

"3. If neither the Virginia Freedom of Information Act nor the Privacy Protection Act of 1976 prohibits the disclosure of grievance procedure documents, is such disclosure prohibited either by the provisions of § 22.1-311 requiring that grievance hearings before the school board be private unless the teacher requests a public hearing, or by the provisions of § 22.1-312(C) requiring that a hearing of a fact-finding panel be private if the teacher so requests?"

As you have noted, § 22.1-311 explicitly grants a teacher the specific right to have his or her grievance heard by the school board in private. Further, § 22.1-312(C) grants the teacher a private hearing before the fact-finding panel at the teacher's request. Finally, in cases in which the school board holds a hearing subsequent to the fact-finding panel, the privacy interests are likewise guaranteed. Section 2.1-313(D).

It is an accepted principle of statutory construction that statutes be read in pari materia in order to give full force and effect to each provision. A statute is construed to promote the legislative purpose. See 1980-1981 Report of the Attorney General at 265; Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961). The General Assembly manifestly has established the teacher's right to a private hearing in a grievance situation, and this express right is not overridden by either the Virginia Freedom of Information Act or the Privacy Protection Act of 1976.

Passage of § 22.1-313(E), which became effective on July 1, 1983, further supports this conclusion. Section 22.1-313(E) provides that certain persons who participate in the earlier grievance hearings may not be present during the school board's deliberations on the grievance. However, "immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant" those persons may join the school board in executive session to "assist in the writing of the decision." In view of the express right to a private grievance hearing and the foregoing statutory language clearly limiting what may be disclosed publicly, I am of the view that, absent clear legislative direction to the contrary or consent of the parties, a school board may not publicly disclose its findings of fact with respect to a teacher grievance to the extent such facts were determined on evidence submitted during a privately held grievance hearing. The school board may, however, announce whether its decision was "in favor of or not in favor of" the grievant. As to the documents or exhibits which make up the record of the hearing, every effort should be made to maintain the spirit of privacy intended by the General Assembly in such matters; however, if the exhibits have some existence independent of the grievance hearing, they may be disclosed, in the discretion of the board, unless otherwise prohibited by law.
Your next question reads as follows:

"4. If disclosure of grievance documents is not prohibited by any of the previously cited statutes, may a school board disclose grievance documents in a selective manner by:

A. disclosing documents only in certain cases?
B. disclosing only some documents in a particular case?
C. disclosing some documents in one case and different documents in another case?
D. disclosing the same documents in every case in which it discloses documents, but not disclosing documents in every case?
E. disclosing the same documents and disclosing them in every case?

The answer to question 3 is responsive to this inquiry. Such a determination must be made by examining the specific documents."

In your last question you ask:

"5. If disclosure of grievance documents is not prohibited, what rights, if any, does the grievant have under the Privacy Protection Act of 1976?"

Generally, the Privacy Protection Act grants a data subject the right to examine his file and make corrections or additions thereto. See, e.g., § 2.1-382. In addition, any aggrieved person may institute a proceeding for injunction or mandamus "against any person or agency which has engaged, is engaged, or is about to engage in any acts or practices in violation" of the provisions of the Privacy Protection Act. See § 2.1-386.

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1Section 22.1-311 provides: "The hearing before the school board...shall be private unless the teacher requests a public one...."
2Section 22.1-312(C) provides: "The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the teacher, the hearing shall be private."
3Section 22.1-313(D) provides: "In any case in which a further hearing by a school board is held after a hearing before a fact-finding panel...such hearing shall be conducted as a hearing by the school board as provided in section 2.1-311."
4I assume that the teacher has not waived any claim to privacy by making a partial public disclosure of certain information favorable to the teacher. Such a disclosure might be regarded as a waiver by the teacher of any privacy provided by these statutes.
5Of course, where disclosure is contemplated by law as, for example, when the board must transmit the record to the circuit court for a determination of grievability under § 22.1-314, such disclosure may be properly made.

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SCHOOLS. SCHOOL BOARDS. SCHOOL BOARD IN COUNTY BOARD FORM OF GOVERNMENT MAY BE INCREASED FROM THREE TO SIX MEMBERS; TERMS SET AT FOUR YEARS; NEED NOT COINCIDE WITH TERMS OF PRESENT MEMBERS.

April 17, 1984

The Honorable Randall B. Campbell
County Attorney for Russell County

This is in reply to your request for my opinion concerning appointments to the school board in Russell County, which operates under the county board form of
government as set forth in § 15.1-697 et seq. of the Code of Virginia. You relate that
the school board, from the time of appointment of its first members pursuant to § 15.1-708 in 1974, has had three members. You ask: (1) whether the board of supervisors may expand the school board from three members to six; (2) whether additional members may be appointed prior to the expiration of the terms of the present members; and (3) what the terms of the added members shall be.

Section 15.1-708(b), relating to school board appointments under the county board form of government, provides, in pertinent part, as follows:

"The county school board shall be composed of not less than three nor more than six members chosen by the board of county supervisors. If the members of the county school board first chosen by the board of county supervisors are three or less in number they shall all be appointed for terms of four years, and subsequent appointments shall be for terms of four years each."

A prior Opinion of this Office interpreted § 15.1-708 to authorize the board of supervisors to increase membership on the school board from the number first chosen, provided that total membership does not exceed six. See 1978-1979 Report of the Attorney General at 220. I concur in that interpretation and, accordingly, the first part of your inquiry is answered in the affirmative.

There is nothing in § 15.1-708 which expressly or impliedly requires the terms of additional appointees to the school board to coincide with the terms of members presently serving, and accordingly, the second part of your inquiry is answered in the affirmative.

With regard to the third part of your inquiry, in my opinion the language of the statute sets the terms of subsequent school board appointments, which I take to include appointments to positions added as well as successor appointments to the three positions first established, at four years.

SCHOOLS. SCHOOL BOARDS. TERMS OF AT LARGE MEMBERS OF SCHOOL BOARD APPOINTED PURSUANT TO § 22.1-44 MUST CONFORM TO § 22.1-38; VACANCY IN AT LARGE POSITION MUST BE FILLED FOR UNEXPIRED TERM.

February 6, 1984

The Honorable Anthony P. Giorno
County Attorney for Patrick County

This is in regard to your request for my opinion concerning the terms of office of the at large members of the Patrick County School Board. You relate that the Patrick County Board of Supervisors appoints members of the school board, pursuant to § 22.1-44 of the Code of Virginia, and that until December, 1980, the school board consisted of five members. At that time the supervisors appointed two additional school board members from the county at large. You ask when the terms of those two members expire. You also ask whether the board of supervisors is obligated to fill a vacancy caused by resignation of an at large member before expiration of his term, and what the required time frame is for such an appointment.

Section 22.1-44 reads as follows:

"If, in a referendum held as provided in § 22.1-42, it shall be determined that the members of the county school board shall be appointed by the governing body of the
county, such governing body shall, by majority vote, thereafter appoint all members of the school board and the tie breaker, if any. Members of the school board and the tie breaker in office at the time of the referendum shall complete their terms and their successors shall be appointed by the governing body. The governing body shall determine whether the office of the tie breaker shall continue after the expiration of the term of the incumbent. Appointments of school board members and tie breakers, if any, shall be made at public meetings. The terms of office of the members of the county school board shall continue to be four years. Vacancies in the office of members of the county school board occurring other than by expiration of term shall be filled by appointment by the governing body for the unexpired terms. The term of office of the tie breaker, if any, shall continue to be four years. Any appointment to fill a vacancy in the office of tie breaker, if any, whether or not by expiration of term, shall be for a four-year term.

The school board shall consist of the same number of members from each magisterial or election district as is provided in § 22.1-36. The governing body of the county may appoint no more than two additional members from the county at large. (Emphasis added.)

Although the above quoted section does not state when the terms of office of school board members are to begin and end, prior Opinions of this office hold that school board appointments, including those made by a board of supervisors, should conform as closely as possible with the requirements of what is now § 22.1-38, which provides that the terms begin on July one of a year and expire on June thirty of the fourth year thereafter. An appointment of an at large member to begin his service at any other time during the year other than July one should be for a term of four years, less the interval between July one and the time he actually assumes the office, in order that his term will end on June thirty of the appropriate year and successor appointments will be for terms which fully comply with § 22.1-38. See 1971-1972 Report of the Attorney General at 91, 321, 327, 338, 344, 347, 348, 354 and 355. Consistent with those Opinions, I conclude that the terms of the at large appointees in this instance, having begun in December, 1980, should expire June 30, 1984, and their successors should be appointed by the board of supervisors for terms beginning July 1, 1984 and every four years thereafter.1

With respect to your second question, the emphasized language of § 22.1-44, quoted above, states in mandatory language that the governing body must fill by appointment vacancies in the office of "members of the county school board" for the unexpired terms thereof. No distinction is made between at large members and the other members in this regard. Accordingly, I am of the opinion that the board of supervisors would be obligated to fill a vacancy caused by resignation of an at large member before expiration of his term. The time within which such an appointment must be made is not specified, nor is it governed by any other statute of which I am aware.

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1I do note that the result may be different for counties operating under certain special forms of government, see, e.g., § 15.1-644, and for cities which may have special provisions in their charters.

SCHOOLS. SCHOOL DISTRICTS MUST AFFORD PARENTS METHOD OF PROVING ACTUAL BONA FIDE RESIDENCE FOR PURPOSES OF FREE ADMISSION TO PUBLIC SCHOOLS.
The Honorable Clarence A. Holland  
Member, Senate of Virginia  

You ask several questions regarding the application of §§ 22.1-3 and 22.1-5 of the Code of Virginia to students whose parents own a house in Virginia Beach, pay Virginia income tax, Virginia Beach personal property tax, and hold valid Virginia driver licenses, yet reside in Knotts Island, North Carolina. You also indicate that the parents drive their children daily from Knotts Island to Virginia Beach for the purpose of attending public school. I will answer your questions in the order raised.

1. May the Virginia Beach school district charge tuition for attendance in the public schools?

Section 22.1-3 states that "[t]he 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...living with a natural parent...who actually resides within the school division...." (Emphasis added.) In previous Opinions this office has held that residence for the purposes of free admission to local public schools must be actual and bona fide. See Reports of the Attorney General: 1982-1983 at 431; 1979-1980 at 292; 1976-1977 at 240; 1974-1975 at 378; 1955-1956 at 192.

Section 22.1-3 creates only presumptions of residency. See Report of the Attorney General 1982-1983, supra. Local school divisions must allow parents, who are not afforded a legislative presumption, a method of proving that they are in fact bona fide residents. See Report of the Attorney General 1980-1981 at 107. In certain factual circumstances, residence has been used synonymously with domicile in applying § 22.1-3. See Report of the Attorney General 1972-1973 at 348. Although the facts described in your inquiry might indicate a non-residency status, it is incumbent upon the local school division to allow the parents an opportunity to offer proof of residency and then make a final determination, based upon all pertinent facts.

2. May the Virginia Beach school district deny the children admission to the public schools?

This question can be answered only in relation to the residency status of the children. If the children are determined to be residents, § 22.1-3 mandates that they will be admitted if they are of school age. If the children are determined to be residents of North Carolina, however, the Virginia Beach school district may, nonetheless, at its discretion, admit the children and/or charge tuition if North Carolina law permits Virginia children who reside near the state line to attend the public schools of that state. See § 22.1-5(A)(4).

3. If the children are determined to be non-residents, may Virginia Beach school district seek reimbursement for back tuition?

Section 22.1-5 enables local school divisions, upon approval of the school board, to admit certain non-resident children and, but not necessarily, to charge tuition. The statute is silent as to whether back tuition may be recovered. The facts and circumstances of each case would have to be considered in determining whether a subsequent application of § 22.1-5 should be applied retrospectively. Common law principles generally do not permit the recovery of funds paid under a mistake of law when the facts are known. See Hughes v. Foley, 203 Va. 904, 128 S.E.2d 261 (1962). This, however, presumes the absence of any misrepresentation of fact or tortious conduct.
SCHOOLS. STUDENTS. LOCAL SCHOOL BOARD MAY ENTER INTO AGREEMENT WITH ANOTHER SCHOOL BOARD TO RENT CLASSROOM SPACE AND MAY ASSIGN CHILDREN TO THOSE FACILITIES.

June 5, 1984

The Honorable Robert E. Harris
Member, House of Delegates

You ask whether it is within the legal authority of the School Board of Fairfax County to require its resident school age children to attend schools situated in Fairfax City and owned by that city's school board. You have further inquired whether the parents of these children are entitled to compensatory relief for perceived differences in the quality of educational services being offered to their children in the city schools, as well as for any potential reduction in their property values.

The school boards and the governing bodies of Fairfax City and Fairfax County (hereinafter "City" and "County") have mutually agreed to cooperate in providing a free public education to the school age children in each jurisdiction. Under an agreement entered on August 10, 1978, the County has agreed to administer, control, and operate certain educational programs and public school facilities for the City and has further agreed that, as nearly as possible, the education provided to the City children would incorporate the same general educational standards and pupil-teacher ratio as is provided for County children. The City has agreed to compensate the County on a per pupil basis. The agreement also specifies that each may rent classroom space to the other, as the needs arise, for the placement of children from the other jurisdiction. Pursuant to this agreement, the City has permitted the County to place children from two residential subdivisions located in the County in school facilities owned by the City.

The Constitution of Virginia (1971) vests local school boards with broad, though not exclusive, authority to supervise the public schools. See Art. VIII, § 7 and § 22.1-28 of the Code of Virginia. Additionally, local school boards have been granted the authority by the legislature to "contract with the school board of an adjacent school division for furnishing public school facilities" and the power to own and operate facilities not located within the geographical boundaries of the school division. See §§ 22.1-27 and § 22.1-125(B). Under the authority of these and other sections, two or more school boards may operate joint schools, cooperate in meeting the standards of quality, operate vacation schools and summer camps, and enter into agreements to provide special educational services. See §§ 22.1-7, 22.1-25(c)(6), 22.1-211, and 22.1-218(B). Finally, precedent of the Supreme Court of Virginia recognizes that a local school board has the power to contract with another school system to provide educational services to resident school age children. Emporia City v. Greensville County, 213 Va. 16, 189 S.E.2d 341 (1972).

Under the facts which were here presented, the County children are, in fact, receiving a free education provided directly by the County in space rented by the County. Further, this Office has recognized that a school board may assign children to facilities not under its ownership in order to fulfill the mandate of § 22.1-3. See Reports of the Attorney General: 1973-1974 at 314 and 1958-1959 at 251.1 Accordingly, I answer your first question in the affirmative.

In view of my conclusion that the cooperative assignment of pupils in this case is within the power of the respective governmental bodies, I am of the opinion that affected County residents objecting to such assignment have no valid legal claim for compensatory damages. I, therefore, answer your second question in the negative.
Section 22.1-3 does not alter the foregoing. In pertinent part, it provides: "The public schools in each school division shall be free to each person of school age who resides within the school division...." This section has been construed as a grant of a free public education to school age residents of a school division. See, e.g., Reports of the Attorney General: 1980-1981 at 107, 1979-1980 at 292 and 1974-1975 at 378.

SCHOOLS. SUPERINTENDENT OF PUBLIC INSTRUCTION MAY INQUIRE INTO RACIAL AND ETHNIC BACKGROUNDS IN CONDUCTING TRIENNIAL SCHOOL CENSUS.

December 28, 1983

The Honorable Mary A. Marshall
Member, House of Delegates

You ask whether the Superintendent of Public Instruction for the Commonwealth of Virginia (the "Superintendent") may require local school divisions to collect and report racial and ethnic data as part of the official triennial school census. Your inquiry is concerned with the privacy rights of residents of the Commonwealth.

I am unaware of any provision of law which limits discretion of the Superintendent in determining the type of information relating to the interests of education which must be collected in the triennial census. See §§ 22.1-283 and 22.1-284. The Privacy Protection Act, § 2.1-377 et seq. of the Code of Virginia, permits public agencies to "[collect, maintain, use, and disseminate only that personal information permitted or required by law...or necessary to accomplish a proper purpose of the agency." Section 2.1-380(1). The Act states that an agency "should not collect personal information except as explicitly or implicitly authorized by law," and as "appropriate and relevant to the purpose for which it has been collected." Sections 2.1-378(B)(10) and 2.1-378(B)(3).

The General Assembly has explicitly granted general authority to the Superintendent to gather information in a triennial census "relating to the interests of education" and "other information required or deemed necessary...." Sections 22.1-283 and 22.1-284. In correspondence which you provided, the Superintendent has stated that racial and ethnic data is necessary in order to have complete demographic information available for the entire school age population. Racial and ethnic statistics are needed for reporting comparisons to the United States Office of Civil Rights and for federal audit reviews of programs funded by the United States Department of Education. Insofar as the General Assembly has granted the Department of Education the discretion to determine the data to be compiled in the interests of education, I am without basis to dispute the Department's articulated need for the data.

The Privacy Protection Act regulates the maintenance and dissemination of such information in the interest of protecting a person's privacy. The Act applies to personal information collected by a local school division. See Reports of the Attorney Generals: 1980-1981 at 299; 1978-1979 at 317; 1977-1978 at 310; and 1976-1977 at 317. "Personal information" is defined as "all information that describes, locates or indexes anything about an individual including...his education, financial transactions, medical history, ancestry, religion, political ideology...or that affords a basis for inferring personal characteristics...." If the census data are maintained as personally identifiable information, the local school divisions must administer the information system in the manner provided in § 2.1-380.1 The Act also provides data subjects with certain rights, among them the right to be informed that the requested information need not be given as
well as notice of possible dissemination by the agency. See § 2.1-382. Significantly, § 2.1-382 provides the data subject with the means for assuring the accuracy of the information.

Accordingly, your question is answered in the affirmative.

1 The requirements for the administration of an information system by a public agency are spelled out in § 2.1-380. Specific procedures for the collection, maintenance and dissemination are provided.

SECURITY FOR PUBLIC DEPOSITS ACT. PUBLIC FUNDS. VIRGINIA SECURITY FOR PUBLIC DEPOSITS ACT DOES NOT APPLY TO FEDERALLY-CHARTERED SAVINGS AND LOAN ASSOCIATIONS.

December 16, 1983

The Honorable Esther F. Cousins
Treasurer for the City of Colonial Heights

You have asked whether the Virginia Security for Public Deposits Act, § 2.1-359 et seq. of the Code of Virginia, permits a city to invest in securities of federally-chartered savings and loan associations if collateral is pledged through a Federal Reserve Bank. You have indicated by subsequent communication that the city wishes to invest in Certificates of Deposit of such savings and loan associations.¹

I would first note that the Virginia Security for Public Deposits Act (the "Act") does not apply to the deposit of public funds in savings and loan associations. The Act regulates the security of public deposits by requiring a "qualified public depository" to furnish collateral for the deposit of public funds of at least fifty percent of the amount deposited.² See § 2.1-382. Section 2.1-360(b) defines "qualified public depository" as "any national banking association located in Virginia and any bank or trust company organized under Virginia law that receives or holds public deposits which are secured pursuant to this chapter." A savings and loan association is not a bank or a trust company and thus, would not qualify for the treatment accorded by this chapter.

On the other hand, deposit of public funds in federally chartered savings and loans may be permitted by § 2.1-329, if such associations are located in Virginia. Section 2.1-329 permits deposit of public funds in interest-bearing time deposits and certificates of deposit of "savings and loan associations which are under Commonwealth supervision, and of federal associations located in this Commonwealth and organized under the laws of the United States and under federal supervision."³ (Emphasis added.) This section further provides that "[s]uch deposits shall not exceed the amount insured by the Federal Savings and Loan Insurance Corporation...unless such deposits in excess of the amount insured shall be fully collateralized by eligible collateral as defined in § 2.1-360(e)..."⁴ (Emphasis added.) Unlike deposits under the Act, time deposits in a savings and loan association are limited by § 2.1-329 to a period not to exceed one year.

Section 2.1-360(e) defines "eligible collateral" as "securities of the character authorized as legal investments under the laws of this Commonwealth for public sinking funds or other public funds and securities acceptable under United States Treasury Department regulations as collateral for the security of treasury tax and loan accounts." These legal investments are set out in §§ 2.1-327 and 2.1-328 and other sections throughout the Code.
Although § 2.1-360(e) is part of the Act, only its definition of "eligible collateral" is incorporated into the provisions relating to savings and loan associations under § 2.1-329. Because the remainder of the Act does not apply to deposits with savings and loan associations, the provisions of § 2.1-362 which restrict the choice of institutions with which collateral may be deposited to the State Treasurer, the Federal Reserve Bank of Richmond or other bank or trust companies are inapplicable. Section 2.1-329 provides that the collateral required for the deposit of public funds in a federal savings and loan "be held in escrow by a third party designated by the depositor."

Therefore, in my opinion, the city may deposit city funds in certificates of deposit of a federally-chartered savings and loan association located in the Commonwealth, so long as any deposit in excess of the federally-insured amount is fully collateralized and the collateral held in escrow, as provided in § 2.1-329.

1 Section 2.1-329 states that the deposit of public funds in "interest-bearing time deposits and certificates of deposit" of savings and loan associations "shall not be considered investment of such funds for the purposes of [Ch. 18, Title 2.1, Investment of Public Funds]." (Emphasis added.) Therefore, this Opinion will use the term "deposit" as opposed to "invest."

2 See § 2.1-360(f) for definition of "required collateral."

3 See 1974-1975 Report of the Attorney General at 535, it was noted that there was no authority for a city to deposit funds in banking institutions located outside of the Commonwealth "except to the limited extent provided by § 2.1-329 for insured deposits in federal savings and loan associations." That statement has been superseded by the 1978 amendment to § 2.1-329 which added the requirement that authorized federal associations be "located in this State" (a 1982 amendment changed "State" to "Commonwealth").

4 This section further provides that collateralization may be provided "by Government National Mortgage Association Pass-through Certificates, by Federal National Mortgage Association Guaranteed Pass-through Certificates, by Federal Home Loan Mortgage Corporation Participation Certificates, by negotiable notes directly secured by a first lien on real estate located in this Commonwealth, the value of such notes not to exceed eighty percent of the fair market value of the real estate securing them, or by any combination of the foregoing types of collateral which collateral shall be held in escrow by a third party designated by the depositor."

SHERIFFS. DEPUTIES. DISCRETION TO APPOINT, REAPPOINT, REMOVE OR NOT REAPPOINT DEPUTIES.

October 26, 1983

The Honorable H. E. McKnight
Sheriff for Grayson County

This is in reply to your request for my opinion whether you are obligated to rehire the same deputies you presently employ if you are re-elected for a third term as Sheriff of Grayson County.

Section 15.1-48 of the Code of Virginia provides, in pertinent part, as follows:

"The sheriff of any county or city...may at the time he qualifies as provided in § 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office...."
Any such deputy may be removed from office by his principal."

Prior Opinions of this Office consistently have held that, pursuant to the above-quoted statute and absent other statutory authority to the contrary, a sheriff has the sole responsibility for personnel actions in his office, including the appointment and removal of deputies. See, e.g., Reports of the Attorney General: 1976-1977 at 250; 1974-1975 at 408. See, also, 1982-1983 Report of the Attorney General at 466. Moreover, in past constitutional challenges to a sheriff's discharge of his deputies based upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution, federal courts in Virginia have held that deputy sheriffs appointed pursuant to § 15.1-48 serve at the will of their sheriffs, are subject to discharge at any time, and that they therefore have no property interest in their positions which would entitle them to any due process rights as a result of state law. See Hutto v. Waters, 552 F.Supp. 266 (E.D. Va. 1982); Sherman v. Richmond, 543 F.Supp. 447 (E.D. Va. 1982); Hopkins v. Dolinger, 453 F.Supp. 59 (W.D. Va. 1978).

The United States Supreme Court has held that under First Amendment protection of the freedoms of speech and assembly, a public employee may not be discharged from a job that he is performing satisfactorily on the sole ground of his political beliefs or political party affiliation, unless it can be demonstrated that such affiliation is an appropriate requirement for the effective performance of the public office involved. See Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). The law in this area is still developing, and I cannot say with certainty that the principle would or would not apply to your removal of, or failure to reappoint, any of your present deputies. The United States Court of Appeals for the Fourth Circuit has held that "the Elrod-Branti principle must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissals," and that the issue of whether a particular personnel action violates any protected rights is one to be decided on the specific facts of each case. See DeLong v. United States, 621 F.2d 618 (4th Cir. 1980).

In addition to the above potential constitutional constraints on your contemplated personnel actions, federal laws prohibiting employment discrimination on the bases of race, color, religion, national origin, sex, age or handicapped status may well apply, depending upon the circumstances of your office and the individuals involved.

In summary, while you have exclusive statutory discretion to appoint, reappoint, remove or not reappoint any of your deputies pursuant to § 15.1-48, under the Constitution and federal laws the motivating reason for any of those personnel actions in a particular case, and the manner in which it is carried out, are important. A deputy may generally be removed for good cause, such as insubordination or unsatisfactory job performance when those bases in fact exist, but a removal based upon any of the other motives discussed above could provide the ground for a lawsuit against you.

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1 The Fourteenth Amendment provides, in pertinent part, as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

2 See Ramey v. Harber, 431 F.Sup. 657 (W.D. Va. 1977), aff'd in part, rev'd in part, 589 F.2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979). In that case the United States District Court held that the fact that Lee County deputy sheriffs had no right pursuant to § 15.1-48 to expect reappointment when the new sheriff took office did not preclude a First Amendment action based upon the sheriff's refusal to consider them for reappointment for patronage reasons. The court stated that the reason for dismissal or failure to reappoint presents the crucial question in each case. See 431 F.Sup. at 663. The court found on the evidence that the old deputies were refused consideration for
reappointment solely because of their political beliefs and affiliations and that Elrod applied. Id. at 667 and at 870.

The Fourth Circuit Court of Appeals reversed the District Court as to the retroactive applicability of Elrod, but also stated that "there is a considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices" and that the factual distinctions between the situation in Elrod and that at the Lee County Sheriff's Office raise a question as to the applicability of Elrod. Ramey v. Harber, 589 F.2d at 757; accord, Ramey v. Harber, 589 F.2d at 761 (Hall, J., concurring) (the facts in the Lee County Sheriff's Office case "are completely dissimilar to those in Elrod, and mandate the conclusion that Sheriff Harber was not constitutionally constrained to re-hire the deputies whose terms had expired").

The Fifth Circuit Court of Appeals, in McBee v. Jim Hogg County, Tex., 703 F.2d 834 (5th Cir. 1983), comments upon the Fourth Circuit's discussion of this issue in Ramey as follows: "Although the authority of Ramey may be somewhat weakened since its primary holding was that Elrod did not apply retroactively to the nonreappointments in question, the court's reasoning is persuasive authority for the proposition that the need for loyalty, trust and confidence may be such as to implicate the Elrod-Branti exception in the small county sheriff's office where only a limited number of positions are available to the sheriff who has exclusive power to hire and dismiss his staff." 703 F.2d at 841.

SHERIFFS. DEPUTIES. WORKERS' COMPENSATION ACT. PRESUMPTION AS TO DEATH OR DISABILITY FROM HYPERTENSION OR HEART DISEASE APPLIES ONLY TO DEPUTY SHERIFFS WHO MEET BOARD OF CORRECTIONS TRAINING STANDARDS AND SERVE IN AUTHORIZED DEPUTY POSITIONS.

February 13, 1984

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

This is in reply to your request for my opinion concerning § 65.1-47.1 of the Code of Virginia. That section establishes a rebuttable presumption in law that disability of a sheriff or of a deputy sheriff as a result of hypertension or heart disease resulted from an occupational disease suffered in the line of duty. You inquire whether this presumption applies to treatment personnel, such as classification officers, whose positions are funded by block grant from the State through the Department of Corrections, and to civil process servers whose positions are funded by the State through the State Compensation Board. You also ask whether § 65.1-47.1 would apply to persons serving in the above positions, and to persons serving in secretarial positions, in the event the sheriff should deputize them.

Section 65.1-47.1 provides in pertinent part as follows:

"The death of, or any condition or impairment of health of...salaried or volunteer fire fighters, or of any member of the State Police Officers Retirement System, or any member of a county, city or town police department, or of a sheriff, or of a deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, caused by hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this Act unless the contrary be shown by a preponderance of competent evidence." (Emphasis added.)

This section is a part of the Virginia Workers' Compensation Act (the "Act") and therefore is remedial in nature and must be given a liberal construction so that its provisions are applied comprehensively and given full effect. County of Amherst v.
Section 15.1-48 provides that a sheriff may appoint "one or more deputies, who may discharge any of the official duties of their principal during his continuance in office."2 The authority given in § 15.1-48 is limited by § 14.1-70, which provides that the number of deputies a sheriff may appoint shall be fixed by the State Compensation Board, except that the governing body of any county or city may employ and pay for a greater number of law enforcement deputies than that fixed by the Compensation Board. Moreover, to be properly classified as a deputy, a person must meet the compulsory minimum training standards established by the Department of Corrections, pursuant to § 9-170, unless he is otherwise exempt therefrom. See § 14.1-73.2 and §§ 9-169, 9-173, 9-179, 9-180, 9-181. I am advised that the Department of Corrections, acting pursuant to paragraphs 2, 5 and 6 of § 9-170, has established alternative minimum training standards for deputy sheriffs whose primary work activity is (a) law enforcement, (b) courthouse and courtroom security, or (c) as a jailer or custodial officer, and that the State Compensation Board classifies as deputy positions those allotted to any of these three functions. Taking all of the above into consideration, I am of the opinion that a person is a deputy sheriff for purposes of the presumption contained in § 65.1-47.1 if he is in a position authorized by the State Compensation Board and classified by the Board as that of a deputy, or in a law enforcement deputy position authorized and funded by city council, and he otherwise has qualified as a deputy in all respects.4 Any person in your office who has not properly qualified as a deputy and is not serving in an authorized deputy's position would not be subject to the presumption in the statute. This conclusion also requires a negative answer to your remaining question, that is, deputization of a person in the absence of an authorized position and the person having properly qualified as a deputy, would be insufficient to invoke the presumption in § 65.1-47 for that person.5

1Note that the statute refers specifically to a deputy sheriff.

2Deputies of a constitutional officer appointed pursuant to § 15.1-48 must possess the same qualifications as their principal and are considered to be public officers, as distinguished from employees. See Reports of the Attorney General: 1978-1979 at 114, 115; 1975-1976 at 50; 1974-1975 at 384; 1970-1971 at 349.

3Note that § 14.1-70 was amended in 1979 to allow a sheriff to appoint as additional deputies such treatment and rehabilitation employees "as are authorized and approved by the State Board of Corrections pursuant to § 53-184 without approval by the State Compensation Board." See Ch. 660, Acts of Assembly of 1979. Section 53-184 since has been repealed by Ch. 636, Acts of Assembly of 1982.

4In addition to meeting, or being properly exempted from, the minimum training standards, he must be appointed pursuant to § 15.1-48, take the oath prescribed in § 49-1, fulfill the requirements of Art. II, § 5 of the Constitution of Virginia (1971), and fulfill the residency requirements of § 15.1-51, as may be applicable. See, e.g., 1974-1975 Report of the Attorney General at 410.

5Note that § 65.1-47.1 does not distinguish among classes of deputies and its presumption would apply to any person who is properly classified as a "deputy." Compare Brockman, supra at 396 ("Code § 65.1-47.1 refers to the 'death of, or any condition or impairment of health of...any member of a county...police department.' (Emphasis added.) The statute thus contains language of general application, which indicates that its provisions should be applied comprehensively.)

* * *
"[T]he statute does not contain any language restricting its application"; 1976-1977 Report of the Attorney General at 259 (deputies who are primarily correctional officers come within the provisions of § 15.1-134, which establishes the same presumption as that in § 65.1-47.1, because the statute makes no distinction between correctional and law enforcement deputies).

Compare 1978-1979 Report of the Attorney General at 188 (school crossing guards, deputized for traffic control, do not qualify as deputy sheriffs within the meaning of § 65.1-47.1); 1976-1977 Report of the Attorney General at 261 (employees who are not deputies authorized by the State Compensation Board and not required by the State Board of Corrections to be deputized are not among the deputies covered by § 65.1-47.1).

SHERIFFS. RESPONSIBLE FOR COLLECTING § 14.1-105 FEES IF SERVICE PERFORMED.

August 4, 1983

The Honorable Ellis D. Meredith
Treasurer for the County of Montgomery

You have asked who is responsible for the collection of fees for service of process and other services as set out in § 14.1-105 of the Code of Virginia. Your question was prompted by the deletion of the reference to sheriffs and criers in the statute by Ch. 407, Acts of Assembly of 1983.

Before the 1983 amendment, § 14.1-105 began: "The fees of sheriffs and criers shall be as follows...." Section 14.1-105 now begins: "The fees shall be as follows...."

The deletion of the reference to sheriffs and criers in the fee schedule cannot be viewed as an attempt to change the present practice of sheriffs collecting the fees for their services. When the fee system as a method of compensating sheriffs was abolished in 1942, the legislature included a provision making it clear that sheriffs would continue to be responsible for collecting fees even though their compensation was no longer based on collections. See § 3487(1), 1942 Code of Virginia. That provision, slightly changed, has been recodified as § 14.1-69 and still requires that "[e]very sheriff...shall, however, continue to collect all fees...provided by law for the services of such officer...."

Sheriffs generally perform the services listed in §§ 14.1-105(1) through 14.1-105(9), for which the fees therein are allowed for services performed by such officers in the circuit courts.

Based on the foregoing, it is my opinion that § 14.1-69 requires sheriffs to collect the fees listed in §§ 14.1-105(1) through 14.1-105(9) for the services performed by them in the circuit courts.

SHERIFFS. SECTION 14.1-105 PRESCRIBES DIFFERING FEES FOR SUMMONING PARTIES AND WITNESSES IN ATTACHMENT PROCEEDING, AS WELL AS SEPARATE FEE FOR LEVYING IN SUCH PROCEEDING.

May 25, 1984

The Honorable Rhea F. Moore, Jr., Clerk
Circuit Court of the County of Tazewell
You have inquired as to the proper interpretation of subsections (1), (2) and (8) of § 14.1-105 of the Code of Virginia regarding fees for service of process.

Subsection (1) specifies the general rule regarding process and service fees in circuit courts. It provides a fee of five dollars for "service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided...." (Emphasis added.) Subsection (2) is an exception to the previous subsection and specifies a fee of two dollars for "summoning a witness or garnishee on an attachment...." See 1969-1970 Report of the Attorney General at 46.

You advise that some sheriffs charge five dollars for summoning any witness and others charge two dollars. The fee depends upon the type of action for which the witness is summoned. In a matter which is not an attachment proceeding, the general rule of subsection (1) would apply, and the fee would be five dollars. I am also of the opinion that subsection (1) would apply in an attachment proceeding when a defendant other than the garnishee is summoned.

You have also suggested there is a variance in the fees in garnishment matters by combining subsections (2) and (8). Subsection (2) mandates, as noted above, a fee for two dollars for summoning a witness or garnishee (co-defendant) in an attachment proceeding. Subsection (8) requires a separate fee of four dollars when the sheriff actually levies upon the property of the principal defendant pursuant to § 8.01-550.

The facts of a particular attachment proceeding may require not only the levy on the property for which a fee of four dollars is applicable, but also the summoning of a co-defendant and/or a witness, for which two dollars is the applicable fee. The sheriff is entitled to the fee applicable to the service he renders.

SHERIFFS. SERVICE OF FEDERAL PROCESS. NO DUTY TO SERVE FEDERAL PROCESS.

October 24, 1983

The Honorable Louis E. Barber
Sheriff for Montgomery County

This is in response to your request for an opinion whether a sheriff is required to serve federal process, and, if so, the fee to be charged for such service. Because I am of the view that the duties of a sheriff do not include service of federal process, a discussion as to fees is not necessary.

Pursuant to Article VII, Section 4, of the Constitution of Virginia (1971), and § 15.1-40.1 of the Code of Virginia the sheriff of each county and city has such duties as shall be prescribed by general law or special acts. Those duties, including service of process, were discussed in an earlier Opinion found in 1973-1974 Report of the Attorney General at 323.

A thorough examination of the Code does not reveal any duty upon a Virginia sheriff to serve federal process. Indeed, the sections in which fees are prescribed for various services rendered by the sheriffs expressly limit themselves to State court. See, e.g., §§ 14.1-105, 14.1-111 and 14.1-125. Accordingly, absent any statutory general law or special acts, I am of the opinion that the duties of a sheriff do not include service of federal process.
SHERIFFS. SERVICE OF NOTICES OF OVERDRAFTS PERMITTED AND FEE MAY BE CHARGED. SERVICE OF NOTICES NOT TO TRESPASS AND NOTICES TO PAY OR QUIT PERMITTED. FEE MAY NOT BE CHARGED.

March 1, 1984

The Honorable James W. Rogers
Sheriff for Henry County

You have asked whether sheriffs are required or authorized by law to serve notices of overdrafts, notices not to trespass and notices to pay or quit.

In an Opinion to the Honorable Lynn C. Armentrout, dated September 8, 1983, I addressed this issue. In that Opinion, I held that § 55-248.31:1 specifically authorized sheriffs to serve pay or quit notices and to charge a fee of $2.00 for each such notice served. I also concluded that no statute specifically required sheriffs to serve notices of overdrafts, and further, because no statute authorizes the payment of fees to the sheriff for service of notices of overdraft and not to trespass, sheriffs could not collect a fee for such services. Section 18.2-119 is the statute dealing with notices not to trespass. This section states that a person will be guilty of trespass if he goes upon another's property without permission after having been forbidden to do so "either orally or in writing." The statute is silent as to the manner in which the written or oral notice should be given to the trespasser. Notice, however, must be given before a prosecution for trespass may be commenced.

Similarly, § 18.2-183, the statute dealing with notices of overdraft, allows the maker of a bad check to avoid prosecution for fraud if he pays the holder of the bad check within five days of receiving notice that the check has been dishonored. This section recites that notice mailed by certified or registered mail will be deemed to be sufficient and equivalent to notice actually delivered to the maker of the bad check. The section, however, does not indicate who may or must serve notice.

This is the same situation addressed in the prior Opinion found in the 1978-1979 Report of the Attorney General at 239, relating to service of a notice to pay or quit (prior to the enactment of § 55-248.31:1). The answer to whether the sheriff was required to serve such notices was said to turn on whether the definition of "process" in § 8.01-285 includes "notice." The Attorney General at that time relied on prior Opinions of this Office to conclude that such notices are tantamount to process, and must be served by the sheriff when requested. See Reports of the Attorney General: 1959-1960 at 327; 1942-1943 at 231. It is noteworthy that courts have historically held that a sheriff is not relieved of duty to serve notice simply because no statute requires the court to issue it. See Leas v. McVitty, 132 F. 510 (C.C.W.D. Va., 1904).

Based on the foregoing, I am of the opinion that it is the duty of sheriffs to serve notices not to trespass and notices of overdrafts. These notices are intimately connected with court proceedings and must be served before actions may be commenced. As previously stated, however, in the absence of statutory authority, sheriffs may not receive fees for serving these notices.

1Prior to the enactment of § 55-248.31:1 in 1981, there was no provision in the statutory law for serving pay or quit notices, or charging a fee for such service. See 1978-1979 Report of the Attorney General at 239.
1983-1984 REPORT OF THE ATTORNEY GENERAL

SHERIFFS. SERVICE OF PROCESS. MAY NOT ENTER FACTORY WITHOUT CONSENT TO SERVE CIVIL PROCESS.

May 23, 1984

The Honorable George W. Bailey, Sheriff
County of Albemarle

This is in response to your request for an opinion whether a Virginia sheriff may enter a factory to serve a civil warrant on an employee over objection of the management.

In my opinion, specific statutory authority would be required to authorize an officer to enter the premises of a third party without permission to serve civil process. Neither § 8.01-296 of the Code of Virginia, governing service of process on natural persons, nor any other Virginia statute, grants such authority.

This view is in accord with a prior Opinion of this Office found in the 1955-1956 Report of the Attorney General at 26.

It is noteworthy that the General Assembly has expressly authorized the service of a summons for a witness or juror at his or her usual place of business during business hours. Section 8.01-298 reads in part:

"In addition to the manner of service on natural persons prescribed in § 8.01-296, a summons for a witness or for a juror may be served:

1. At his or her usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment...."

Until such time as the General Assembly grants such authority, I am of the opinion that a sheriff may not enter a factory over the objection of the management for the purpose of serving an employee with a civil warrant.

SHERIFFS. SERVICE OF PROCESS. NO DUTY TO SERVE PROCESS OF OUT-OF-STATE COURTS.

April 3, 1984

The Honorable Darrel McMurray
Sheriff for Scott County

This is in response to your request for an opinion whether a Virginia sheriff is required to serve process issued by a Tennessee court, and, if so, the fee to be charged for such service. Because I am of the view that the duties of a sheriff do not include service of out-of-state process, a discussion as to fees is not necessary.

Pursuant to Art. VII, § 4 of the Constitution of Virginia and § 15.1-40.1 of the Code of Virginia, the sheriff of each county and city has such duties as shall be prescribed by general law or special acts. Those duties, including service of process, were discussed in an Opinion found in the 1973-1974 Report of the Attorney General at 323.
An examination of the Code does not reveal any duty upon a Virginia sheriff to serve out-of-state process. Indeed, it is apparent that the Code contemplates that sheriffs shall serve only Virginia process. See, e.g., §§ 14.1-105, 14.1-111 and 14.1-125. Accordingly, absent any statutory general law or special acts, I am of the opinion that the duties of a sheriff do not include service of out-of-state process.

1I enclose a copy of my Opinion to the Honorable Louis E. Barber, Sheriff of Montgomery County, dated October 24, 1983 which held that a Virginia sheriff is not required to serve federal process.

SOCIAL SERVICES. COMMUNITY WORK EXPERIENCE COMPONENT OF EMPLOYMENT OPPORTUNITIES PROGRAM NOT OPERATED IF SUFFICIENT FEDERAL OR STATE FUNDS NOT AVAILABLE. REQUIREMENT FOR LOCAL PARTICIPATION IN COST OF SOCIAL SERVICES NOT AFFECTED.

August 1, 1983

The Honorable A. Willard Lester
County Attorney for Wythe County

You have asked for my opinion concerning the State statute which requires every local department of welfare/social services to establish a program of employment opportunities. See § 63.1-133.12:1 of the Code of Virginia. Specifically, the question is whether the Virginia Department of Social Services (the "Department") may require a local department to fund ten percent of the costs of purchased social services, such as day care and transportation, which are intended to be supportive social services activities to the actual program of employment opportunities.

I am advised that the Department has interpreted § 63.1-133.12:1 so that, on July 1, 1982 (its effective date), the Department assumed the responsibility of providing direct employment-related services to eligible individuals. The provision of such services had previously been the responsibility of the Virginia Employment Commission from 1968, when it initiated the Work Incentive Program ("WIN"), until July 1, 1982, the effective date of § 63.1-133.12:1. The Department has indicated that the direct employment-related services would include services such as job development, job counseling, job placement, etc. These are the same types of direct employment-related services that had previously been provided by the Virginia Employment Commission for the WIN program. The Department is funding one hundred percent of the costs of those direct employment-related services with State and federal funds. Finally, I am advised that the Department has required local agencies to provide supportive social services, such as transportation and day care services, to eligible individuals, and has required the local agencies to provide ten percent of the costs for such services. This ten percent funding requirement was required of local agencies participating in the WIN program for the same type of supportive social services since 1968 when that program became operational. It is the position of the Department that the requirement for local agencies to provide and pay ten percent of the costs of these supportive social services is a continuation of the same responsibility the local agencies had when the WIN program was operational and was not intended to be covered or changed by the enactment of § 63.1-133.12:1. The question you have asked thus raises the query of whether the ten percent requirement is mandated by § 63.1-133.12:1.
Section 63.1-133.12:1 initially provides, in part, as follows:

"Subject to availability of either state or federal funds or both, every local department of public welfare or social services shall establish and operate no later than January 1, 1983, a program of employment opportunities to include a work experience program component." (Emphasis added.)

This provision clearly requires that a local department establish and operate a program of employment opportunities when State or federal funds are available and to include a work experience component in the program.

The last sentence of § 63.1-133.12:1 provides as follows:

"Where state or federal funds are not available in sufficient amounts, the local governing body may appropriate such funds as may be necessary to operate the program." (Emphasis added.)

While this sentence could be read to give local agencies the option of operating the entire program of employment opportunities if sufficient federal or State funds are not available to meet all costs for direct employment-related services and for supportive social services, a statute's meaning should not be derived from single words isolated from the true purpose of the statute. Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953). Furthermore, the construction of a statute by a State official charged with the administration is entitled to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); Dept. Taxation v. Prog. Com. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975). The Department's construction of § 63.1-133.12:1 under which it is only applicable to direct employment-related services appears to be reasonable in light of the fact that the same separation of job activity requirements and funding requirements has been in place and made applicable to local agencies since 1968. Furthermore, no question was raised concerning this distinction prior to the implementation of § 63.1-133.12:1. County of Henrico v. Mgt. Rec., Inc., 221 Va. 1004, 1011, 277 S.E.2d 163, 167 (1981).

The term "sufficient" means "[a]dequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object." Black's Law Dictionary 1285 (5th ed. 1979). See, also, International Ass'n, Etc. v. City of San Diego, 178 Cal. Rptr. 250, 125 C.A.3d 605 (1982). Applying the above-referenced definition to the last sentence of § 63.1-133.12:1, it would appear that the Department must provide federal or State funds sufficient enough to cover all costs for direct employment-related services or else the local agencies would have the option of operating the programs.

I am, therefore, of the opinion that the requirement of sufficient funding found in the last sentence of § 63.1-133.12:1 is intended to apply to those direct employment-related activities assumed by the Department from the Virginia Employment Commission when § 63.1-133.12:1 became effective. The section neither mandates nor alters the Department's policy to require a locality to fund ten percent of the supportive social services activities.

1Although your question is whether Wythe County may be mandated to fund ten percent of the total cost of operating the program of employment opportunities required by § 63.1-133.12:1, I am advised that the Department has, in fact, only required the local agencies to fund ten percent of the costs of purchased social services such as day care and transportation. These are supportive social services activities for the program of
employment opportunities traditionally supplied by the Department and local agencies. See Department of Social Services Information Bulletin (82-172), dated October 29, 1982.

SOCIAL SERVICES. LICENSURE AS HOME FOR ADULTS REQUIRED OF FACILITY CARING FOR SEVERELY PHYSICALLY HANDICAPPED ADULTS.

July 6, 1983

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

You have asked for my opinion concerning whether a facility caring for severely physically handicapped adults may avoid licensure as a home for adults, pursuant to § 63.1-172 et seq. of the Code of Virginia, by asserting that it is a boarding school. You have also asked whether the facility may avoid licensure as a home for adults by asserting that it is exempt from the general certification requirement by the State Board of Education for private trade, technical, business and correspondence schools and schools for the handicapped pursuant to §§ 22.1-323, based on the exemption found at § 22.1-320(8).

Your letter indicates that the facility in question previously had five residential consumers and ten day-care consumers. All of the consumers were severely physically handicapped adults who were confined to wheelchairs because of the severity of their handicaps. The age scope of the consumers ranged from eighteen years through middle age. The programming at the facility did include some educational and therapeutic components for the consumers, but you have stated that your licensure standards for homes for adults are not directed at or concerned with a facility's activities in educational programming. Your question, therefore, is whether such a facility may avoid licensure as a home for adults by claiming to be a boarding school or by stating that it is exempt from the certification required by § 22.1-323, based on the exemption provided by § 22.1-320(8).1

Section 63.1-175 requires a license issued by the Director [of Public Welfare] as a condition of operating a home for adults. Sections 63.1-172(A) and 63.1-172(B) define a home for adults as follows:

"A. 'Home for adults' means any place, establishment, or institution, public or private, including any day-care center for adults, operated or maintained for the maintenance or care of four or more adults who are aged, infirm or disabled, except (1) a facility or portion of a facility licensed by the State Board of Health or the State Hospital Board, but including any portion of such facility not so licensed, and (2) the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage.

B. 'Maintenance or care' means the protection, general supervision and oversight of the physical and mental well-being of the aged, infirm or disabled individual."

Based on the limited facts presented in your letter, it appears that the facility would be providing maintenance or care for at least four or more adults who are infirm or disabled within the definition of § 63.1-172(A). Further, the "maintenance or care" requirement of § 63.1-172(B) would appear to be met by the fact that five of the consumers were residents at the facility, which would require the facility to provide protection, general supervision and oversight to them.
Section 63.1-172(A) does provide for two exceptions to classifying a facility as a home for adults. These are for a facility licensed in whole or in part by the State Board of Health or the State Hospital Board or for a facility that is the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage. From the facts presented, neither of these exceptions appears to be applicable to the facility in question. Because § 63.1-172(A) only lists two exceptions to the requirement for licensure as a home for adults, it is immaterial that the facility claims to be a boarding school or that it may qualify for an exemption from the certification by the Board of Education as required by § 22.1-323 by asserting that it is a sheltered workshop. Words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. See 1980-1981 Report of the Attorney General at 180. The requirements for licensure in § 63.1-175 are clear and unrelated to the certification in § 22.1-323.

I am, therefore, of the opinion that the question presented must be answered in the negative and the facility must comply with the licensure requirement of § 63.1-175.

1Section 22.1-323 proscribes the operation of various types of trade schools without a certificate to operate issued by the Board of Education. Section 22.1-320(8) grants an exemption for "[a] program through which handicapped persons are provided employment and training primarily in simple skills in a sheltered or protective environment." Such programs are commonly called "sheltered workshops."

STATE EMPLOYEES. DEPARTMENT OF TAXATION EMPLOYEE NOT SPECIFICALLY PROHIBITED FROM OWNING AND OPERATING PART-TIME JANITORIAL SERVICE. COMPREHENSIVE CONFLICT OF INTERESTS ACT OR AGENCY'S INTERNAL POLICY MAY APPLY.

January 9, 1984

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

This is in response to your request for my opinion as to whether an employee of the Commonwealth who works for the Department of Taxation may own and operate a part-time janitorial service. Based upon the general facts provided in your inquiry, this opinion is necessarily limited in its application. As a general matter, I am not aware of any prohibition against an employee of the Commonwealth engaging in part-time, outside employment as long as such activities do not conflict with or affect his employment with the Commonwealth and are consistent with the policies of the employing agency. See 1978-1979 Report of the Attorney General at 47.

The Comprehensive Conflict of interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act") may apply to this employee. For example, a janitorial service owned and operated by an employee of the Department of Taxation may not enter into a contract to provide services to that governmental agency. See, § 2.1-605(A). Further, the janitorial service may not enter into a contract with any other agency of the Commonwealth unless certain conditions outlined in § 2.1-605(B) exist. Other prohibitions may exist under the Act depending upon the circumstances. See §§ 2.1-602(1), 2.1-602(5) and 2.1-610(A).

I draw your attention to the fact the Department of Taxation is an agency governed by the Virginia Personnel Act, §§ 2.1-110 through 2.1-116. Employees of the
Department of Taxation must comply with the rules established for the administration of that Act. Pursuant to the Personnel Act and rules promulgated thereunder, the Department of Taxation has internal policies and procedures which may prohibit, limit or qualify outside employment by its employees. For instance, an employee intending to engage in employment activities for pay other than those prescribed by the Department must request permission to do so from the State Tax Commissioner. See Rules for the Administration of the Virginia Personnel Act, Rule 9.5 and Department Policy: "Outside Employment."

In summary, it is my opinion that, based upon the general facts which you have provided, an employee of the Department of Taxation is not prohibited from owning and operating a part-time janitorial service as long as he does so during nonworking hours in a manner which does not conflict with his responsibilities to the Commonwealth, has received the requisite approval from the State Tax Commissioner and his action does not conflict with any other Department regulations. Owning and operating a part-time janitorial service is not in itself a violation of the Comprehensive Conflict of Interests Act; however, this general opinion is not to be construed to mean that a conflict under the provisions of the Act could not occur. As I have already indicated, certain provisions could be violated if particular facts were to develop.

STATE EMPLOYEES. HATCH ACT.

March 16, 1984

The Honorable Robert E. Russell
Member, Senate of Virginia

This is in reply to your request for my opinion whether an employee of the State Department of Health may be a candidate for, and if elected serve as, chairman of a county or city committee of a major political party. You refer specifically to the Hatch Act, which prohibits participation in certain political activities by certain federal, state and local public employees.

The provisions of the Hatch Act applicable to state and local officers and employees are contained in 5 U.S.C. § 1501 et seq. Section 1501(4) defines "state or local officer or employee" as follows:

"State or local officer or employee means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization." (Emphasis added.)

Employees of State agencies, including the Health Department, may fall within the purview of the Hatch Act by virtue of their principal employment being in connection with activities financed in whole or in part by federal funds. You do not supply information in your inquiry sufficient to determine whether the employee in question falls within the definition, or the exclusion, contained in § 1501(4), quoted and
emphasized above. Assuming that the person does fall within the definition in § 1501(4) and is covered by the Act, I refer you to the provisions of § 1502, which restrict the political activities of any such employee as follows:

"(a) A State or local officer or employee may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office."²

None of the provisions of § 1502 expressly prohibits state and local officers and employees covered by the Hatch Act from being candidates for or serving as officers or members of a local committee of a political party. Federal regulations adopted to implement the Act provide, in part, that "[a] State or local officer or employee may participate in all political activity not specifically restricted by law and this part, including candidacy for office in a nonpartisan election and candidacy for political party office." 5 C.F.R. §§ 151.111 (1983). See, also, 5 C.F.R. § 151.121-122 ("83). Thus, in answer to your question, the Hatch Act does not prevent the State employee about whom you inquire from being a candidate for, or serving as, chairman of a county or city committee of a major political party.³


See, also, Political Activity and the State and Local Employee, published by the Office of the Special Counsel, U.S. Merit Systems Protection Board, at page 3: "When an employee holds two or more jobs, principal employment is generally deemed to be that job which accounts for the most work time and the most earned income."

Compare Simmons v. Stanton, 502 F.Supp. 932, 938 (W.D. Mich. 1980): "There is no indication that any of these federal funds were used to contribute to the plaintiff's salary directly or to activities which constituted his principal employment responsibilities within the Sheriff's Department. Consequently, the Hatch Act does not apply to plaintiff's employment situation because he is not a local employee under the provisions of Section 1501(4) of the Act."

²Note § 1502(c), which reads: "Subsection (a)(3) of this section does not apply to--

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil service system; or

(4) an individual holding elective office."

³Note, also, § 1503, which states that § 1502(a)(3) "does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected."

³This conclusion has no effect upon, and the Hatch Act does not control, any
restrictions upon such activity which may exist now or in the future as part of State Health Department personnel regulations. See, e.g., Opinion to the Honorable Charles G. Flinn, County Attorney for Arlington County, dated February 22, 1984.

STATUTE OF LIMITATIONS. TOLLING OF STATUTE OF LIMITATIONS RESULTING FROM VOLUNTARY DISMISSAL UNDER RULE 41(a)(1)(i) OF FEDERAL RULES OF CIVIL PROCEDURE GOVERNED BY § 8.01-229(E)(3).

March 9, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether voluntary dismissal, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, of a civil case filed in federal court is considered the equivalent of a nonsuit as set forth in § 8.01-380 of the Code of Virginia, which would result in the tolling of the statute of limitations as set forth in § 8.01-229(E)(1).

Section 8.01-380 provides that a nonsuit may be taken by a party before a motion to strike the evidence has been sustained, or before the jury retires from the bar or before the action has been submitted to the court for decision. Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure provides that a suit may be voluntarily dismissed by the plaintiff at any time before the adverse party has filed an answer or a motion for summary judgment.

As quoted in footnote 1, the tolling provision of § 8.01-229(E)(3) applies "irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court." This certainly indicates that the General Assembly analogized nonsuits in federal court to those in state court pursuant to § 8.01-380. Accordingly, based upon this indication of intent and because of the similarity between the voluntary dismissal procedures, I am of the opinion that a voluntary dismissal pursuant to Rule 41(a)(1) is the functional equivalent of a nonsuit under § 8.01-380 for purposes of tolling the statute of limitations as set forth in the Code of Virginia.

It appears, however, that the applicable tolling provision would be § 8.01-229(E)(3) rather than subsection (E)(1). Subsection (E)(3) governs "a voluntary nonsuit as prescribed in § 8.01-380." Therefore, if a voluntary dismissal under Rule 41(a)(1) in federal court is the equivalent of a nonsuit under § 8.01-380, as I believe it is, then the controlling provision with respect to tolling the statute of limitations would be § 8.01-229(E)(3).

1Section 8.01-229 provides, in part: "E. Dismissal, abatement, or nonsuit. 1. Except as provided in paragraph 2 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period. 3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date he suffers such nonsuit, or within the original period of limitation, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court."
The Honorable Franklin P. Hall  
Member, House of Delegates

You have asked whether a Virginia insurance agent licensed by the State Corporation Commission to sell life insurance must also obtain a license from the Virginia Board of Funeral Directors and Embalmers pursuant to Ch. 10.2 of Title 54 of the Code of Virginia, § 54-260.64 et seq., if he sells life insurance policies whose proceeds may be revocably assigned to a Virginia funeral home for burial and funeral expenses.

According to the specific terms outlined in your request, the life insurance proceeds may be assigned to a funeral home and any excess would be payable to the designee or beneficiary named in the policy. The insured, or his duly authorized legal representative, would retain the right to revoke the assignment to the funeral home at any time prior to performance by the funeral home, as well as the right to change the beneficiary under the policy. The assignment could be revoked and the services of another funeral home utilized, or the proceeds of the policy could be utilized for a different and unrelated purpose. It is my understanding that the insurance company is a corporation wholly owned by a parent corporation which also owns funeral homes in Virginia.

Section 54-260.67(2) defines the practice of funeral services to include, among other things, "the engagement of making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies." (Emphasis added.) Persons engaged in the funeral service profession must be licensed "for the practice of funeral service" under § 54-260.70 by the Virginia Board of Funeral Directors and Embalmers. Thus, the issue is whether a licensed insurance agent who sells revocable life insurance policies, the benefits of which may be used to pay for funeral services, is making financial arrangements for the rendering of funeral services and, therefore, is engaged in the practice of the funeral service profession for which licensure is required from the Virginia Board of Funeral Directors and Embalmers.

Although the sale of a life insurance policy, the proceeds of which are assigned to a funeral home for the payment of funeral expenses, arguably could fall within the "making financial arrangements for the rendering of [funeral] services" portion of the definition of the practice of funeral services, one must look to the entire statute to ascertain the intent of the General Assembly. See Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953). It is well-settled that the paramount object of statutory construction is to ascertain the legislature's intent, as it is that intent which controls if the statute may be interpreted to permit its implementation. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976).

Section 54-260.70 lists a number of personal and educational qualifications which must be satisfied prior to licensure in the funeral service profession. None of these qualifications requires education or training related to the sale of insurance, and it is apparent from both this statute, and the others contained in Ch. 10.2 of Title 54, that the purpose of the chapter is to regulate the conduct and activities of those persons directly engaged in the management and operation of funeral service establishments. The type of insurance agent to which you refer is not directly engaged in the management and operation of funeral service establishments, nor is he making financial arrangements for
funeral services so long as the assignment of the life insurance proceeds may be revoked in favor of a different funeral home or for a purpose totally unrelated to funeral expenses.

Accordingly, I am of the opinion that licensure as a funeral service professional under Ch. 10.2 of Title 54 is not necessary for a State Corporation Commission licensed insurance agent to sell the type of policy described herein.

1Chapter 10.2 of Title 54 includes, inter alia, provisions for the creation of a licensing and regulatory board at § 54-260.64; a definitional section at § 54-260.67; a section listing powers and duties of the aforesaid board, including the power to promulgate rules and regulations for the promotion of the standards of service and practice of the funeral service profession and the power of inspection of facilities where funeral practice is performed at § 54-260.68; provisions for the licensing of such practitioners at §§ 54-260.70:1, 54-260.70:2, and 54-260.70:3; requirements that itemized statements to be provided to consumers at § 54-260.71:1; provisions for the regulation of funeral establishments at § 54-260.73; and a list of grounds for refusal to issue, revoke or suspend licenses, as well as a description of offenses at § 54-260.74.

SUPREME COURT. SALARIED COURT REPORTERS IN CLERKS' OFFICES MAY NOT BE PAID FROM CRIMINAL FUND UNDER §§ 19.2-165 OR 19.2-166.

July 26, 1983

The Honorable Robert N. Baldwin, Executive Secretary
Supreme Court of Virginia
This is in response to your inquiry whether §§ 19.2-165 and 19.2-166 of the Code of Virginia authorize your office to fund salaried court reporter positions in circuit court clerks' offices out of the appropriation for criminal charges.

Section 19.2-165 requires the judge in all felony cases to provide, by order, for the recording of the evidence and incidents of trial. It further sets out the circumstances when the expense of the record is to be borne by the Commonwealth, and when by the defendant. It does not otherwise address the source or manner of court reporter compensation.

Section 19.2-166 specifically authorizes circuit court judges to appoint court reporters in felony cases and habeas corpus proceedings. It specifically provides that: "[s]uch reporter shall be paid by the Commonwealth on a per diem or work basis as appropriate out of the appropriation for criminal charges." (Emphasis added.) The General Assembly has thus provided the method by which court reporters are to be compensated. I am, therefore, of the opinion that your office may not provide the funding of full-time salaried positions for court reporters. While your proposal may well be a logical and cost saving extension of the concept already authorized, it appears that your specific proposal will require legislative authorization.

**TAXATION. BOARD OF ASSESSORS. NO DUTY TO PHYSICALLY EXAMINE EACH PROPERTY IN GENERAL REASSESSMENT.**

May 9, 1984

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

Your recent letter asked for my opinion on three different matters: (1) whether the board of assessors is obligated to visit each property and review the appraisal value or whether it may rely on the post-reassessment, taxpayer-protest hearings to remedy potential inequities of a reassessment; (2) whether the correct value of bank real property for purposes of determining the deduction from gross capital allowed for the Bank Franchise Tax under § 58-485.08(1) of the Code of Virginia is the 1983 reassessment value or the 1983 land book value; and (3) whether the maximum rate limitations for license taxes imposed under § 58-266.1 would apply individually or in the aggregate to a county and town license tax where the town imposes a license tax under § 58-266.1 and the governing body of the town within the county provides that the county license tax applies within the town limits. I will answer your questions seriatim.

1. Section 58-790 governs the answer to your first question pertaining to the obligation of the board of assessors to visit each property and review the appraisal value in the course of a general reassessment. This section reads:

"The assessors or appraisers designated under the provisions of this article shall, as soon as practicable after being so designated, proceed to ascertain and assess the fair market value of all lands and lots assessable by them, with the improvements and buildings thereon. They shall make a physical examination thereof if requested by the taxpayer, and in all other cases where they deem it advisable."

The meaning of this statute is clear on its face. The first sentence of § 58-790 imposes a general duty on the board of assessors to ascertain the fair market value of all real estate including improvements and buildings thereon assessable by it. The second sentence then specifically requires it to make a physical examination of the properties in only two instances: where a taxpayer requests it or where the board deems it advisable.
While physical inspection in other instances could be utilized as an appraisal tool, it is
plainly not required in the absence of a request by the taxpayer. Many other factors
which can be determined without physical inspection may be considered; e.g., the size,
location and economic situation in the area of the property as well as the rental value of
the property, where applicable. See 1974-1975 Report of the Attorney General at 496.

Based on the foregoing, I am of the opinion that the board of assessors is not
required to visit each property in the absence of a request by the taxpayer. The board
is obligated, however, on the basis of the information available to it, to ascertain what,
in its opinion, was the fair market value of each property assessable by it. Union Tanning
Co. v. Commonwealth, 123 Va. 610, 632, 96 S.E. 780, 786 (1918).

The reassessment hearings to which you refer are provided for in § 58-792.01.
Pursuant to this section, a notice of any change in the assessed value of real estate is
sent by mail to the owner of the property as shown on the land books and the taxpayer is
afforded the right to a hearing to protest the change. Although this hearing process
allows landowners to object to the results of the reassessment, it does not relieve the
board of assessors from its duty to ascertain the fair market value of property assessable
by it.

2. Your second question concerning the Bank Franchise Tax requires an
interpretation of § 58-485.08(1). Subject to certain limitations, this section provides for
a deduction from gross capital of the assessed value of real estate which is owned by a
bank as defined in § 58-485.01. The deduction is to be based on:

"[t]he assessed value of real estate...[for] the most recent assessment made prior to
January one of the current bank franchise tax year for real estate owned by the
bank or affiliate on January one of the current year." Section 58-485.08(1).

The value to be used turns on the meaning of "assessment" as used in the last
sentence of § 58-485.08(1). As originally enacted, this sentence read:

"The deduction of assessed value of real estate shall be the assessment as of the
prior tax year for real estate owned by the bank or affiliate on January one of the
current year." Ch. 578, Acts of Assembly of 1980. (Emphasis added.)

This exact language appeared in the Virginia Bankers Association draft of the proposed
bank franchise tax statute. The Association's comments on the deduction stated:

"The use of the assessment as of the prior year should limit the bank's deductions
and give the taxing authority the benefit of a one-year inflation lag.... Administratively it would simplify the bank's and the tax auditor's work, since new
assessments are not usually available in March, requiring multiple amendment of
returns." Virginia Bankers Association Draft at 4.

In light of these comments accompanying proposed language which was in fact
enacted, the word "assessment" in the last sentence of § 58-485.08(1) could only refer to
the valuation of the property which is placed on the land books for the prior tax year. Accordingly, it is my opinion that the correct value of bank real property for determining
the deduction from gross capital pursuant to § 58-485.08(1) is the 1983 land book value.

3. Your final question pertains to the applicability of the maximum rate limitations
of § 58-266.1(B) where a county, authorized by act of the appropriate town's governing
body as provided by § 58-266.1(A)(7), and the town within the county both issue revenue
licenses within the town limits.
Neither the rate limitation provisions of § 58-266.1(B) nor § 58-266.1(A)(7), which authorizes upon an act of the governing body of a town within a county, the county to impose its revenue license tax within the geographical limits of such town when the town also imposes a town license tax, contains any language which indicates a legislative intent to require the license taxes of the two jurisdictions to be considered in the aggregate for purposes of the rate limitations of § 58-266.1(B). By way of contrast, under § 46.1-65(d), concerning the imposition of a local motor vehicle license fee by a county and a town therein, the General Assembly made a specific provision for a credit against the fee imposed by the county to the extent of the fees paid to the town. The net effect of this credit provision is that the aggregate tax imposed by the county and town will not exceed the maximum fee allowable under § 46.1-65(a). See 1970-1971 Report of the Attorney General at 259.

Because of the absence of any language in § 58-266.1 indicating that license taxes imposed by a county and town within the town limits should be considered in the aggregate for rate limitation purposes, while in the analogous situation of motor vehicle license fees the General Assembly did so provide, I must conclude that the town and county may each issue a license based on the maximum rate for the classifications set forth in § 58-266.1(B). This conclusion is supported logically by the requirement in § 58-266.1(A)(7) that both county and town license taxes may be imposed only with the express consent of the governing body of the town.

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1See Franklin & P.R. Co. v. Shoemaker, 156 Va. 619, 159 S.E. 100 (1931) holding that a statute plain on its face should be taken at its face value.

2Because 1983 reassessments are at issue, § 58-790 as amended and effective July 1, 1983 is being utilized for purposes of this opinion. See Ch. 161, Acts of Assembly of 1983. The result would not change under the earlier versions of this section. See 1981-1982 Opinion of the Attorney General at 348 indicating that the language of § 58-790 is broad enough to permit physical inspection but noting further that information in the deed of record in the clerk's office should be considered as well as other information the Board possesses. See, also, Perkins v. Albemarle County, 214 Va. 416, 200 S.E.2d 566 (1973) (holding that with annual reassessments pursuant to § 58-769.2 physical inspection of all parcels within the county was not required).

3The applicable language is found on page four of the draft under proposed § 58-485.9(d).

4The subsequent changes to the wording of this sentence in 1981 did not affect the meaning of the word "assessment." Ch. 432, Acts of Assembly 1981. A summary of the Department of Taxation explaining the 1981 amendments to the Bank Franchise Tax indicates that the rewording was to clarify the reference in regard to localities assessing on a fiscal year basis. See § 58-851.7.

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**TAXATION. COLLECTION. COUNTY TREASURER NOT AUTHORIZED TO COLLECT TOWN TAXES.**

December 2, 1983

The Honorable Alfred C. Anderson
Treasurer for Roanoke County

You have asked whether your county can collect taxes due to a town which lies wholly within the county and remit those taxes to the town treasurer or, in the alternative, whether the town can collect taxes due to the county and remit those taxes
to your office. Your letter does not define what you mean by the word "collect." I will assume that you are referring only to the "collection" of current taxes in the sense that payment would be accepted but that no enforcement action is contemplated.

The answer may be found in a reading of §§ 58-958, 58-962 and 58-967 of the Code of Virginia. Section 58-958 provides in pertinent part that: "[e]ach county...treasurer shall receive the...amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer...." This section does not authorize the county treasurer to accept for payment any amounts which are not payable into the treasury of his county. Section 58-962 provides for county treasurers to go to convenient public places "for the purpose of receiving...county levies...." Similarly, § 58-967 provides treasurers with the power to collect "all uncollected taxes and levies in their hands...." None of these statutes authorize a treasurer to collect taxes not in his hands, that is, taxes not owed to the jurisdiction of which he is treasurer.

I am, therefore, of the opinion that the county treasurer is without authority to accept payment of town taxes. But cf. 1977-1978 Report of the Attorney General at 131 (county treasurer may collect town dog license tax where dog law powers exercised jointly by county and town under § 15.1-21(a)). There being no specific statutory provision governing town treasurers in these circumstances, the provisions of the town charter will control. See 1982-1983 Report of the Attorney General at 54. According to § 4.3 of the Charter for the Town of Vinton, the duties of the town treasurer "shall be as prescribed by the council." See Ch. 618, 1981 Acts of Assembly. I am unaware of the scope of the duties which may have been prescribed by the town council for its treasurer. Moreover, the interpretation of local ordinances enacted pursuant to town charters is a matter on which this Office does not render official advisory opinions. See 1976-1977 Report of the Attorney General at 17.

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TAXATION. CONSTITUTIONALITY. ORDINANCE EFFECTIVE RETROSPECTIVELY TO JANUARY 1, 1983 IMPOSING "GROSS RECEIPTS" LICENSE TAX ON UTILITY COMPANIES PURSUANT TO §§ 58-578, 58-603, 58-266.1 IS VALID.

July 6, 1983

The Honorable William M. Heartwell, III
County Attorney for Botetourt County

You have asked whether a proposed ordinance, a copy of which you have enclosed, imposing a "gross receipts" license tax on telephone, telegraph, heat, light and power companies pursuant to §§ 58-578, 58-603 and 58-266.1 of the Code of Virginia would be valid if it is made effective retrospectively to January 1, 1983.

Sections 58-578, 58-603 and 58-266.1, inter alia, authorize the board of supervisors to enact "gross receipt" license tax ordinances. Section 58-578, pertaining to telegraph and telephone companies, states that "[a]ny...county may impose a license tax under § 58-266.1...." Section 58-603, pertaining to water or heat, light and power companies, states that "[a]ny...county may impose a license tax under § 58-266.1...." Section 58-266.1, the general license tax statute, states that "the governing body of any county, may levy...county license taxes...." Thus, the General Assembly has delegated to the localities its legislative power to impose a license tax.

In holding a retroactive tax statute valid, the Supreme Court of Virginia has stated:

"that the mere retroactivity of a statute affecting taxation does not render it unconstitutional. Such a statute is valid if it is not arbitrary and does not disturb

In that case, the Court upheld the statute imposing an ad valorem tax on intangible personal property which was passed in 1964 and made applicable to tax use beginning January 1, 1964. In the Colonial Pipeline decision the Court relied on the United States Supreme Court case which affirmed the constitutionality of a retroactive state income tax. See Welch v. Henry, 305 U.S. 134 (1938).

Based on the foregoing, it is my opinion that the proposed ordinance made effective retrospectively to January 1, 1983, imposing a license tax measured by the gross receipts on telephone, telegraph, heat, light and power companies pursuant to SS 58-578, 58-603 and 58-266.1 would be valid under the laws of Virginia and the United States. The question of whether such a tax should be made retroactive, however, is a matter of policy for the local board of supervisors to decide.

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TAXATION. COUNTIES. DISTRICT LEVIES. NO AUTHORITY FOR COUNTY TO LEVY TAXES IN 3 OF 5 MAGISTERIAL DISTRICTS TO FUND UNLIMITED PUBLIC IMPROVEMENTS IN COUNTY.

September 6, 1983

The Honorable John C. Singleton
Commonwealth's Attorney for Bath County

This is in reply to your request for my opinion concerning the validity of an ordinance enacted by the Board of Supervisors of Bath County relating to the fixing of district levies in three of the five magisterial districts in the county. The text of the ordinance reads as follows:

"Be it enacted that annually the Board of Supervisors of Bath County, Virginia shall, as mandated by the Code of Virginia, fix the amount of the district levies uniformly in the Warm Springs Magisterial District, the Cedar Creek Magisterial District and the Valley Springs Magisterial District; said levies to be Uniform Unit District Levies within the three named districts and the amount raised by such levies to be utilized for including, but not limited to, the construction and funding of public school facilities, water and sewer facilities, recreational facilities, fire fighting and health facilities, industrial development, capital improvements to County property and that of its political subdivisions and agencies and other projects not inconsistent with the Comprehensive Plan as adopted by the Bath County Board of Supervisors." (Emphasis added.)

Article X, § 1 of the Constitution of Virginia (1971) provides, in pertinent part, that "[a]ll 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...." (Emphasis added.) This limitation has been construed to include only the limits of the particular district for the benefit of which the taxes are imposed, which may include all or only a portion of the land lying within the jurisdiction of the authority levying the tax. Thus, a levy may be confined to a particular district, if authorized by statute, so long as the taxes raised in the district are expended therein. See, e.g., Town of Narrows v. Giles County, 128 Va. 572, 105 S.E. 82 (1920); Watkins v. Barrow, 121 Va. 236, 92 S.E. 908 (1917); Moss v. County of Tazewell, 112 Va. 878, 72 S.E. 945 (1911); 1981-1982 Report of the Attorney General at 388.
The uniformity principle does require that a tax levy to pay general county expenses for the benefit of all county citizens, as distinguished from special levies in particular districts for purposes benefitting only those districts, must be countywide, because a part of a county cannot be made to bear all the burden of taxation for county purposes. See Watkins, supra; Day v. Roberts, 101 Va. 248, 43 S.E. 362 (1903); 1971-1972 Report of the Attorney General at 95. In my opinion, the above quoted county ordinance, insofar as it purports to be a levy, is subject to invalid application because of its language which indicates that the resulting taxes may be used for practically any county purpose, without territorial restriction to the districts wherein the taxes would be raised.

In the ordinance under consideration here, the county board attempts to establish three of its magisterial districts as a special taxing district for purposes of financing an unlimited variety of public improvements and facilities. I am unaware of any specific statutory authority for such an ordinance. Compare 1979-1980 Report of the Attorney General at 396.

I note that the board, in enacting the above quoted ordinance, has not in fact levied a tax. A levy is the legislative act of imposing a tax, declaring the subject and the rate of taxation. Richmond v. Eubank, 179 Va. 70, 18 S.E.2d 397 (1942); McGinnis v. Nelson County, 146 Va. 170, 174, 135 S.E. 696 (1926). This ordinance declares the current board's resolve that future boards shall levy taxes in particular magisterial districts for county-wide purposes. While a tax actually levied remains a tax unless, and until, repealed or modified, a governing body's enactment purporting to bind itself or future governing bodies in exercising legislative discretion for a governmental purpose is of doubtful validity. See 1981-1982 Report of the Attorney General at 48.

1See the emphasized language in the ordinance, supra.


TAXATION. DELINQUENT. PUBLICATION COSTS UNDER § 58-983 MAY BE APPORTIONED AMONG DELINQUENT TAXPAYERS.

May 31, 1984

The Honorable H. K. St. Clair
County Attorney for Alleghany County

You have asked whether the costs of publication of lists of delinquent taxpayers pursuant to § 58-983 of the Code of Virginia may be charged on a pro rata basis to the delinquent taxpayers listed in the advertisement. If the answer to this question is in the affirmative, you ask further what procedure must be followed to allocate the publication costs.

You mention that § 58-983 is silent on the imposition of costs on a pro rata basis. In a letter supplementing your original inquiry, you note that § 58-1020.1 authorizes localities to impose a fee to cover administrative costs associated with the collection of taxes. You question whether this section applies only to Art. 9 of Ch. 20 of Title 58,
pertaining to the collection of taxes by suit. You also state that § 58-1117.1, dealing with the sale of land for delinquent real estate taxes, provides for the imposition of publication and other costs of the proceeding. In light of the foregoing, you inquire whether the absence of similar specific language in § 58-983 indicates that the General Assembly has made no provisions for recovery of publication costs under § 58-983 and whether the cost must, therefore, be borne by the locality.

This Office has previously held that because "the cost of publication under § 58-983 is part of the [location's] costs in handling delinquent real estate, it should be apportioned among delinquents, to be added to the tax due and paid out of the proceeds from sale or redemption of the properties." (Emphasis added.) See 1973-1974 Report of the Attorney General at 352. The holding in that Opinion was based on language in §§ 58-1117.3 and 58-1117.101 which refers to costs in broad terms. I concur with that earlier opinion and find that the pro rata costs of publication under § 58-983 may be deducted from the proceeds of a sale of delinquent real estate under § 58-1117.1 et seq. or, alternatively, may be charged to the taxpayer as part of the costs of redemption.

If, however, the taxpayer comes forward before the initiation of efforts to sell the land under § 58-1117.1, then § 58-1020.1 applies to enable the locality to collect a fee to cover the administrative costs of collection of delinquent taxes provided that the local governing body has passed an ordinance specifying a fee under § 58-1020.1. Thus, where such an ordinance exists and no efforts to sell the land have been commenced, it is my opinion that the county, through the administrative fee authorized by § 58-1020.1, may collect in whole or part a pro rata allocation of § 58-983 publication costs.

Your second question concerns the procedure to follow in charging the pro rata share of publication expense. In a telephone conversation you indicated that the focus of this question was whether the actual charging of this expense to the accounts of delinquent taxpayers could be done administratively without separate legislative authorization. The legislative authority pursuant to §§ 58-1020.1 and 58-1117.1 et seq. to collect publication costs necessarily implies that these costs will be administratively charged on a pro rata basis to the delinquent taxpayers' accounts. Accordingly, it is my opinion that no additional legislative authority is required for the entry of these publication costs on your delinquent tax records.

1Section 58-1117.1 also provides for payment of "all other costs," on redemption. These words are comprehensive enough to encompass publication expenses incurred under § 58-983. The reference to "such publication" in § 58-1117.1, however, is limited to the costs of publication required by that section.

2The fee permitted under § 58-1020.1 is limited to an amount not to exceed ten dollars for taxes collected prior to judgment and fifteen dollars subsequent to judgment.

TAXATION. ERRONEOUS ASSESSMENTS. OVERVALUATION ON TAXPAYER'S RETURN OF TANGIBLE PERSONAL PROPERTY MAKES ASSESSMENT ERRONEOUS.

December 1, 1983

The Honorable Dennis L. Edwards
Commissioner of the Revenue for Brunswick County

Your inquiry concerns a corporate taxpayer which has applied to you for a refund for tax years 1981 and 1982, based on an erroneous assessment. The errors in assessment were attributable to the taxpayer's having filed a return of tangible personal property
based upon a method of valuing tangible personal property different from that used by your office. The methodology used by the taxpayer resulted in a higher valuation than would have been the case had the valuation been determined by your office. The taxpayer is now requesting a refund based upon the difference between the valuations calculated by these two different methodologies.

Assuming you are treating this request for a refund as an application to you for correction of an erroneous assessment under § 58-1141 of the Code of Virginia, you are required by § 58-1142 to take appropriate action upon the application. Section 58-1142 provides in part:

"If such Commissioner of the Revenue, or other official performing the duties imposed on the 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." (Emphasis added.)

According to the facts you have presented, the application for correction of erroneous assessment has been made within three years from the last day of the tax year for which the assessments for 1981 and 1982 were made. Furthermore, you are satisfied that the assessments were erroneous in that the property was overvalued according to your methodology. Failure to correct the assessment would not only be contrary to § 58-1142 but would also violate § 58-829(M) and the Constitution of Virginia (1971). Absent a correction in the assessment, treatment of this taxpayer will be nonuniform with respect to other taxpayers and will run afoul of Art. X, § 1 of the Constitution. That section requires, in fact, that "[a]ll 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...."

It is my opinion that Brunswick County must refund the overpayment of taxes in accordance with § 58-1142 so long as the procedures and conditions outlined therein are followed. See, e.g., 1980-1981 Report of the Attorney General at 64. Should the county refuse such a refund, the taxpayer is left with a judicial remedy under § 58-1145 to seek to enforce a correction of the allegedly erroneous assessment and to secure a refund of taxes overpaid if the assessment is erroneous.

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1 The sole method which may be used to value tangible personal property employed in a trade or business is by means of a percentage or percentages of original cost. See § 58-829(M).

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TAXATION. EXEMPTION. HOUSE OWNED BY MINISTER USED BY HIM AS RESIDENCE NOT EXEMPT FROM PROPERTY TAX UNDER §§ 58-12(2) OR 58-12.24.
August 11, 1983

The Honorable John H. Dressler
Commissioner of the Revenue for the City of Poquoson

You have asked whether a house and lot which is owned by a minister and used by him as his residence is exempt from real property taxation.

The parsonage was formerly held by the church trustees and, while it was held by the church trustees, you determined that the real property was exempt from taxation. This year, however, the trustees transferred, by deed, all of their interest in the property to the minister. The deed does not indicate any restrictions upon the minister's use of the property nor does it indicate that the trustees retained any reversionary interest. From all appearances, the minister now owns the property in the same manner that a private individual may own his residence and, like the private individual, is free to use it regardless of his future occupation, or to sell it and keep any equity derived therefrom. Based upon the foregoing understanding, I will answer your questions.

Article X, § 6(a)(2) of the Constitution of Virginia (1971) states in part:

"The following property...shall be exempt from taxation...:

(2) Real estate and personal property owned and exclusively occupied or used by churches or religious bodies for religious worship or for the residences of their ministers."

Accordingly, § 58-12(2) of the Code of Virginia was enacted by the General Assembly which exempts from taxation:

"Buildings with land they actually occupy, and the furniture and furnishings therein, and endowment funds 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, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

As you suggest, exemption under § 58-12(2) requires that the residence be owned by the church. Because the residence is not owned by the church, § 58-12(2) does not authorize an exemption in the fact situation you posed.

Article X, § 6(a)(6) also exempts:

"Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation 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." (Emphasis added.)

Under this authority, § 58-12.24 was enacted by the General Assembly which states that:

"Property owned by any church, religious association or denomination or its trustees or duly designated ecclesiastical officer, and used exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby designated and classified as religious and charitable in the meaning of Article X, § 6(a)(6) of the Constitution of Virginia. Property so owned and used is hereby determined to be exempt from taxation." (Emphasis added.)
Property exempted under § 58-12.24 must meet both the ownership and use tests. In determining whether the tests are met, the rule of strict statutory construction applies. See Art. X, § 6(f); 1974-1975 Report of the Attorney General at 491. First, I will address the ownership issue. Depending on the particular form of government under which a religious body operates, the authority to hold title to property may rest with a designated group or official. The phrase "duly designated ecclesiastical officer" must be interpreted to mean an officer designated by the religious body for the particular purpose of holding title to property for the benefit of the religious body. There is no indication that the minister in your question is an official designated by the church to hold title to its property, as is evident by the fact that the trustees formerly held title to the house. Therefore, it does not appear that this minister is a "duly designated ecclesiastical officer" within the meaning of the statute. Thus the ownership test is not satisfied.

Although both tests must be satisfied, and I have already found that the property fails the ownership test, I will mention that there is no indication that use of the house as the residence of the minister complies with the requirement of exclusive use for religious, charitable or educational purposes. Rather, it appears that the minister holds title and uses the property as his residence for his own personal benefit in the same manner that other private individuals may own their residences. Therefore, it appears that the property would fail the use test also.

Thus, based upon the information in your letter and the understanding described in the second paragraph of this letter, I am unable to conclude that the particular property in question is eligible for the exemption under § 58-12.24.

I am not aware of any other provisions in the Constitution or the Code under which this property can be exempted from taxation. Based upon the foregoing review of state law and upon the facts as presented by you, it is my opinion that this house, owned by the minister in Poquoson and used by him as his residence, is not exempt from real property taxation.

TAXATION. EXEMPTION. INSTITUTION OF LEARNING.

April 17, 1984

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

You have asked whether certain real property owned by Blue Ridge Chapel, Inc. of Franklin County, Virginia, is exempt from the local real estate tax. It appears from your letter and enclosures that Blue Ridge Chapel, Inc. is a newly formed nonstock, nonprofit corporation which plans to develop a school and retreat center that teaches subject matter related to the Bible. Also enclosed with your letter is a copy of an Opinion to the Honorable George R. St. John, found in the 1973-1974 Report of the Attorney General at 365.1

In a recent Opinion of the Attorney General to the Honorable Ivan D. Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated February 24, 1984 this Office held that any organization not in existence on July 1, 1971, which seeks to establish its eligibility for an exemption under the 1971 Virginia Constitution may rely only upon a strict construction of Art. X, § 6(a)(1)-6(a)(4) or a strict construction of an act passed by a three-fourths' vote of the House of Delegates and the Senate classifying or designating exempt property under authority of § 6(a)(6) of Article X.
The Mapp Opinion was the result of an exhaustive review of prior opinions and various legislative comments and proceedings. To the extent that prior opinions may be read as inconsistent with the Mapp Opinion, they are expressly overruled.¹

Property tax exemptions are provided by and pursuant to Art. X, §6 of the Constitution. If the organization described is eligible for any such exemption, it would seem that §6(a)(4) is the most relevant. Sections 6(a)(1) and (a)(3) clearly are not applicable. Section 6(a)(2) is not applicable by virtue of the last paragraph of Art. IV, §14 which prohibits the incorporation of a church or religious denomination. Section 6(a)(4) provides an exemption for property owned "by institutions of learning not conducted for profit, so long as such property is primarily used for literary, scientific, or educational purposes or purposes incidental thereto." At a minimum, an "institute of learning," within the meaning of Art. X, §6(a)(4), must have a faculty, a student body, and prescribed courses of study. See Reports of the Attorney General: 1980-1981 at 353; 1976-1977 at 274; 1975-1976 at 348. The available information in this case does not indicate that there is a faculty, student body or prescribed courses of study.

Article X, §6(a)(4) of the 1971 Constitution is a continuation of the exemption previously provided by §183(d) of the 1902 Constitution for property owned by incorporated colleges or other incorporated institutions of learning not conducted for profit and primarily used for literary, scientific, or educational purposes or purposes incidental thereto. Whether the property described is eligible for an exemption under Art. X, §6(a)(4) is a determination of fact, which is the responsibility of the office of the commissioner of revenue. See Reports of the Attorney General: 1982-1983 at 534; 1977-1978 at 415.

Finally, it should be reiterated that, in accordance with the Mapp Opinion, supra, all new property exemptions must now be strictly construed. Should property of organizations such as that which is here involved not fall within Art. X, §6(a)(4), the organization may follow the procedures outlined in §30-19.04 of the Code to obtain an exemption through the exercise of power granted to the General Assembly under §6(a)(6) of Art. X.

¹This Opinion held that real property owned by Christian Retreats, Inc., a nonprofit, nonstock Virginia corporation is exempt from taxation. The Opinion analogized the organization to the Y.M.C.A. (a tax-exempt organization) and noted that the property tax exemptions are liberally construed.

²Opinion to the Honorable Ivan D. Mapp, February 24, 1984 at 17.
transaction. You state that the transaction in question involves the following factual situation:

1. The Authority is negotiating a lease-purchase agreement under which it will transfer title of Authority-owned land and certain improvements to a third party as security to finance park improvements and then lease the same property as lessee from the third party lessor;

2. The third party will provide $1,000,000 in financing at 9% interest for a period not greater than seven years;

3. At the end of the lease term, complete ownership will revert to the Authority on payment of one dollar; and

4. The agreement will contain a clause which states that the Authority shall be deemed to retain title to the property, subject to the provisions of the agreement, unless otherwise required by law.

Further information indicates that the Authority was created pursuant to the Park Authority Act, § 15.1-1228 et seg. and that if the Authority defaults on a lease payment, the third party titleholder would be able to exercise a power to sell the land, similar to a mortgagee or trustee under a deed of trust.

Section 58-12(1) of the Code, which tracks Article X, § 6(a)(1) of the Constitution of Virginia (1971) exempts from taxation "[p]roperty owned directly or indirectly by the Commonwealth, or any political subdivision thereof...." The Prince William County Park Authority is a political subdivision of the Commonwealth pursuant to §§ 15.1-1230(A) and 15.1-1232. Accordingly, property which it owns "directly or indirectly" enjoys exemption from real estate taxation.

In Citizens' Foundation v. Richmond, 207 Va. 174, 148 S.E.2d 811 (1966), the Supreme Court of Virginia construed the meaning of the exemption from taxation for property indirectly owned by the Commonwealth as used in § 183(a) of the Constitution of Virginia (1902). The provisions of Article X, § 6(a)(1) of the present Constitution and § 58-12(1) contain the same exemption. Thus, the decision in Citizens' Foundation remains applicable today and can be used in interpreting what constitutes indirect ownership pursuant to the present Constitution and § 58-12(1).

In construing § 183(a), the Citizens' Foundation court held that "something less than the holding of actual legal title by an instrumentality of the state is contemplated by the constitutional clause 'property owned...indirectly by the Commonwealth.'" The Court explained further that the theory of the separation of legal and equitable title to property may not be ignored and that "[t]hough bare legal title to property may rest in someone else, if the beneficial interest therein is vested in a public corporation created, managed and controlled by the state, then that property must be said to be owned indirectly by the Commonwealth." (Emphasis added.)

The facts in that case indicated that the Foundation had legal title to the property in question but that the Richmond Professional Institute ("R.P.I.") (the exempt instrumentality of the Commonwealth), by agreement, had the power to control the disposition of the property including the right to request and receive conveyance of the property legally titled in the name of the Foundation. As further evidence of R.P.I.'s beneficial interest, the Court noted that the Foundation was not free to sell its property if an interested purchaser could be found and that R.P.I. had the right to use the property.
Applying the rationale of the Citizens' Foundation decision to the situation at hand, I find, for the reasons set forth below, that the subject property is owned indirectly by the Prince William County Park Authority within the meaning of § 58-12(1) and the equivalent constitutional exemption. The transaction described is a conveyance to secure a debt. As such, it is in the nature of a mortgage. Holladay v. Willis, 101 Va. 274, 43 S.E. 616 (1903). See also, 13A M.J. Mortgages and Deeds of Trust §§ 9-11 (1978). The Authority-grantor remains in possession. Additional information indicates that the lease payments are intended as a promise to pay back the money lent plus 9% interest over a period not to exceed seven years and that, absent default on a lease payment, the third party lender has no authority to sell the subject property. In other words, under the proposed agreement the bare legal title vests in the third party mortgagee, but, in equity, the Authority (mortgagor) remains the actual owner unless debarred by its own default.

Based on the foregoing, I am of the opinion that the third party in question holds mere legal title and that sufficient control and use remain in the Authority to come within the meaning of "indirect ownership" as set forth in Citizens' Foundation. Accordingly, the subject property would be exempt from taxation as property indirectly owned by a political subdivision of the Commonwealth pursuant to Article X, § 6(a)(1) of the Constitution of Virginia (1971) and § 58-12(1) of the Code.

1The Authority has the power to effect this financing arrangement under § 15.1-1232. See, especially, §§ 15.1-1232(f), (o) and (p). The Opinion of this Office to the contrary as to the power to borrow from private corporations, 1966-1967 Report of the Attorney General at 215, was superseded by subsequent legislation. See Ch. 613, Acts of Assembly of 1968.

2See § 58-12(1).

3Citizens Foundation, supra, 207 Va. at 179, 148 S.E.2d at 81.

4Id.

5See 13A M.J. Mortgages and Deeds of Trust § 3 (1978) on the definition and nature of mortgages. The agreement in this case appears structured to follow the title theory of mortgages. Cf. the lien theory of mortgages which is well established in Virginia, i.e., a mortgage or deed of trust creates a lien on property to secure a debt. Interstate Railroad Co. v. Roberts, 127 Va. 688, 105 S.E. 463 (1920).

6See 1977-1978 Report of the Attorney General at 413 holding that a Masonic lodge is exempt under § 58-12(6) although legal title was in a title-holding entity.

TAXATION. EXEMPTION. RELIGIOUS CORPORATIONS PROMOTING AND SELLING CHURCH LITERATURE NOT EXEMPT.

September 14, 1983

The Honorable Dorothy O'B. Schaeffer
Commissioner of the Revenue for Culpeper County

You have asked whether two organizations, as hereinafter described, are entitled to exemption from property taxation.

1. Christian Bookstore & Library, Inc., is a chartered nonprofit organization that sells church literature. The top floor of the building owned by this corporation is being used for church services three times a week.
2. The Church League of America, Inc., is based in Wheaton, Illinois and is interested in acquiring real estate in Culpeper County. The corporation is not chartered, but is a nonprofit organization. There would be no other church activities other than the promotional mailing of church literature.

The information furnished for the second entity gives an unclear description of its legal status. You refer to it as a corporation and you give its organizational name in a form which indicates that it is a corporation, yet you state that it is not chartered. I assume from this conflicting description that the organization is an Illinois corporation which is not registered to do business in the Commonwealth of Virginia. Accordingly, for purpose of this opinion, both organizations are presumed to be corporations.

A prior Opinion of this Office to the Honorable N. Everette Carmichael, Commissioner of the Revenue for Chesterfield County, dated July 8, 1982, held that an organization similar in some respects to the ones you describe is not entitled to a property tax exemption under § 58-12.24 of the Code of Virginia because of its corporate status. As has been previously noted in opinions on this subject, the General Assembly is fully familiar with the distinctions between churches and religious associations on the one hand and corporations on the other. The failure to include corporations in § 58-12.24 means that their property cannot qualify for exempt status under that section. The fact that church services are held three times a week in the property of the Christian Bookstore & Library, Inc., does not render its property exempt.

In order to claim exemption under § 58-12(2), the property must be "lawfully owned and held by churches or religious bodies and wholly and exclusively used for religious worship...." The property does not meet these tests either with respect to being owned by a church or religious body or with respect to being used for religious worship. Even if the property were owned by a church, if a business is operated on the property, it will not be exempt, regardless of the fact that the revenues derived may go to the church. See 1982-1983 Report of the Attorney General at 534.

The Carmichael Opinion relied upon another prior Opinion of this Office to the Honorable Ivan D. Mapp, Commissioner of the Revenue for the City of Virginia Beach, dated February 23, 1982 and found in the 1981-1982 Report of the Attorney General at 373, for the proposition that corporations are not entitled to exemption under § 58-12.24. The Mapp Opinion found it "unnecessary to determine whether [the taxpayer's] corporate structure also excludes it from the exemption found in § 58-12(5)]." The Mapp Opinion ruled that the exemption provision of § 58-12(5) was unavailable to "a nonstock Virginia corporation whose stated primary purpose is the sharing of Christian ideas through various forms of telecommunication." See, also, 1972-1973 Report of the Attorney General at 393 (holding the exemption under § 58-12(5) is not available to a corporation formed for the purposes to establish and operate a radio station for cultural, educational and religious broadcasts; to establish a Bible institute; to grant diplomas or degrees in biblical education; to provide for lectures related to Christian education; to establish and operate a bookstore to distribute religious literature; and to publish religious literature).

Based upon the foregoing analysis and the limited factual information provided, I find no basis upon which any distinction can be drawn between the Christian Bookstore & Library, Inc. or the Church League of America, Inc. and the other religious organizations for which this Office has ruled an exemption was not available under §§ 58-12(2), 58-12(5) or 58-12.24. Thus, it is my opinion that the exemptions must be denied.
February 24, 1984

The Honorable Ivan D. Mapp
Commissioner of the Revenue for the City of Virginia Beach

You have asked several questions concerning the eligibility of certain organizations for exemption from real property taxation under Art. X, § 6 of the Constitution of Virginia (1971), and § 58-12 of the Code of Virginia. In connection with such eligibility, you have described three factual situations as follows:

1. A charitable, nonprofit organization is incorporated subsequent to the 1971 revision to the Constitution of Virginia, and thereafter acquires improved real estate on which it operates a home for indigent aged persons.

2. A benevolent, nonprofit association is formed in 1974 and thereafter acquires improved real estate which is used exclusively as a meeting room by the association.

3. A church is organized and comes into being subsequent to July 1, 1971.

You wish to know whether the first two organizations are currently entitled to an exemption from real estate taxation or whether they must obtain a specific exemption under Art. X, § 6(a)(6) of the Constitution and whether the exemption for the church is subject to strict or liberal rules of construction.

For the reasons which follow, this Opinion holds that the church exemption from property taxation must be strictly construed and the other two organizations will be exempt from property taxation only if they are so specifically designated or classified by an act of the General Assembly pursuant to Art. X, § 6(a)(6) of the Constitution.

Your questions prompted a review of more than fifty prior Opinions of this Office issued since July 1, 1971, the effective date of the revised Constitution of Virginia. This review revealed that a number of the Opinions issued are ambiguous on the questions you have presented. Still other Opinions appear to contradict one another. None of the Opinions attempts a comprehensive analysis of the relationship between exemptions under the 1902 Constitution, the 1971 Constitution and § 58-12 of the Code. In order to answer your questions and, at the same time, to resolve further uncertainty in the area of exemption from local property taxation, this Opinion will present a definitive analysis of the pertinent authorities. The approach will be to trace the constitutional revision process from its inception through the work of the Commission on Constitutional Revision, the constitutional debates in the House and Senate of Virginia, the Virginia Code Commission, actions of the General Assembly subsequent to the adoption of the revised 1971 Constitution and a decision of the Supreme Court of Virginia.

Commission on Constitutional Revision

Although the Commission on Constitutional Revision (hereinafter "Revision Commission") considered undertaking a major revision to the exemption provisions of § 183 of the 1902 Constitution, it resolved "to leave the basic structure of the section as it is." Report of the Commission on Constitutional Revision at 305 (January 1, 1969) (hereinafter "Revision Report"). Except for some relatively minor changes which are not relevant here, the Revision Commission presented its recommendation for exemptions in Art. X, § 6 by merely renumbering §§ 183(a) through 183(g) as §§ 6(a)(1) through 6(a)(7). "[I]f the [Revision Report] were to be adopted, our Constitution would be left with the present Section 183 provisions." Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution [hereinafter "House Debates"], Remarks of the Honorable Theodore V. Morrison, Jr. at 352 (March 31, 1969); see, also, Revision Report at 437-440 (Parallel Tables).
The Revision Commission did, however, undertake two important and related steps which set apart the exemption provisions under the new constitution from those under the old. First, a "requirement of strict construction" was added to signal a departure from the previous rule of liberal construction under § 183 of the 1902 Constitution. The liberal rule had been developed by the Supreme Court of Virginia in the early case of Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1914). Revision Report at 306. Second, this clean break with the past was limited in its application to all exemptions which would be granted after the adoption of the proposed revised constitution. The Revision Commission commented upon this limitation by noting that "[a] proviso has been added to paragraph (h) [adopted as paragraph (f)] which is intended to protect existing exemptions from the strict construction requirement." (Emphasis added.) This provision will be hereinafter referred to as the "grandfather" clause.

Inasmuch as the Revision Report proposed no change in the exemptions which existed under § 183 of the 1902 Constitution, there would have been nothing to distinguish an exemption arising while the 1902 Constitution was in effect from an identical exemption under the 1971 Constitution except whether it arose before or after July 1, 1971. Thus, the fact that protection is afforded to "existing exemptions" can only mean that the grandfather clause applies exclusively to specific parcels of property which were already exempt at the time the proposed revised constitution was to become effective. Those parcels, and only those specific parcels of property, would be entitled to a liberal rule of construction from exemption. A specific piece of property which was not already exempt on July 1, 1971, could only obtain an exemption under the identical provisions of the proposed revised constitution under a rule of strict construction.

Prior to the adoption of the Revised 1971 Constitution, Code § 58-12 simply mirrored the provisions of § 183 of the 1902 Constitution with several additions not relevant here. If the Revision Report had been adopted without change, no legislative amendment to § 58-12 of the Code would have been necessary to implement the new Constitution, except to draw the distinction between properties which already had obtained and were enjoying an exemption under the 1902 Constitution and those taxpayers who would seek tax exemptions for their property after the adoption of the 1971 Constitution, even though the exemption provisions under both constitutions were identical.

Proceedings and Debates Pertaining To Amendment of the Constitution

The General Assembly did not adopt Art. X, § 6 of the proposed revised constitution as presented in the Revision Report. In fact, the General Assembly specifically rejected the "no change" position of the Revision Commission. The Revision Commission's version of Art. X was introduced in the House by 1969 House Joint Resolution 16. The subcommittee studying § 6 of Art. X "found that the language of present Section 183 not only is inappropriate to a modern Constitution, but is having the effect of promoting and perpetuating what could be considered inequities in exempting property from taxation." House Debates at 352, Delegate Morrison (March 31, 1969). Only paragraphs (a)(1) through (a)(4) of § 6 containing exemptions for "publicly owned property, church property, nonprofit cemeteries, libraries and institutions of learning" were adopted with "little change in substance." Id. at 353-54.

Conversely, substantial change was effected by the elimination of the Revision Report §§ 6(a)(5), 6(a)(6) and 6(a)(7), which corresponded to § 183(e), (f) and (g) of the 1902 Constitution and to §§ 58-12(5), 58-12(6) and 58-12(7). Delegate Morrison explained that the stricken sections were "rendered unnecessary by virtue of paragraph (a)(6) of the committee substitute" which corresponds to the current § 6(a)(6), Art. X of the 1971 Constitution. Id. at 356. Delegate Morrison had earlier revealed that § 6(a)(6) was "designed to allow broad authority for the General Assembly to provide for tax
exemption of property by classification, such as nonprofit hospitals, nursing homes, parks or playgrounds." Id. at 354. In other words, after July 1, 1971, taxpayers seeking new exemptions based upon facts arising after that date and who would have been entitled to an exemption under §§ 183(e), 183(f) and 183(g) of the 1902 Constitution, are not entitled to exemption under the revised constitution unless they can point to a legislative exemption granted to them under the authority of § 6(a)(6) of Art. X. Any organization described by these same paragraphs of § 183 which held or was entitled to hold an exemption on July 1, 1971, would continue to be exempt under the grandfather clause.

The rejection by the General Assembly of the suggestion in the Revision Report to continue the existing basis for exemptions without change has been described by the Supreme Court of Virginia in the following words:

"The advent of the new constitution signaled a different approach to tax exemption problems. As pertinent here, property used by its owner for charitable or benevolent purposes may be exempted from taxation 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, Section 6(a)(6). Furthermore, under Article X, Section 6(f), 'exemptions of property from taxation as established or authorized hereby shall be strictly construed.' Manassas Lodge, supra fn.2, 218 Va. at 222. (Emphasis added.)

Assuming no action were to be taken by the General Assembly under § 6(a)(6) to amend Code § 58-12 after the effective date of the 1971 Constitution, none of the language in § 58-12 has any application whatsoever to any taxpayer which did not hold property exempt or eligible for exemption on July 1, 1971. Because § 58-12(1)-(4) had been enacted to implement the corresponding provisions of § 183(a)-(d) of the 1902 Constitution, this would even be true as to the exemptions authorized by Art. X, §§ 6(a)(1) through 6(a)(4).

Further support for the conclusion that the grandfather clause, § 6(f), does not preserve exemptions under the 1902 Constitution and Code § 58-12 to any organization other than one which was exempt or was legally entitled to be exempt on July 1, 1971, may be found in the proceedings and debates in the General Assembly. The version of the grandfather clause recommended by the Revision Report was not changed in any respect. House Debates at 870 (Parallel Tables); II A. Howard, Commentaries on the Constitution of Virginia 1088 (1974) (hereinafter "Commentaries"). It may properly be inferred from this absence of change that the 1971 constitutional language in § 6(f) has exactly the same meaning ascribed to it by the Revision Commission; that is, the preservation of the liberal rule of construction for exemption cannot apply to property which was not exempt or eligible for exemption on July 1, 1971. See earlier discussion. We need not rest the conclusion on inferences alone, however. Consider the following comments:

Delegate Morrison stated:

"The grandfather clause, in itself, would continue [§ 58-12] exemptions...if [the organizations] presently enjoy a tax-exempt status." House Debates at 362. (Emphasis added.)

"[T]hose organizations presently enjoying an exempt status under the present Constitution...will remain exempt by virtue of the grandfather clause...." Id. at 408. (Emphasis added.)

"[Section 6(f) has the effect of] preserving tax exemptions already enjoyed at the time of the adoption of the revised Constitution...." Id. at 480. (Emphasis added.)
Consider also, the remarks of several Senators appearing in *Proceedings and Debates of the Senate of Virginia Pertaining to the Amendment of the Constitution (1969-1970)* [hereinafter "Senate Debates"], in which it was stated:

"[W]e have included a grandfather's clause that says any organization now exempt shall continue to be exempt unless the legislature in the future should otherwise specify." Remarks of the Honorable Edward L. Breeden, Jr., Senate Debates at 448. (Emphasis added.)

"[T]he purpose of [§ 6(f)] was to provide a grandfather clause, that all organizations or entities whose property is now exempt would remain exempt under the new Constitution when it was adopted." Remarks of the the Honorable Herbert H. Bateman, id. at 452. (Emphasis added.)

"But what this says is that if you are now lawfully exempt you continue to be exempt. If you are not lawfully exempt you would have to meet the requirement of the new act." Senator Breeden, id. (Emphasis added.)

"[W]e made what has been referred to as the 'grandfather' clause here for those organizations presently having, as the gentleman from Norfolk expressed it, lawful exemption." Remarks of the Honorable J. Harry Michael, Jr., id. at 467. (Emphasis added.)

Given this especially well-documented legislative history which led to the adoption of the revised 1971 Constitution, the conclusion is inescapable that any organization which was not in existence on July 1, 1971, may not claim eligibility for exemption from property taxation under any provision of the 1902 Constitution. *Contra*, 1971-1972 Report of the Attorney General at 412. Moreover, any organization not in existence on July 1, 1971, which seeks to establish its eligibility for an exemption under the 1971 Constitution may only rely upon a strict construction of Art. X, §§ 6(a)(1) through 6(a)(4) pertaining to publicly owned property, church property, nonprofit cemeteries, public libraries and nonprofit institutions of learning, respectively, or a strict construction of an act passed by a three-fourths vote of the House of Delegates and the Senate classifying or designating exempt property under authority of § 6(a)(6) of Art. X.⁴

This conclusion must be tempered by the fact that the General Assembly could exercise its power granted by § 6(a)(6) to classify or designate all or any part of the property formerly exempt under the 1902 Constitution. Accordingly, we must examine the actions of the General Assembly after July 1, 1971, to determine the current status of exemptions from property tax. Before proceeding to such an analysis, one other point arising out of the proceedings and debates pertaining to constitutional revision should be recognized. As noted by Professor A. E. Dick Howard, the exemptions afforded by Art. X, §§ 6(a)(1) through 6(a)(4) are self-executing and require no legislation to implement them. II A. Howard, Commentaries, supra, at 1074.

**Report of the Code Commission**

While § 5 of the Schedule of the 1971 Constitution calls for the General Assembly to convene in January, 1971, to "enact such laws as may be deemed proper, including those necessary to implement this revised Constitution", § 58-12 remained unchanged until 1972. Thus, to the extent § 58-12 correctly implemented the exemptions authorized under § 183 of the 1902 Constitution, § 58-12 merely reflected the exemptions established by the 1902 Constitution which were continued for those exempt parcels after July 1, 1971, by the authority of self-executing § 6(f), the grandfather clause. Taking particular note of §§ 58-12(1) through 58-12(4), it must be reemphasized that these statutory paragraphs do not implement the 1971 Constitution exemptions in
$6(a)(1)$ through $6(a)(4)$, but merely recite the grandfathered exemptions in $183(a)$ through $183(d)$ which preexisted the 1971 Constitution.

This view is confirmed by an examination of the Report of the Virginia Code Commission on Revision of the Code of Virginia 1950, as Amended, to Conform with the Constitution of Virginia Effective July 1, 1971, November 30, 1970. At pages 33 and 34, the Code Commission stated:

"[T]he new Constitution contains a 'grandfather' clause which preserves the exemption from taxation of all the property that is so exempt on the effective date of the new Constitution....Additionally, it is assumed that the 'grandfather' clause applies to specific property and not to classes of property. Therefore, there may be some difficulty in determining just what property is protected by the 'grandfather' clause.

* * *

The Commission, having considered several alternatives with respect to this article, recommends that $58-12$ remain unchanged at the present time. This would maintain the exemption of all property exempted by the old Constitution, but which might not be exempt under the new Constitution. This result might be expected by reason of the 'grandfather' clause in the new Constitution (Article X, $6(f)$). Further, property exempt by the self-executing provisions of the new Constitution, would be exempt whether or not it is mentioned in ($58-12$).

The Commission strongly recommends that a special study be conducted by the General Assembly on the subject of exemptions with the purpose of completely rewriting $58-12$, a task which is beyond the scope of this study and report." (Emphasis added.)

Indeed, $58-12$ has never been completely rewritten and has undergone significant change only in its introductory paragraph.

1972 General Assembly

Chapter 667, Acts of Assembly of 1972, amended $58-12$ as follows:

"The following classes of property, exempt from State and local taxation on July 1, 1971, 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 1, 1971...." (Emphasis in original.)

Chapter 667 also purported to exercise the constitutional power of the General Assembly to classify and designate two organizations as exempt entities under the authority of $6(a)(6)$ of Art. X by the addition of two new Code sections.

The questions raised by this legislation, and 1973 legislation in the very next session, are:

1. Whether the General Assembly's amendments to $58-12$ were intended to classify or designate all categories of property previously described by $58-12$ under the 1902 Constitution as property exempt under the 1971 Constitution by virtue of the General Assembly's authority to classify or designate exempt property granted by $6(a)(6)$ of the 1971 Constitution; and

2. Whether any such attempt to exercise the $6(a)(6)$ power obtained the necessary three-fourths vote of each house.
The Supreme Court of Virginia commented on this legislative action with the following observations:

"By the required three-fourths vote at its 1972 session, the General Assembly amended Va. Code § 58-12 to provide that certain classes of property exempt from taxation on July 1, 1971, shall continue to be exempt...under the rules of statutory construction applicable to this section prior to July one, nineteen hundred and seventy-one." Manassas Lodge, supra, 218 Va. at 223.

It is unclear whether, by this language, the Supreme Court meant to suggest a belief that the 1972 amendment was an attempt to make all pre-1971 categories or classes of exemptions applicable to new situations arising after July 1, 1971. If it did, then I must respectfully note, as did the Attorney General in 1972, that the 1972 amendments did not meet the three-fourths vote requirement mandated by § 6(a)(6) of the Constitution.

This Office has previously noted that Ch. 667, Acts of Assembly of 1972, failed to obtain the required three-fourths vote in the Senate and, therefore, would not be a valid exercise of the General Assembly's power under § 6(a)(6). See 1971-1972 Report of the Attorney General at 412. According to the Journal of the Senate of Virginia, 1972 regular session, Vol. II, at 1068, the Senate vote on agreement to the joint conference committee report on S.P. 20 was 29-0, one fewer than the required three-fourths vote of the 40-member Senate. It is also noted that Ch. 667 was passed in 1972, two years after the adoption of the Constitution by the General Assembly and is, therefore, not contemporaneous legislative interpretation.

Moreover, § 6(c) of Art. X provides in part that the General Assembly "may restrict or condition...but not extend" the exemptions allowed by § 6. With this limitation in mind, it is apparent that the 1972 amendment to § 58-12 should not be construed as an attempt to extend the 1902 constitutional exemptions set out in § 58-12, because the power of the General Assembly to classify or designate under § 6(a)(6) was not validly exercised.

It matters little what the 1972 General Assembly intended to do by its amendments to § 58-12 because of the failure to obtain a three-fourths vote of each house. Chapter 667, however, unconstitutionally purported to exercise the § 6(a)(6) power to designate with respect to two organizations. In the absence of any severability clause which would permit the amendments to § 58-12 to survive the unconstitutional nature of the remainder of the act, the entire act is presumed to be nonseverable. Bd. Sup. James City County v. Rowe, 216 Va. 128, 147, 216 S.E.2d 199, 214 (1975). Here, there is no evidence of legislative intent to overcome the presumption and the entire act is presumed to be invalid. Id. This conclusion is supported by the discussion which immediately follows under the next heading.

1973 General Assembly

By an act which did pass with a three-fourths vote of each house, Ch. 438, Acts of Assembly of 1973 effected a verbatim reenactment of the provision amending the introductory paragraph to § 58-12 found in Ch. 667, Acts of Assembly of 1972. The 1973 act also classified or designated thirteen organizations including the two which failed proper passage in 1972 and specifically recited its exercise of the authority under § 6(a)(6) but only with respect to the thirteen organizations, not with respect to § 58-12. See Reports of the Attorney General: 1974-1975 at 491; 1972-1973 at 390; see also, 1982-1983 at 568. The question arises whether any significance should be ascribed to the 1973 amendments to § 58-12 in view of the fact that the entire act received the constitutional three-fourths vote of each house.
It is apparent from the General Assembly's express recitation of the exercise of its authority under § 6(a)(6) in connection with (1) the thirteen organizations designated in 1973, (2) the unsuccessful attempt in 1972 to designate two of those thirteen, and (3) the classification and designation of two other organizations in 1971, that the General Assembly would have recited the exercise of its § 6(a)(6) authority with respect to the amendment to § 58-12 if it had so intended. Hence, the three-fourths vote on the entire bill cannot be seen as an exercise of the § 6(a)(6) power to classify and designate all that property described by §§ 58-12(1) through 58-12(17). To infer such intent would require the assumption that the General Assembly had done a complete turnabout in the three years since the proceedings and debates on constitutional revision and intended to render the revised constitutional scheme for property tax exemption to be of no effect. Such an assumption lacks credibility. It certainly could not be seriously contended that the introduction of the word "classes" into § 58-12 coupled with the 1973 three-fourths vote resulted in an inadvertent exercise of the § 6(a)(6) power to classify.

No help is obtained from an examination of the 1973 cumulative supplement to Title 58. Again, the introductory paragraph to § 58-12 reads exactly as it did in the 1972 cumulative supplement. As the editor's note states, "[t]he 1973 amendment reenacted this section, as amended in 1972, without change." Nevertheless, a more than plausible explanation for the reenactment "without change" is supplied by the fact that this Office twice called attention to the failure of Ch. 667, Acts of Assembly of 1972 to obtain the required three-fourths vote necessary to exercise the General Assembly's power under § 6(a)(6). See Reports of the Attorney General: 1972-1973 at 392; 1971-1972 at 412. As noted earlier, the absence of a severability clause precludes the saving of a provision which would only require passage by simple majority. Consequently, it was necessary to reenact the amendment to the introductory paragraph of § 58-12.

As previously suggested, it would be unconstitutional for the General Assembly to extend the grandfather clause exemption to reach classes of property identified in §§ 58-12(1) through 58-12(17) for property which was not exempt on July 1, 1971. This question surfaced in a recent General Assembly study of the real property tax exemptions. In the Report of the Joint Subcommittee to Study Real Property Tax Exemptions (the "Report"), 1980 H. Doc. No. 35, the Joint Subcommittee reported on its effort to bring equity to the real property tax exemption structure. Like the Revision Commission, the Joint Subcommittee reported it had failed in its task and it settled for a procedure to standardize the determination of new exemptions. The new procedure is now codified in § 30-19.04 of the Code. The Joint Subcommittee reported:

"The grandfather clause insures that 'property' which was exempt in 1971 will continue to be exempt; § 58-12 extends this principle to the 'classes of property' enumerated in that section. (There has not yet been a court decision on whether the General Assembly had the power to make that extension of exemptions.) Organizations which existed in 1971, and were tax exempt thanks to the 'liberal construction' rule remain tax exempt, while new organizations of the same nature must obtain approval of their local governing bodies and the General Assembly unless they can fit into one of the classes in § 58-12." Report at 6. (Emphasis in original.)

The Report appears to assume that "classes" as used in § 58-12 is an "extension" of the exemptions under the 1902 Constitution but simultaneously calls that assumption into question by suggesting that it may have been an ultra vires act.

Without a legitimate basis for imputing the exercise of the § 6(a)(6) power to classify and designate with respect to all of those 1902 constitutional exemptions recited in § 58-12, the revised language of that Code section can do nothing more than codify the effect of the grandfather clause in § 6(f).
Presumption of Constitutionality

All acts of the General Assembly are entitled to a presumption of constitutionality. Infants v. Virginia Housing Dev. Auth., 221 Va. 659, 272 S.E.2d 649 (1980). If a statute is ambiguous and may be construed with different meanings, one constitutional and the other unconstitutional, the meaning which sustains the constitutionality of the act should be adopted. See Hannabass v. Ryan, 164 Va. 519, 180 S.E. 416 (1935). There are a number of persuasive arguments which will sustain the constitutionality of the use of the word "classes" by limiting it to a constitutional meaning.

In the remarks of Delegate Morrison, he described the reasoning behind retaining the proposed grandfather clause when he said:

"The necessity of a grandfather clause was considered by your committee and it was decided to have it included as an alternative to reenacting all of the existing exemptions at a special session in 1971." House Debates at 356.

In other words, without the grandfather clause, all of the organizations and entities holding property exempt on July 1, 1971 would lose their exemptions under the 1902 Constitution on that day at noon unless there was created a specific exemption in the revised Constitution. It would have been necessary to reenact all of the existing exemptions by special designation, a task of inestimable proportion.

It does no injustice to the use of the word "classes" to achieve the very purpose illustrated by Delegate Morrison; that is, to avoid the necessity of listing all the individual organizations which enjoyed a lawful exemption under the 1902 Constitution by referring to such properties generically as "the following classes of property, exempt from State and local taxation on July one, nineteen hundred seventy-one." If an organization was a member of one of those "classes of property" described in § 58-12 which actually held property exempt from State and local taxation on July 1, 1971, the exemption for that parcel of property continues under the liberal rules of construction. The membership of the class was closed on July 1, 1971, however, and may not be reopened to include property for which an exemption is sought after July 1, 1971.

In Ch. 469, Acts of Assembly of 1974, the General Assembly deleted from § 58-12 a number of the organizations which were specifically designated therein but then granted specific designations exercising its authority under § 6(a)(6) in separate statutory provisions of the same act. If Ch. 438, Acts of Assembly of 1973 amended § 58-12 by a three-fourths vote with the intention of classifying everything listed in § 58-12 as exempt property under § 6(a)(6), Ch. 469 of the 1974 Acts would have been completely unnecessary. In a similar vein, the General Assembly has continued, with each succeeding session, to add specific statutory exemptions by classification or designation for many organizations which, ostensibly, could claim exemption under § 58-12. These legislative enactments lend considerable weight to the conclusion that the use of the word "classes" in § 58-12 was never intended to bestow upon all of the classes of exemptions under the 1902 Constitution a grant of exemption after July 1, 1971 for specific parcels of property not actually exempt or eligible for exemption on July 1, 1971.

Ascribing a broad interpretation to the use of the word "classes" also results in a chain of logic which creates an inevitable constitutional conflict. It is noted first that § 6(f) does not use the word "classes," but reads as follows:

"Exemptions of property from taxation as established or authorized hereby 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 as herein set forth." (Emphasis added.)

This provision requires a strict construction of all exemptions created by § 6, including §§ 6(a)(1) through 6(a)(4). II A. Howard, Commentaries 1085 (1974); see, also, 1971-1972 Report of the Attorney General at 81 and 392; contra 1974-1975 Report of the Attorney General at 487. If we interpret § 58-12 to require the application of a rule of liberal construction to the exemptions furnished in §§ 58-12(1) through 58-12(4), we have an unavoidable conflict between the rules of strict and liberal construction and § 58-12 would appear to override the constitutionally mandated rule of strict construction for publicly owned property, church property, nonprofit cemeteries, public libraries and nonprofit institutions of learning. Such an unconstitutional result must be avoided.

I also note that § 6(f) requires a strict construction for all exemptions established or authorized by § 6 without exception. Inasmuch as the grandfather clause establishes the continuing right to an exemption, the grandfather clause itself must be strictly construed. The grandfather clause states "that all property exempt from taxation on the effective date of this section [i.e., July 1, 1971] shall continue to be exempt until otherwise provided...." (Emphasis added.) As noted earlier, the classes of property under the 1902 Constitution which continue to enjoy exemption were closed on July 1, 1971. If the General Assembly amendments to § 58-12 are taken to continue the old rule of liberal construction for all property mentioned in § 58-12, regardless of whether such property was exempt on July 1, 1971, then such amendments would implicitly repeal the new constitutional rule of strict construction imposed by § 6(f). Article XII, § 1 of the 1971 Constitution does not permit the General Assembly to amend the Constitution by legislative act. Because a strict construction of the grandfather clause necessitates an interpretation which limits the use of the word "classes" in § 58-12 to a constitutional meaning, we must conclude that § 58-12 and its liberal rule of construction apply exclusively to parcels of property which were exempt or eligible for exemption on July 1, 1971.

Another analysis which furnishes a constitutional interpretation of the use of the word "classes" emerges from the fact that the grandfather clause is self-executing and requires no amendment to § 58-12. Theoretically, § 58-12 could be abolished entirely without diminishing the effect of § 6(f). See Report of the Virginia Code Commission, supra, at 34. An organization which finds itself in circumstances similar to that of the organization in Manassas Lodge, however, would have to show itself to be within one of the lawful classes of property, exempt from State and local taxation on July one, nineteen hundred seventy-one" which, according to § 58-12, shall continue to be exempt under liberal rules of construction.

Considering the amendment to the introductory paragraph to § 58-12 in this light, the placement of the word "classes" is syntactically, pragmatically and legally correct. Therefore, in order for § 58-12 to be constitutional, the exemptions therein must be limited to organizations described in § 58-12 which held a specific parcel of property on July 1, 1971 which was actually exempt on the land book or could have been found to be exempt as in Manassas Lodge.

Conclusion

It is my opinion that in no circumstance is § 58-12 a source of authority for exemption from real property taxation, except for that property which is owned by an organization which (1) existed on July 1, 1971 and (2) held the property on July 1, 1971; and (3) the property was (a) exempt, or (b) entitled to be exempt under the 1902 Constitution. If, and only if, those conditions are met, then property exempt on July 1, 1971 continues to enjoy exemption, and property not actually exempt on July 1, 1971 will be considered for exemption under liberal rules of construction. Apart from this limited
application of the liberal rule of construction, all property exemptions must now be
strictly construed.

The exemptions authorized in the 1971 Constitution, Art. X, §§ 6(a)(1) through
6(a)(4) for publicly owned property, church property, nonprofit cemeteries, public
libraries and nonprofit institutions of learning are:

1. Self-executing;
2. Do not depend upon §§ 58-12(1) through 58-12(4); and
3. Must be strictly construed, even as to the property of governments and churches.

Exemption is not available to any other taxpayer (i.e., those not falling within §§ 6(a)(1)
through 6(a)(4)) except through the exercise of the power granted to the General
Assembly under § 6(a)(6) of Art. X by following the procedures outlined in § 30-19.04 of
the Code.

As noted at the beginning of this Opinion, a number of the prior Opinions of this
Office on the issues you have raised may have created uncertainty. To the extent prior
Opinions can be read as inconsistent with this Opinion, they are expressly overruled.

Applying these conclusions to the facts you have given, the two nonprofit
organizations which both were formed after July 1, 1971, one of which operates a home
for indigent persons and the other of which is a benevolent association using its real
property exclusively as a meeting room, are not eligible for exemption in the absence of
their qualifying for exemption under a classification or designation statute adopted
by the General Assembly under its authority granted by § 6(a)(6), Art. X of the
Constitution. The exemption for the church organized after July 1, 1971 must be strictly
construed in accordance with § 6(f) of the Constitution.

1 The revised Constitution went into effect at noon on July 1, 1971. Constitution of
Virginia, Schedule § 1 (1971).

2 As noted by the Supreme Court of Virginia, the specific piece of property need not
actually have appeared in the land book as exempt property in 1971, so long as the owner
of the property was legally entitled to an exemption for the property on that date.

3 Certain of these additions were held by this Office to be unconstitutional under the
at 356; 1972-1973 at 393; and 1965-1966 at 277.
4 H. A. Howard, Commentaries, supra, at 1085.
5 See fn. 3.

6 There is also some question whether the measure passed the House by the required
three-fourths vote. The House vote on agreement to the Joint Conference Committee
Report on S.B. 20 was 61-3, 14 fewer than the required three-fourths vote of the 100-
1524. The House amendments to S.B. 20 which became the basis for the Joint
Conference Committee Report did receive a vote of 88-0. Journal of the House of
Delegates, at 1320-1321. According to Rule 75 of the Rules of the House, however, "a
conference report to be adopted, must receive the same recorded vote as required to
pass the bill itself."

The 1972 cumulative supplement to Title 58 of the Code incorporated the language
purporting to amend § 58-12 as if it had been lawfully passed. The editor's comment
simply states, "The 1972 amendment rewrote the introductory paragraph."

To be precise, the fourth word of the first sentence, "of," was italicized in the
printing of the 1972 act but not italicized in the 1973 act. This appears to be a
TAXATION. GROSS RECEIPTS. HOME MORTGAGE CORPORATION WHICH IS
SUBSIDIARY OF SAVINGS AND LOAN ASSOCIATION LIABLE FOR GROSS RECEIPTS
TAX.

June 12, 1984

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You have asked whether a home mortgage corporation which is the wholly owned
subsidiary of a savings and loan association is liable for the local gross receipts license
tax. I assume the county has an ordinance requiring every corporation providing financial
services to pay a business license tax measured by its gross receipts as authorized by
§ 58-266.1 of the Code of Virginia. I also assume that the county ordinance establishes a
minimum amount that these corporations must pay for the business license even though
they may have little or no gross receipts.

In order to answer your question, the legal, business and financial relationships
between the two entities must be examined and distinguished. The facts provided reveal
that the savings and loan association has created a separate home mortgage corporation,
which is its wholly owned subsidiary, to accomplish the loan generation function of the
business. Thus, two separate corporations exist, each of which is liable for the gross
receipts tax, assuming the county ordinance is drafted in a manner that imposes the tax
on every corporation providing financial services.

Liability of each corporation for a gross receipts license tax having been
established, you must next determine the amount of tax to be assessed, based upon the
gross receipts of each corporation. In order to determine the gross receipts of each
corporation, you must examine the financial relationship between these related entities
as reflected in their books of account and financial statements.

The State Corporation Commission requires every savings and loan association to
furnish the Commission with an annual statement of its financial condition. See § 6.1-
195.87. I am informed by the State Corporation Commission that if a savings and loan
association has ownership interests in separate corporations, the Commission requires
that the statement of financial condition be presented in consolidated form. Simply
stated, the consolidated statement presents the financial information of all of the
corporations as if they were one corporation; consequently, the subsidiary corporations
lose their identity in a consolidated statement. Note, however, that this loss of identity
for particular financial reporting purposes has no effect on a subsidiary's status as a
separate legal entity.

Consolidated financial statements do not furnish you with the separate company
information that you need to assess a tax based on the gross receipts of each
corporation. Therefore, you must seek additional information from the corporation.
Section 13.1-47 of the Virginia Stock Corporation Act requires that each corporation
keep "correct and complete books and records of accounts...." You, as the commissioner
of revenue, have the authority to require taxpayers to furnish you access to these books of account so that you can properly assess the business license tax. See § 58-874. The officers of the corporation refusing to comply with your request may be subject to a penalty imposed for each day's refusal to furnish the information. See § 58-875.

When you examine the separate company financial records of the home mortgage corporation, you should assess the tax on all gross receipts recorded except those receipts recorded as the result of transactions with the parent savings and loan corporation. Section 58-266.1(A)(13). For instance, you stated that the home mortgage corporation employees are paid by the savings and loan association. Depending on the accounting method used, these transactions may result in gross receipts being recorded on the books of the home mortgage corporation. Similarly, payments by the savings and loan association on behalf of the mortgage corporation for its rent supplies and other items may appear in the accounts of the home mortgage corporation as gross receipts. Section 58-266.1(A)(13) prohibits you from including these types of items in gross receipts of the home mortgage corporation. Taxable gross receipts in the accounts of the home mortgage corporation must have resulted from transactions with third parties. Most likely, these would be receipts in the form of interest and fees collected from customers.

The savings and loan association asserts that all interest and fees are earned by the savings and loan association, all interest and fees are reflected as income to the savings and loan association for all financial reporting purposes as well as income tax purposes, and the home mortgage corporation acts only as an incorporated division and an agent of the savings and loan association and as such lends no money and earns no fees or interest. It is not clear from this statement whether interest and fees "reflected as income to the savings and loan association" were originally recorded as income (receipts) in the accounts of the savings and loan association and, therefore, would appear only on the savings and loan association's separate company financial statement and never on the home mortgage corporation's separate company financial statement; or whether interest and fees were originally recorded in the accounts of the home mortgage corporation and, as a result of consolidated financial reporting, now appear to have been earned by the savings and loan association.

Based on the foregoing, it is my opinion that a home mortgage corporation which is the wholly owned subsidiary of a savings and loan association is liable for the local gross receipts license tax. The amount of the tax should be based on gross receipts generated by transactions with third-party customers. All gross receipts resulting from transactions with the parent savings and loan association must be excluded. If there are no gross receipts from third-party transactions, the home mortgage corporation remains liable for the minimum tax in accordance with the local ordinance.

1See §§ 6.1-195.4(17) and 6.1-195.34(e) authorizing a savings and loan association to organize in this manner.

2Section 6.1-195.5 of the Virginia Savings and Loan Act states "[t]he provisions of the Virginia Stock Corporation Act (§ 13.1-1 et seq.) shall apply to all stock savings and loan associations in all cases not inconsistent with the provisions of this chapter...."

3Section 58-266.1(A)(13) reads: "No county, city or town shall levy a license or other tax on or measured by receipts or purchases by a corporation which is a member of an affiliated group of corporations from other members of the same affiliated group. This exclusion shall not exempt affiliated corporations from such license or other tax measured by receipts or purchases from outside the affiliated group. For purposes of this exclusion, the term 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if:
(a) Stock possessing at least eighty percent of the voting power of all classes of stock and at least eighty percent of each class of the nonvoting stock of each of the includible corporations, except the common parent corporation, is owned directly by one or more of the other includible corporations; and

(b) The common parent corporation owns directly stock possessing at least eighty percent of the voting power of all classes of stock and at least eighty percent of each class of the nonvoting stock of at least one of the other includible corporations. As used in this paragraph, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends; the term 'includible corporation' means any corporation within the affiliated group irrespective of the state or country of its incorporation; and the term 'receipts' includes gross receipts and gross income.

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**TAXATION. INTEREST. INTEREST ON SPECIAL FUND BELONGS TO SUCH FUND.**

March 28, 1984

The Honorable Douglas G. Campbell  
County Attorney for Tazewell County

You have asked whether interest accruing on local coal road improvement license taxes collected under an ordinance adopted pursuant to § 58-266.1:2 of the Code of Virginia may be transferred to the general fund of a county or whether it must remain in the special fund for coal road improvements.

Section 58-930 provides as follows:

"Whenever the treasurer of any county or city in this State shall receive interest on funds belonging to the State or to any political subdivision thereof, such interest shall become a part of the principal of the particular fund on which such interest accrued and shall be accounted for by the treasurer in the same manner as he is required by law to account for the principal; provided, however, that the governing body of any county or city may direct that the interest received from general obligation bond proceeds invested shall be credited to the general fund of such county or city. Any treasurer violating this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five thousand dollars."

Several prior Opinions of the Attorney General have held that, except for interest on general obligation bonds, interest becomes a part of the fund which generates the income. See Reports of the Attorney General: 1974-1975 at 71 and 213; 1972-1973 at 340.

Unlike the general fund of a county, special funds are created for a specific purpose. Section 58-266.1:2 establishes the Coal Road Improvement Fund, which is a special fund designed for improving public coal hauling roads. In an Opinion found in the 1977-1978 Report of the Attorney General at 350, this Office ruled that before county funds are appropriated to a school board, a county is entitled to retain any investment income on money. Once an appropriation is made to the school board, however, such monies become part of the school fund. Similarly, once monies have been deposited in a coal road improvement special fund, any investment income or interest that has accrued on those monies becomes part of the special fund.

Based on the foregoing, it is my opinion that § 58-930, when read with § 58-266.1:2, requires that interest accruing on local coal road improvement license taxes be credited to the Coal Road Improvement Fund.
TAXATION. LAND USE. AIRPORT USE OF PASTURELAND FOR ULTRALIGHT AIRCRAFT NOT AGRICULTURAL USE.

March 5, 1984

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

You have asked whether use of 20 acres of pastureland on a 403 acre farm as an airport for ultralight aircraft disqualifies that 20 acres, but not the entire farm, from the special assessment available for "[r]eal estate devoted to agricultural use" under § 58-769.5(a) of the Code of Virginia. You state that the 20 acres were rezoned from A-1 Agricultural Limited to A-2 Agricultural General with a conditional use permit for an airport. I assume that Isle of Wight County has an ordinance as required by § 58-769.6 which allows the special land use assessment.

Section 58-769.5(a) establishes a special classification for real estate when it is "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...." (Emphasis added.) According to Webster's New Collegiate Dictionary 312 (1974), to "devote" means "to give over (as to a cause, use, or end) wholly or purposefully [as in] land devoted to agriculture." Use of the land as an airport infringes upon the use of the land as pasture. Thus, the land is not "devoted" to agricultural purposes. It is irrelevant that the land continues to be zoned for agricultural use. Zoning terms are not determinative of actual use for purposes of the special assessment classifications under § 58-769.4 et seq.

Based on the foregoing, it is my opinion that use of the 20 acres of farm pastureland as an airport for ultralight aircraft disqualifies that 20 acres, but not the entire farm, from the special assessment available for "[r]eal estate devoted to agricultural use" under § 58-769.5(a).

1I am advised by the Department of Aviation that the landing strip in question is a licensed commercial ultralight airport facility.

TAXATION. LAND USE. INSTALLMENT PAYMENTS DO NOT AFFECT DATE FOR REVIEW OF DELINQUENT LIST FOR PURPOSES OF REMOVING PARCEL FROM SPECIAL LAND USE ASSESSMENT PROGRAM UNDER § 58-769.8:1.

August 23, 1983

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

You have asked whether a local ordinance requiring installment payments of real property taxes alters the dates set by § 58-769.8:1 of the Code of Virginia for the county treasurer to review delinquent taxes for parcels enrolled in land use taxation. Your question arises because in 1984 Frederick County will require payment of the annual real property assessment in two installments, due June 5th and December 5th of the tax year.
For the purpose of answering your inquiry, I am assuming that the foregoing practice was instituted by ordinance in accordance with the authority of § 58-847. That section provides in pertinent part:

"[T]he governing body of any county...may provide by ordinance...the time or times for payment of annual taxes or levies on real estate...which may...be in installments; and may provide by ordinance penalties...for nonpayment in time...."

Accordingly, the section allows localities to bill real property taxes and establish the times at which taxes will be paid more frequently than annually. No language in § 58-847, however, permits the locality to change the dates established in § 58-769.8:1 for review of delinquent taxes for purposes of complying with the statutory procedure to remove parcels from the special land use assessment program.

The language of § 58-769.8:1 clearly establishes June one as the date for review of the delinquent taxes "for any prior year." According to § 58-979, "In any locality which requires the payment of such taxes in installments, real estate shall be delinquent if all taxes on it are not paid by the date the last installment is due."

Based on the foregoing, it is my opinion that a requirement for installment payments of real property taxes under the authority of § 58-847 does not alter the dates set for review of delinquencies by § 58-769.8:1. The county treasurer must review delinquent taxes for all prior years as of June one for purposes of complying with the statutory procedure to remove parcels from the special land use assessment program.

1Section 58-769.8:1 states that: "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." (Emphasis added.) Note: The land use program referred to in this section is provided for in Art. 1.1, Ch. 15 of Title 58.

TAXATION. LAND USE. LANDOWNER MAY REAPPLY FOR TAXATION OF PROPERTY UNDER LAND USE PROGRAM WHERE PROPERTY REMOVED FOR DELINQUENT TAXES UNDER § 58-769.8:1. ALL DELINQUENT TAXES MUST BE PAID.

May 17, 1984

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

You have asked whether the landowner or successor to the owner of a parcel of real estate, which has previously been removed from a land use program under § 58-769.8:1 by reason of delinquent taxes, may reapply for inclusion of the parcel in the program. Your inquiry is based on the assumption that the parcel otherwise qualifies for the land use program.

Your question pertains to the Land Use Taxation Act (the "Act"), § 58-769.4 et seq. of the Code of Virginia, which authorizes localities to provide by ordinance for the use value assessment and taxation of real estate as classified in § 58-769.5. Section
58-769.8:1 requires removal of real estate from the land use program if, after mail notice to the property owner on June one of taxes delinquent for any prior year on property which has a special land use assessment under the Act, the delinquent taxes remain unpaid on November one. The last paragraph of § 58-769.8 also bases the continuation of valuation and assessment under a local land use program ordinance on the "continued payment of taxes as referred to in § 58-769.8:1...."

I find nothing in §§ 58-769.8 or 58-769.8:1 or any other section of the Act to prohibit a landowner from reapplying and being reinstated in the land use program after removal pursuant to § 58-769.8:1. Accordingly, if all the prior delinquent taxes and applicable penalties and interest are paid, it is my opinion that the landowner could submit a new application for taxation under the locality's land use program to the local assessing officer within the time limits established in § 58-769.8. See 1979-1980 Report of the Attorney General at 339 (holding that real estate removed from taxation on the basis of use under a different set of facts is not forever disqualified from special land use tax treatment).

1Cf. Opinion to the Honorable David L. Berry, Commissioner of the Revenue for Rockingham County, dated November 7, 1983 (parcel for which zoning changed to a more intensive use is permanently ineligible); but cf. Ch. 222, Acts of Assembly of 1984 (reverses Berry Opinion restoring eligibility three years after parcel is rezoned to an eligible land use).

2The requirement that all delinquent taxes as well as applicable interest and penalties be paid prior to acceptance or approval of the application is evident from the last two sentences of the third paragraph of § 58-769.8. These sentences provide: "Except as provided by local ordinance, no application for assessment based on use shall be accepted or approved if at the time the application is filed, the tax on the land affected is delinquent. Upon the payment of all delinquent taxes, including penalties and interest, the application shall be treated in accordance with the provisions of this section." This language was added to the Code in 1979. See Ch. 632, Acts of Assembly of 1979. The "except" clause permits a locality by ordinance to provide for acceptance and approval of the land use program application even where taxes are delinquent. Such a local provision would clearly be repugnant to the removal provisions for delinquent taxes enacted in 1980. See Ch. 508, Acts of Assembly of 1980. The leter amendment, therefore, operates as a repeal of the "except" clause. See Miller v. State Entom't, 146 Va. 175, 135 S.E. 813 (1928), aff'd 276 U.S. 272 (1928).

3This opinion dealt with the conveyance of five acres from a larger parcel of forest land. The five-acre tract alone did not meet the minimum acreage requirement for eligibility for assessment based on use. The Opinion held that the tract could, in the future, qualify for forest use valuation if it is combined with a contiguous parcel owned by the same person because the total acreage would meet the minimum size requirements.

TAXATION. LAND USE. REZONING TO MORE INTENSIVE CLASSIFICATION AT REQUEST OF OWNER PREVENTS ASSESSMENT AT USE VALUE EVEN IF UNDER NEW OWNERSHIP.

November 7, 1983

The Honorable David L. Berry
Commissioner of the Revenue for Rockingham County
You have asked whether real property may qualify for land use valuation under the following circumstances: (1) the owner obtains a rezoning to a more intensive use at his own request; (2) he then subdivides the land into tracts of five acres or more and sells them. You wish to know whether the new owners may obtain land use valuation for these rezoned tracts.

Section 58-769.10(D) of the Code of Virginia states in part:

"If at any time after July one, nineteen hundred eighty the zoning of property taxed under the provisions of this article is changed to a more intensive use at the request of the owner or his agent, such property shall not be eligible for assessment and taxation under this article for the years such change is effective or any subsequent tax year, but it shall not be subject to roll-back taxes until a change in use occurs."

The language of this section is clear: the land is ineligible for land use taxation for the year that the rezoning change is effective or for any subsequent tax year, regardless of the fact that there may not be a change in use of the land or that the property or a portion thereof is sold to a new owner.¹

The provisions of § 58-769.13 do not change this result. Section 58-769.13(a) states in part that separation or split-off of lots from real estate valued under land use shall subject it to the roll-back tax but "shall not impair the right of each subdivided parcel of such real estate to qualify for such valuation, assessment and taxation in any and all future years, provided it meets the minimum acreage requirements and such other conditions of this article as may be applicable ...." (Emphasis added.) Land which has been rezoned at the request of its owner to a more intensive classification and then subdivided would not meet the "other conditions of this article."

This result is in accordance with the purpose of the land use valuation statutes. The purpose is stated, in § 58-769.4, to be to tax land in a manner that will promote its preservation. This section and § 58-769.10(D) provide in effect, that in determining whether a property qualifies for land use, an intensive zoning classification in effect prior to July 1, 1980 will not be considered. Action by an owner, however, to rezone his land to a more intensive use so as to make it eligible for development will render it ineligible for land use valuation. This section could easily be circumvented if its effect could be avoided by merely selling off the land immediately after obtaining the rezoning.

Furthermore, if the new owner wishes to use the land for purposes which would make it eligible for use valuation, he may obtain a rezoning to a less intensive category. The intensive zoning classification would no longer apply and the land would then be eligible for land use valuation in the future if all other requirements are met.

¹A prior Opinion of this Office held that a county-wide rezoning, not requested by the owner, which resulted in a change in zoning to a more intensive use did not disqualify the parcel from land use valuation, assessment and taxation until the use of the parcel changed. See 1975-1976 Report of the Attorney General at 357. That result was not overruled by the addition of § 58-769.10(D), Ch. 363, Acts of Assembly of 1980, because in order to trigger that provision the action to change the zoning to a more intensive use must originate with the owner or his agent.
The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have asked whether a nonprofit corporation, qualified as an exempt organization under Internal Revenue Code Section 501(c)(3), is engaged in a business, trade or occupation for the purpose of procuring a local business license under an ordinance enacted pursuant to § 58-266.1 of the Code of Virginia. The organization has over $10 million in annual gross receipts derived from federal and foreign government grants, foundation grants and contributions. It provides educational grants to students here and abroad, educational services to foreign governments and institutional programs, and it purchases equipment for foreign governments and institutions. In your letter, you cited two Virginia Supreme Court cases, Portsmouth v. Citizens Trust, 219 Va. 903, 252 S.E.2d 339 (1979) and Commonwealth v. Employees Assoc., 195 Va. 663, 79 S.E.2d 621 (1954), as pertinent to your question.

The threshold question is whether the corporation is "engaged in a business, trade or occupation." Although the case of Portsmouth v. Citizens Trust did not involve a charitable organization, one issue discussed was the definition of "engaged in business." Quoting from prior Virginia cases, the Court defined "engaged in business" as:

"[A] course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit....It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction...."

Portsmouth, supra at 906. (Emphasis added.)

Consistent with this case are the Guidelines for Local Business, Professional and Occupational License Taxes ("BPOL"), issued by the Department of Taxation, January 1, 1984. In BPOL guideline 4-4, "business service" is defined as "any service, rendered for compensation to any business, trade, occupation or governmental agency...." It would, therefore, appear that an organization which is not receiving compensation or which is not engaged in business for the purpose of earning a livelihood or profit is not engaged in a business, trade or occupation for the purpose of procuring a local business license.

The case of Commonwealth v. Employees Assoc., involved a voluntary, unincorporated organization composed exclusively of employees of certain mills which operated a canteen at which it sold food and drink to its members. The small profits realized were used for the association's purposes. The court held that the organization was subject to the tax, finding that the organization was engaged in business as a retail merchant. The court focused its attention on the definition of "retail merchant" and noted that the tax is measured by the amount of sales and not by the amount of profit or loss on sales.

The Employees Assoc. case does not conflict with the definition presented in Portsmouth. The organization in the Employees Assoc. case was operating as a retail merchant in the same manner as any other retail merchant. The organization was in the business of buying and selling merchandise at prices which would result in a profit. The fact that it sold or dispensed merchandise to its own membership with the intention of applying the proceeds to the benefit of its members, does not change the nature of the business in which the organization was engaged.

Consistent with this position, the BPOL guideline 2-7 states that "[a] charitable institution or other not-for-profit organization that engages in the business of buying and selling merchandise may be subject to a local license tax as a retail or wholesale
merchant, even though the proceeds from the sales are subsequently used for charitable purposes."

Whether an organization is required to secure a local business license is a determination of fact which is the responsibility of the commissioner of the revenue. See, e.g., 1982-1983 Report of the Attorney General at 534. If an organization is operating a licensable business for profit, such as a retail merchant, a locality may require it to procure a local business license under an ordinance enacted pursuant to § 58-266.1.

With respect to the activity of the organization at issue wherein it purchases equipment for foreign governments and institutions, there is insufficient information available to determine whether such activity is consistent with the organization’s 501(c)(3) status. Again, a factual determination is necessary to determine whether the activity is licensable.

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TAXATION. LICENSE. DEFINITION OF "MANUFACTURER" FOR PURPOSES OF § 58-266.1(A)(4) EXEMPTION NOT CONTROLLED BY § 58-441.3(p) DEFINING "MANUFACTURING, PROCESSING, REFINING, OR CONVERSION.

December 28, 1983

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You have asked for an opinion on the interaction of §§ 58-266.1(A)(4) and 58-441.3(p) of the Code of Virginia. More particularly, you have asked whether the definition of "manufacturing" in § 58-441.3(p) of the Virginia Retail Sales and Use Tax Act would be applicable in ascertaining who is a manufacturer for purposes of § 58-266.1(A)(4) pertaining to local license taxes. You have also asked whether the Standard Industrial Classification Manual referred to in the second paragraph of § 58-441.3(p) should carry any weight in defining "manufacturer" for local license tax purposes. Finally, you have inquired whether the decision of the Virginia Supreme Court in the case of Solite Corp. v. King George Co., 220 Va. 661, 261 S.E.2d 535 (1980) would impact upon the interaction of these Code sections.

For reasons hereinafter discussed, I am of the opinion that there is no interaction between the two statutes.

Section 58-266.1(A)(4) prohibits the levying of any local license tax on a manufacturer who sells at wholesale at the place of manufacture. A 1982 amendment to this section extends this prohibition to persons engaged in the business of severing minerals from the earth and who sell the severed minerals at wholesale at the place of severance.

Nowhere in Virginia’s statutes on local license taxes is the term "manufacturer" defined. Only in § 58-441.3(p) does a definitional reference to "manufacturing" occur, but it is lumped together with the terms "processing, refining, or conversion." On its face then, § 58-441.3(p) addresses a concept more general in character than who is a manufacturer within the scope of § 58-266.1(A)(4).

Furthermore, the following statutory language in the opening sentences of § 58-441.3 and § 58-441.3(p) evidences a legislative intent to limit the applicability of the definitions to Ch. 8.1, Art. 2 of Title 58, i.e., to Virginia retail sales and use taxes:
"The following words and terms shall have the following meanings when used in this chapter:

(p) 'Manufacturing, processing, refining, or conversion' as used in this chapter...."

§§ 58-441.3 and 58-441.3(p), respectively. (Emphasis added.)

To apply the definition in § 58-441.3(p) to the question of who is a manufacturer for purposes of § 58-266.1(A)(4) would ignore the legislative intent expressed in § 58-441.3 limiting the definitions to sales and use taxes. Similarly, to apply the 1983 amendment to § 58-441.3(p) to the license tax statute would be tantamount to an implied legislative amendment to § 58-266.1(A)(4). Such a result would be contrary to the rule of statutory construction that amendments by implication are disfavored. 1A C. Sands, Statutes and Statutory Construction § 22.30 (4th ed., 1972).

Moreover, the Supreme Court of Virginia has determined what constitutes "manufacturing" for license tax purposes on several occasions. In its most recent decision, the Court stated that it saw no reason to depart from its previously announced standard that "manufacture" implies a transformation into a product or article of substantially different character. Solite Corporation v. King George Co., 220 Va. at 663, 261 S.E.2d at 536. The Court's definition has not been changed by subsequent legislation.

Based on the foregoing, it is my opinion that the definition in § 58-441.3(p) does not govern § 58-266.1(A)(4). Accordingly, the former section would not be applicable to the determination of the meaning of "manufacturer" as used in § 58-266.1(A)(4). Having so opined, it becomes unnecessary to consider your remaining questions on the weight of the second paragraph of § 58-441.3(p) and the influence of the Solite case on the interaction of the two statutes.

I would apprise you also that § 58-266.1(E) charges the State Tax Commissioner with the responsibility to issue advisory opinions in the area of local license taxes. If, in a particular factual situation, you wish clarification on who is a manufacturer within § 58-266.1(A)(4), you may consult him for such an opinion.

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1 See Ch. 552, 1982 Acts of Assembly.

The Solite case held that the processing of sand and rock by crushing, washing, screening, grading and blending, resulting in finished products called "concrete sand" and "No. 68 gravel" did not constitute manufacturing for purposes of the local license tax because there was no transformation of the sand and broken rock into articles of substantially different character. The result of this case was overturned by the 1982 amendment to § 58-266.1(A)(4). See footnote 2 and related text. The amendment did not affect the court's definition of "manufacture." It merely added to § 58-266.1(A)(4) a specific exemption from the imposition of a local license tax on persons engaged in a Solite-type business, i.e., severing of rocks, sand and certain other minerals and selling them at wholesale at the place of severance.

5 But, see, 1973-1974 Report of the Attorney General at 381. This opinion discusses a holding of the Circuit Court of Rockingham County where tire recapping machinery was held exempt from sales tax as machinery used directly in manufacturing a product for sale or resale. The court used the definition of "manufacturing" given in a license tax case to reach its decision. The opinion holds that the recappers should be treated as manufacturers for purposes of other tax laws including the prohibition of § 58-266.1(A)(4) against levying a local license tax on manufacturers. The opinion applies a court-
rendered definition of "manufacture" from one kind of tax to another. It does not apply
nor consider the statutory definition of "manufacturing, processing, refining, or
conversion" appearing in § 58-441.3(p) to other taxes. For these reasons I find the
opinion distinguishable from and not controlling as to the applicability, for local license
tax purposes, of the statutory definition set forth in § 58-441.3(p).

TAXATION. LICENSE. LOCALITY MAY EXCLUDE MERCHANTS FROM BUSINESS
LICENSE TAX WHILE IMPOSING TAX ON MERCHANTS' CAPITAL.

October 20, 1983

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked whether Franklin County may continue to impose a tax on the
capital of retail and wholesale merchants and impose a business license tax on all other
businesses except merchants. For reasons hereinafter discussed, in my opinion, such a
system of taxation is permissible.

The statutory authority for local governing bodies to impose license taxes is § 58-
266.1(A) of the Code of Virginia, which provides in pertinent part:

"The...governing body of any county, may levy and provide for the assessment and
collection of...county license taxes on businesses, trades, professions, occupations
and callings and upon the persons, firms and corporations engaged therein...."

Subsection (5) of the above section states:

"Whenever any county...imposes a license tax on merchants, the same shall be in
lieu of a tax on the capital of merchants, as defined by § 58-833." (Emphasis
added.)

Localities are thus authorized to impose license taxes on all businesses, trades,
professions and occupations if they so elect. As an alternative, they may impose the tax
on capital of merchants as provided in § 58-833, but they cannot impose both. If the
localities elect to impose a license tax on merchants, that tax is in lieu of the tax on
capital.

Nothing in the language of § 58-266.1 prohibits the county from taxing merchants
by a different method from that used on other businesses. Cf. 1981-1982 Report of the
Attorney General at 365 (§ 58-266.1 does not require a local ordinance to include the
specific business classifications listed in subsection (B)). In fact, the statute impliedly
authorizes taxing merchants differently from other businesses, professions, etc. Local
governments have wide discretion in making taxing classifications which in their
judgment produce a reasonable system of taxation. See Rogers v. Miller, 401 F. Supp.

Accordingly, it is my opinion that a license tax imposed on businesses, professions,
trades and occupations under the authority of § 58-266.1 may exclude merchants if the
county elects to impose a tax on the capital of merchants under §§ 58-832 and 58-833.

TAXATION. LICENSE. MANAGEMENT SUPERVISION OF DOOR-TO-DOOR RETAIL
SALESPERSONS LICENSABLE BUSINESS.
August 4, 1983

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

You have asked a question concerning imposition of business license taxes in the following situation:

A local Amway distributor operates the wholesale aspect of his business outside of the City of Martinsville in Henry County and is thus, as you point out, not taxable by the city. He resides in the city, however, and conducts meetings with his retail distributors at his home. These persons operate as independent retailers; he offers services to them in the nature of consultation and advice. Based on the volume of sales these distributors make, he receives income from Amway described as bonus or merit income. You wish to know if he may be taxed by the city on this consulting business, with the merit or bonus income as the measure of gross receipts.

Section 58-266.1 of the Code of Virginia permits the city to "levy and provide for the assessment and collection of city...license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city...." You state that the city's license tax ordinance establishes a category for taxation of business services "not specifically listed."

Situs for taxation of businesses is either the locality where the person "has a definite place of business or maintains his office..." (see § 58-266.5(a)) or, if he has no definite place of business or office within the Commonwealth, "each locality in which he engages in such business, trade, occupation or calling, with respect to what is done in each such locality." See § 58-266.5(c).

It is my understanding that, although the distributor operates a wholesale business in another locality, you have found that the activity in question here is separate from and is categorized differently from the wholesale business. It is also my understanding that the distributor operates this business from his home. If a person is engaged in more than one type of business, he may be taxed separately on each facet. See 1973-1974 Report of the Attorney General at 381.

Depending on the circumstances, the licensee's home may be considered a "definite place of business." See Reports of the Attorney General: 1982-1983 at 553; 1981-1982 at 387 and 1974-1975 at 472. Even if it is not, it is still a taxable situs as a place where he "engages" in his business, pursuant to § 58-266.5(c).

The merit or bonus income appears to be the proper measure of gross receipts for the imposition of tax. The tax is based on the gross receipts derived from activities or services performed within the locality. See 1981-1982 Report of the Attorney General at 383. In this case, the merit or bonus income is based upon the amount of sales made by the distributors whom the licensee has consulted with and provided guidance to at the meetings held at his residence in the city and is thus attributable to such activity. Therefore, the receipts arise "with respect to what is done in [the] locality." I am, accordingly, of the opinion that your inquiry may be answered in the affirmative.

1The result of this Opinion is limited to your finding of fact that the wholesale distributor is operating an entirely separate business in his home. In the situation where the meetings, consultation and advice are a regular part of or incidental to the wholesale business either as a matter of contract, common understanding or expectation among the parties, or as a requirement of the parent company, such activities should not be
regarded as a separate business. There is reason to question your finding of fact that a separate business exists. Your description of the manner in which the wholesale distributor is compensated for the meetings, consultation and advice raises substantial doubt as to whether a separate business is being operated. There appears to be no direct compensation for the service performed either from the parent company or from the retail distributors. This would lead me to believe that the entire operation is a single business. In that case, the situs for taxation would be the principal place of business which you have indicated is located in Henry County and the wholesale distributor would be subject to tax in that jurisdiction on his entire income from the business.

See, also, Guidelines for Local Business, Professional and Occupational License Taxes, Department of Taxation, January 1, 1980, p. 3, which states: "If the conduct of a business, trade or occupation at a single place of business involves operations that fall within two or more of the four categories as set forth, the licensee is subject to the rate ceiling applicable to each operation."

TAXATION. LICENSE. PRORATED REFUND UNDER § 58-266.5:1 ALLOWABLE TO TAXPAYER WHO PAID TAX IN ONE JURISDICTION FOR 1983 WHEN MOVED TO NEW JURISDICTION AFTER JULY 1, 1983.

October 11, 1983

The Honorable Walter A. Stosch
Member, House of Delegates

You have asked whether a taxpayer, who paid a business license tax in one jurisdiction for the entire year 1983, is entitled to a prorated refund of the 1983 tax from that jurisdiction under § 58-266.5:1 of the Code of Virginia if he ceases doing business in the jurisdiction after July 1, 1983. In the facts you presented, the taxpayer moved his business to a different jurisdiction after July 1, 1983.

As you have noted, § 58-266.5:1 was added to the Code by the 1983 session of the General Assembly. See Ch. 252, Acts of Assembly of 1983. The Act did not contain an emergency clause or a clause specifying an effective date. Thus, the effective date of this section is July 1, 1983. See Art. IV, § 13 of the Constitution of Virginia (1971); § 1-12 of the Code.

The language of the statute does not express the intent of the General Assembly as to the application of the proration provision to those taxpayers who had paid the 1983 license tax before July 1, 1983. Section 58-266.5:1 states in part:

"In the event a person, firm or corporation ceases to engage in a business, trade, profession or calling within a county, city or town during a year for which a license tax has already been paid, the taxpayer shall be entitled upon application to a refund for that portion of the license tax already paid, prorated on a monthly basis so as to ensure that the licensed privilege is taxed only for that fraction of the year during which it is exercised within the county, city or town." (Emphasis added.)

In absence of a clearly enunciated intent to apply the refund provision retroactively, or only to tax years subsequent to 1983, the statute is applicable to those taxpayers falling within its ambit subsequent to the effective date.

As of the effective date, July 1, 1983, the statute unquestionably allows a refund to qualifying taxpayers who have paid their 1983 license tax and thereafter ceased operating within the taxing locality. The fact that a refund is not available to 1983 licensed taxpayers who cease to engage in a business, trade, profession or calling prior to
July 1, 1983 does not offend the uniformity provisions of Art. X, § 1 of the Constitution. Uniformity principles apply only to ad valorem taxes on property. See 1981-1982 Report of the Attorney General at 350. Therefore, it is my opinion that a taxpayer who paid a business license tax in one jurisdiction for the entire year 1983 is entitled to a prorated refund from that jurisdiction under § 58-266.5:1 when he moves to a new jurisdiction after July 1, 1983.

TAXATION. LICENSE. WHOLESALE MERCHANTS' LICENSE TAX BASED ON PURCHASES. SALES OUTSIDE "AFFILIATED GROUP" DO NOT AFFECT TAX OR EXEMPTION.

May 18, 1984

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You have asked three questions concerning the effect of § 58-266.1(A)(13) of the Code of Virginia on a locality's authority to impose a wholesale merchants' license tax on corporations in an "affiliated group." You note that the wholesale merchants' license tax is based on purchases made by the merchant. Your questions are:

"(1) Does Virginia Code § 58-266.1(A)(13) preclude a locality from levying on an 'affiliated corporation' a wholesale merchants' tax based on purchases made from a member of the 'affiliated group,' despite the fact that the merchant corporation makes all of its wholesale sales to parties outside the 'affiliated group'?

(2) Does Section 58-266.1(A)(13) presuppose an affiliation with a corporation that is licensable in Virginia, i.e., would the exemption apply if the affiliated corporation from whom purchases are made is located outside of the Commonwealth of Virginia?

(3) For purposes of the definition of purchases under Code § 58-266.1(A)(13), is the language of § 58-441.49 exempting from [the ban on local general] sales tax certain wholesale merchants' license taxes measured by purchases, applicable?"

I will answer your questions seriatim.

Section 58-266.1(A)(13) states, in part, that:

"[n]o county, city or town shall levy a license or other tax on or measured by receipts or purchases by a corporation which is a member of an affiliated group of corporations from other members of the same affiliated group." (Emphasis added.)

Goods handled by a wholesale merchant are the subject of two separate transactions. First, the merchant must purchase the goods, then he resells them. The wholesale merchants' license tax is computed on total purchases by a merchant. Income generated by subsequent resale of the goods does not enter into the computation. Therefore, the fact that a merchant makes sales to parties outside the affiliated group is irrelevant in determining whether to apply the exemption from the tax for purchases made within the affiliated group. It is my opinion that § 58-266.1(A)(13) precludes a locality from levying on an "affiliated corporation" a wholesale merchants' tax based on purchases made from a member of the "affiliated group," despite the fact that the merchant corporation makes all of its wholesale sales to parties outside the "affiliated group."

In answer to your second question, the statute is designed to exempt from local license taxation all intercompany transactions (purchases, in this instance) of companies
within an "affiliated group." An "affiliated group" is "one or more chains of includible corporations connected through stock ownership...the term 'includible corporation' means any corporation within the affiliated group irrespective of the state or country of its incorporation...." Section 58-266.1(A)(13). This definition recognizes that members of an affiliated group may be incorporated outside of Virginia. The statute does not contain language that limits the exemption to transactions with companies located within Virginia. Therefore, it is my opinion that the exemption would apply even if the affiliated corporation from which purchases are made is located outside Virginia.

In answer to your last question, § 58-441.49 eliminates local authority to impose certain taxes while preserving local authority to impose "local wholesale merchants' license taxes measured by purchases, the same being in principle the same as the state wholesale merchants' license tax which is being discontinued on and after January 1, 1967...." Section 58-266.1(A)(13) prohibits localities from levying a "license or other tax on or measured by receipts or purchases by [certain] corporation[s]...." Both of these statutes deal with local authority to tax merchants on purchases made by them. When two statutes relate to the same subject they may be considered as in pari materia.

Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957). Statutes in pari materia "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement." Id. at 405, quoting 50 Am.Jur. Statutes § 349 (1944). It is my opinion that because §§ 58-266.1(A)(13) and 58-441.49 are parts of a "homogeneous system" of local license taxation, "purchases" should be given the same meaning under both sections.

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1Section 58-266.1(A)(13) provides: "No county, city or town shall levy a license or other tax on or measured by receipts or purchases by a corporation which is a member of an affiliated group of corporations from other members of the same affiliated group. This exclusion shall not exempt affiliated corporations from such license or other tax measured by receipts or purchases from outside the affiliated group. For purposes of this exclusion, the term 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if:

(a) Stock possessing at least eighty percent of the voting power of all classes of stock and at least eighty percent of each class of the nonvoting stock of each of the includible corporations, except the common parent corporation, is owned directly by one or more of the other includible corporations; and

(b) The common parent corporation owns directly stock possessing at least eighty percent of the voting power of all classes of stock and at least eighty percent of each class of the nonvoting stock of at least one of the other includible corporations. As used in this paragraph, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends; the term 'includible corporation' means any corporation within the affiliated group irrespective of the state or country of its incorporation; and the term 'receipts' includes gross receipts and gross income."

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TAXATION. LOCAL BOARDS OF EQUALIZATION. REQUIRED UNDER § 58-895 (EFFECTIVE JANUARY 1, 1984) ALTHOUGH REASSESSMENT UNDER § 58-786(b) (EFFECTIVE UNTIL JANUARY 1, 1984) COMPLETED IN 1983.

November 10, 1983

The Honorable Henry L. Puckett
Commissioner of the Revenue for the City of Galax
You have asked whether a city which is conducting a general reassessment by a board of assessors during 1983 is required to have a board of equalization or if the appointment of a board of equalization remains an optional choice. You have suggested that the version of § 58-895 of the Code of Virginia in effect at the time the general reassessment began in 1983 should govern so that the entire reassessment process can be completed before the new procedures are implemented.

As your letter denotes, Ch. 304, Acts of Assembly of 1983 amended both §§ 58-786 and 58-895 but delayed the effective date of the amended versions until January 1, 1984. The answer to your question depends upon which version of § 58-895 relating to the appointment of boards of equalization should be applied to a general reassessment which was begun under the current version of § 58-786.

The version of § 58-895 which becomes effective January 1, 1984 states in part:

"A. The circuit court...shall, in each tax year immediately following the year a general reassessment...is conducted...appoint...a board of equalization of real estate assessments...." (Emphasis added.)

The statute speaks as of the effective date, January 1, 1984. You stated that a general reassessment for Galax occurred in 1983. Thus, 1984 is the "tax year immediately following the year [in which] a general reassessment...[was] conducted...." The situation in Galax, as described by you, is clearly governed by the language of the amended § 58-895. The General Assembly provided no grandfather clause which would allow cities that had started a general reassessment before January 1, 1984 to continue the process according to the old provisions. The fact that a board of equalization could be appointed at the option of the city council under the current § 58-895(B) indicates that the appointment of a board of equalization is not inconsistent with current procedures.

Based on the foregoing, it is my opinion that a city which is conducting a general reassessment by a board of assessors during 1983 under § 58-786(b) (effective until January 1, 1984) is required to have a board of equalization appointed during 1984 under § 58-895 (effective January 1, 1984).

TAXATION. LOCAL LEVIES. CITY CHARTER NOT OVERRULED BY GENERAL STATUTE WHERE NO CONFLICT EXISTS IN BASIC GRANTS OF AUTHORITY.

September 15, 1983

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

You have asked whether there is a conflict between § 58-835.1 of the Code of Virginia and §§ 2.05(j)(2) and (4) of the charter of the City of Alexandria, and, if so, which of these legal provisions regulates the authority of the City of Alexandria to prorate tangible personal property taxes.

The City of Alexandria is the first jurisdiction to have been granted general authority to prorate tangible personal property taxes. That authority was initially granted in a 1968 amendment to the city charter adding § 2.05(j) which read:

"The City shall also have power: * * *"
(j) To adopt by ordinance the establishment of the date, in each year, for the
levying of personal property tax on motor vehicles and to prorate and compute the
same, including procedures for filing returns and ascertaining dates of purchases
and exchanges from all persons concerned, including both taxpayers and automobile

That section was later amended in 1970 to its present form. In pertinent part, the
section now reads:

"In the case of such motor vehicles, boats, and trailers which are first registered
after January one of each year, the city shall have the power to:

2. Establish the methods by which such tax shall be prorated and computed.

4. Establish the methods by which a return or returns previously submitted by the
owner shall be amended to reflect, on a prorated basis, the purchase or exchange of
motor vehicles, boats, or trailers after January one of each year." Ch. 492, Acts of
Assembly of 1970.

The City of Alexandria was the only jurisdiction in the Commonwealth which
possessed the general authority to prorate tangible personal property taxes prior to the
adoption of § 58-835.1, the authority to prorate tangible personal property taxes is
limited to certain jurisdictions.

Whereas the city's charter grants to the City of Alexandria the latitude to
determine "the methods by which such tax shall be prorated and computed," § 58-835.1
requires a proration ordinance to provide for taxes to be "prorated on a monthly basis"
and makes the further requirement that "a period of more than one-half of a month shall
be counted as a full month and a period of less than one-half of a month shall not be
counted."

It is clear from a comparison of these provisions that proration under § 58-835.1 is
limited to a monthly basis, whereas the City of Alexandria has the authority to prorate
on a basis of its choice and may utilize any fraction of a year which it determines to be
an appropriate basis. This could include proration on a daily, weekly, semimonthly,
monthly, bimonthly, quarterly, semiannually or any other fractional period of time. I am
advised that the city prorates tangible personal property taxes on a monthly basis,
assessing any fraction of a month as a full month.

The basic authority granted by both the charter provision and § 58-835.1 is the
authority to prorate tangible personal property taxes. In view of the fact that the City
of Alexandria is a city whose population is in excess of 100,000, it may avail itself of the
opportunity to enact an ordinance under the authority of § 58-835.1 just as it may avail
itself of the authority to enact a proration ordinance under its own charter.

Both of these grants of authority are permissive and the city is under no legal duty
to choose one over the other. Attendant to each of these grants of basic authority are
certain conditions under which the authority may be exercised. If the City of Alexandria
acts under the authority of its charter, it must comply with all the conditions stated
therein. If it acts under § 58-835.1, it must comply with all the conditions and
restrictions under that statute. Conversely, whichever of these two sources of authority
the City of Alexandria chooses as the basis for its proration ordinance, it is not bound to
comply with the conditions and restrictions of the other source of authority.

Had the General Assembly intended to strip the City of Alexandria of the authority
granted under its charter or had the legislature otherwise intended to require that
proration ordinances adopted by local political subdivisions be uniform, the General Assembly could have prefaced § 58-835.1 with the language "notwithstanding any other provision of law." In the absence of such preemptive language and because of the permissive nature of these grants of basic authority, it is my opinion that an ordinance prorating tangible personal property taxes adopted pursuant to §§ 2.05(2) and (4) of the charter of the City of Alexandria remains valid and it need not be amended to conform to the conditions and restrictions imposed by § 58-835.1.3

1Section 58-851.7 was amended by Ch. 692, Acts of Assembly of 1978 and § 58-851.6 was amended by Ch. 437, Acts of Assembly of 1981 to require certain local governing bodies which adopt a July one tax day or which adopt a fiscal year basis for levying taxes, respectively, to prorate taxes where the taxpayer is taxed in another jurisdiction and the tax is paid on a calendar year basis with a January one tax day. Section 58-829.3 was amended by Ch. 567, Acts of Assembly of 1976 to permit quarterly proration of tangible personal property taxes on mobile homes delivered or moved into the jurisdiction after January one.

2Section 58-835.1 is permissive and not mandatory. It provides that certain local governments may adopt an ordinance providing for proration of tangible personal property taxes. Those local governments are a "county operating under the county manager plan or the urban county executive plan, the Counties of Albemarle, Chesterfield, James City, and Loudoun, any city having a population in excess of 100,000, and the City of Falls Church..." 3

It is an accepted principle of statutory construction that where two legislative enactments appear to conflict, if at all possible, they should be construed in a manner to allow both to remain viable. Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935).

Furthermore, before a later enacted general law may be construed to repeal a special law by implication, there must be a direct conflict which cannot be reconciled. City of Danville v. Ragland, 175 Va. 27, 33, 7 S.E.2d 121, 124 (1940); see, also, Reports of the Attorney General: 1978-1979 at 35; 1974-1975 at 415. The conflict must be both inevitable and substantial. Commonwealth v. Sanderson, 170 Va. 33, 39, 195 S.E. 516, 519 (1938). The conclusion of this opinion reconciles § 58-835.1 and the charter provision so that no conflict exists and both enactments remain intact.

TAXATION. LOCAL LEVIES. STATE AGENCIES NOT SUBJECT TO LOCAL ORDINANCES ABSENT EXPRESS STATUTORY AUTHORIZATION.

September 7, 1983

The Honorable W. E. Lavery, President
Virginia Polytechnic Institute and State University

You have asked whether the Town of Blacksburg may impose tax collection responsibilities upon a State educational institution's officers and employees for a tax on meals sold by the institution. The recently enacted ordinance provides for a two percent tax on each prepared meal purchased within the town limits. The ordinance does include a limited number of exemptions.

The tax is levied upon the purchaser. The seller of the meal is charged with the responsibility of collecting the tax, as well as preparing reports of meals purchased which will be submitted to the town. Failure to comply with the ordinance may result in the assessment of penalties and interest.
You furnished a copy of the ordinance which recites that it is enacted under the authority of § 2.03 of the Charter for the Town of Blacksburg, Virginia and § 15.1-841. The Charter for the Town of Blacksburg, Ch. 619, Acts of Assembly of 1975, provides in § 2.03 that "[t]he powers set forth in Chapter 18 of Title 15.1 of the Code of Virginia as in force on January 1, 1975, and any acts amendatory thereof or supplemental thereto, are hereby conferred on and vested in the town of Blacksburg." Within Ch. 18 of Title 15.1 is § 15.1-841, which reads as follows:

"A municipal corporation may raise annually by taxes and assessments on property, persons and other subjects of taxation, which are not prohibited by law, such sums of money as in the judgment of the municipal corporation are necessary to pay the debts, defray the expenses, accomplish the purposes and perform the functions of the municipal corporation, in such manner as the municipal corporation deems necessary or expedient."

The town ordinance also cites § 58-441.49(a) of the Code which permits "local taxes on transient room rentals and meals...to the extent authorized by law...." This language is not itself a grant of power to impose such a tax. Rather, it is an exception to the prohibition of § 58-441.49(a) against all local general sales taxes except the one percent local sales and use tax authorized by § 58-441.49(b). See 1982-1983 Report of the Attorney General at 562.

Before turning to your question, it is helpful to consider one of the exemptions because it narrows the scope of the purported duty imposed upon the University. As noted above, the ordinance contains exemption provisions, including one which exempts the sale of any meal which is exempt from taxation under the Virginia Retail Sales and Use Tax Act. The Virginia Department of Taxation has issued Virginia Retail Sales and Use Tax Regulations (January 1, 1979) which pertain to your question. Although there is no express exemption provision for the University under § 1-64 of the regulations pertaining to meals, there is a limited exemption afforded by § 1-96, interpreting the exemption of § 58-441.6(t) relating to colleges or other institutions of learning. That regulation, § 1-96(a), states that "the institution must collect the tax on retail sales of meals to students or others if the price of the meals is not included in room, board or tuition charges or fees." In other words, meals which are included in room, board or tuition charges or fees are not subject to the State tax. Therefore, under the ordinance, those meals are not subject to the tax imposed by the Town of Blacksburg.

For any meal transactions which are not exempt under the specific provision just described, I believe that the town does not have authority to impose upon a State institution the duty to collect the tax and report the purchases of meals. "Generally, the State and its agencies are not bound by any statute, unless the statute in express terms is made to extend to the State." See 1979-1980 Report of the Attorney General at 404. Virginia Polytechnic Institute and State University "is a State agency for purposes of the State's general exemption from statutory and local requirements." Id.

It is the policy of the Commonwealth that "[t]axes are not to be assessed against it or its subdivisions unless the right to tax is made plain." Norfolk v. Nansemond Supervisors, 168 Va. 606, 626, 192 S.E. 588, 596 (1937). Although a number of jurisdictions hold that a constitutional exemption from property taxation accorded the State and its political subdivisions is limited to ad valorem taxes on specific property and does not extend to exemption from excise and privilege taxes, the rule in the Commonwealth is otherwise. Pelouze v. Richmond, 183 Va. 805, 33 S.E.2d 767 (1945).

The Pelouze case held that because the legislature neither expressly required nor made any specific provision with respect to the payment of a privilege tax in the form of a writ tax on suits brought in court by municipal corporations, the court presumed that the legislature did not intend to require imposition of the tax upon municipalities.
Pelouze, supra, at 811, 33 S.E.2d at 769; see, also, O'Berry v. Mecklenburg County, 198 N.C. 357, 151 S.E. 880, 87 A.L.R. 1304 (1930) (general statutes do not bind the sovereign unless the sovereign is expressly mentioned and it will not be presumed, in the absence of express statutory declaration, that the legislature intended to require payment of an excise tax).

Thus, the decision to permit the economic incidence of a municipal tax to be imposed upon the Commonwealth rests with the General Assembly. Cf. United States v. Forst, 442 F.Supp. 920, 923 (W.D. Va. 1977) (Congress determines whether a state tax may be placed upon the United States). Had the ordinance of the Town of Blacksburg sought to impose the tax upon the University as the seller of the meals, it would be my opinion that such an ordinance would be ultra vires with respect to the Commonwealth and her instrumentalities, including the University.

Among the reasons given by the court in Pelouze for requiring express legislative intention to impose excise or privilege taxes on the State, its political subdivisions or instrumentalities, was a statement that "[t]his immunity rests upon fundamental principles of government, being necessary in order that the functions of government shall not be unduly impeded, as well as for other reasons." Pelouze, supra, at 811 (quoting 51 Am.Jur. Taxation § 557 (1944)).

This same rationale applies in equal measure to a requirement that the sovereign act as a collector of a local tax. Therefore, I am persuaded that the prohibition against local taxes being imposed upon the Commonwealth in the absence of express statutory authority extends as well to prohibit the imposition upon the Commonwealth of the duty to collect and make reports for any local tax.

In summary, the tax is imposed upon the purchasers of meals within the town. Under the terms of the ordinance, the tax would not be applicable to meals purchased through general room, board and tuition charges paid to the University. With respect to other meals purchased individually, the town does not have authority to require the University to collect the tax. Thus, for practical purposes, the town is without authority to enforce collection of the tax in facilities owned and operated by the University.

1See, also, 1982-1983 Report of the Attorney General at 458 (in a zoning context, the powers of governmental bodies extend to other governmental bodies of equal or lesser authority than the local government seeking to apply them).

TAXATION. LOCAL LICENSE. COLLECTION BY ORDINANCE PROHIBITING ISSUANCE OF SUCH LICENSE WHERE PERSON DELINQUENT IN PAYMENT OF LICENSE, PROPERTY OR OTHER TAXES TO CITY NOT AUTHORIZED EXCEPT FOR DELINQUENT LICENSE TAX.

January 17, 1984

The Honorable Frank M. Slayton
Member, House of Delegates

You have asked whether the City of South Boston may amend its business, professional and occupational license tax ordinance to provide that the commissioner of revenue is prohibited from issuing a business license to any person who is delinquent in the payment of any license tax, property tax or other tax which may be due by such person to the city.
A recent opinion of this Office found in the 1982-1983 Report of the Attorney General at 156 addressed the issue which you have raised. That Opinion held that a city may not refuse to issue local business licenses to persons or firms as a method of collecting delinquent personal property taxes. The holding was based on the fact that legislative authority would be necessary to permit the collection of delinquent personal property taxes in this manner and no such authority was found to exist.

I am, therefore, of the opinion that the City of South Boston is prohibited from enacting the proposed amendment because it constitutes a method of collecting other specie of delinquent taxes besides the license tax without any authority in the Code to support such a collection method.

Section 58-266.1 expressly authorizes localities to provide for the levy, assessment and collection of license taxes. Thus, provisions in the ordinance for sanctions related to the nonpayment of the license tax would be permissible. See 1974-1975 Report of the Attorney General at 470. Refusal to issue a current business, professional or occupational license to a person who conducted business in a prior year without paying such license tax would be a permissible sanction. Any such sanction would be subject, of course, to a statute of limitations defense.

TAXATION. LOCAL SALES TAX. DISTRIBUTION OF TAX REVENUES TO TOWNS WITHIN COUNTY. COUNTIES. TOWNS. CONTRACTS.

June 11, 1984

The Honorable Thomas J. McCarthy, Jr.
County Attorney for Pulaski County

This is in reply to your request for my opinion concerning the proper proportionate amount of local sales tax revenue which would be payable to incorporated towns located within Pulaski County under § 58-441.49 of the Code of Virginia. Section 58-441.49 authorizes a county governing body to levy a local sales tax, which is administered and collected by the State Tax Commissioner along with the State sales tax. Subsections (f), (g) and (h) of § 58-441.49 provide for distribution of local Sales tax revenue back to the localities after collection as follows:

"(f) As soon as practicable after the local sales tax moneys have been paid into the state treasury in any month for the preceding month, the Comptroller shall draw his warrant on the Treasurer of Virginia in the proper amount in favor of each city or county entitled to the monthly return of its local sales tax moneys, and such payments shall be charged to the account of each such city or county under the special fund created by this section. If errors are made in any such payment, or adjustments are otherwise necessary, whether attributable to refunds to taxpayers, or to some other fact, the errors shall be corrected and adjustments made in the payment for the next month or for subsequent months.

(g) Such payments to counties are subject to the qualification that in any county wherein is situated any incorporated town constituting a special school district and operated as a separate school district under a town school board of three members appointed by the town council, the county treasurer shall pay into the town treasury for general governmental purposes the proper proportionate amount received by him in the ratio that the school age population of such town bears to the school age population of the entire county. If the school age population of any town constituting a separate school district is increased by the annexation of territory since the last preceding school age population census, such increase shall, for the
purposes of this section, be added to the school age population of such town as shown by the last such census and a proper reduction made in the school age population of the county or counties from which the annexed territory was acquired.

(h) One-half of such payments to counties are subject to the further qualification, other than as set out in paragraph (g) above, that in any county wherein is situated any incorporated town not constituting a separate special school district which has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance, the county treasurer shall pay into the town treasury of each such town for general governmental purposes the proper proportionate amount received by him in the ratio that the school age population of each such town bears to the school age population of the entire county, based on the latest statewide school census. If the school age population of any such town not constituting a separate special school district is increased by the annexation of territory since the last preceding school age population census, such increase shall, for the purposes of this section, be added to the school age population of such town as shown by the last such census and a proper reduction made in the school age population of the county or counties from which the annexed territory was acquired." (Emphasis added.)

You relate that the Towns of Dublin and Pulaski are situated within Pulaski County, each does not constitute a separate special school district, and has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance. Accordingly, as to the Towns of Dublin and Pulaski, § 58-441.49(h) applies in determining the town's share of the local sales tax revenue.

The formula prescribed in subsections (g) and (h) are similar but obviously not identical. The formula in (g) may be expressed as:

\[
town \text{ entitlement} = \frac{town \text{ school population}}{county \text{ school population}} \times \frac{total \text{ county local sales tax revenue}}{total \text{ county school population local sales tax revenue}}
\]

Subsection (h) differs from (g) because only one-half of the total county revenue is to be subject to the apportionment. Accordingly, the formula in subsection (h) may be expressed as:

\[
town \text{ entitlement} = \frac{town \text{ school population}}{county \text{ school population}} \times \frac{1/2 \times total \text{ county local sales tax revenues}}{total \text{ county local sales tax revenues}}
\]

I have confirmed with the Office of the Auditor of Public Accounts the foregoing description of the formula and it is my understanding that counties throughout Virginia have historically applied the formula in accordance with this interpretation. Of course, a longstanding administrative interpretation of a statute is entitled to great weight. Dept. of Taxation v. Prog. Com. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975).

You relate also that the Town of Pulaski has alleged that a contract was made between the town and the county in 1968, under which the town agreed not to annex portions of the county in exchange for the county's promise to make future sales tax revenue payments to the town in excess of the amounts payable pursuant to § 58-441.49(h). You ask that I confirm your opinion that such an agreement, if not in writing, would be unenforceable under the Statute of Frauds, and would be otherwise invalid insofar as it purports to bind the county to make payments in future years, in the absence of approval of such an arrangement by county voters in a referendum. The rules of law
applicable to contracts, including the Statute of Frauds, are applicable to an agreement to which a locality is a party. Thus, with respect to the application of the Statute of Frauds, if the agreement cannot be performed within a year, it is not enforceable if not in writing. Because I am unaware of the specific terms of the agreement, I am unable to opine whether the Statute of Frauds is applicable to it. With regard to the second part of your request, I previously have opined that an agreement between a county and a town which purports to bind the county to a fixed contractual obligation to make payments in future years is invalid unless the arrangement is first submitted to the qualified voters of the county for approval. See 1982-1983 Report of the Attorney General at 149.

1In an earlier opinion of this Office, a contrary conclusion was reached with respect to subsection (h). To the extent that the Opinion found in 1977-1978 Report of the Attorney General at 451 is inconsistent with this Opinion, it is expressly overruled.

2See § 11-2.


TAXATION. PAYMENT. TAXPAYER MAY DIRECT TREASURER TO APPLY PAYMENT TO PARTICULAR TYPE OF DELINQUENT TAX BY TENDERING EXACT AMOUNT OWED FOR THAT TAX.

September 14, 1983

The Honorable James E. Durant
Treasurer for the City of Falls Church

You have asked whether a treasurer may apply a delinquent tax payment to the most delinquent of the real estate or personal property taxes when (1) the taxpayer is delinquent as to both taxes, (2) the taxpayer fails to expressly specify which of the two he wishes to reduce and (3) it is evident from the amount received that the taxpayer intended to credit either the delinquent real estate tax or personal property tax. I assume that you are referring to a situation where the amount tendered by the taxpayer corresponds with the amount due for one type of tax owed. I also assume that your jurisdiction has not adopted an ordinance regulating the application of payments under § 58-961 of the Code of Virginia.

Section 58-961 provides, in part:

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

In construing this section, this Office has held that a taxpayer may direct the treasurer to apply a payment to a particular type of tax, although, absent a local ordinance, the taxpayer cannot dictate the year to which the payment will be credited. See 1981-1982 Report of the Attorney General at 262; 1978-1979 Report of the Attorney General at 267.

It is well established in Virginia law that a debtor's "direction may be given expressly or by implication." Chapman et al. v. Commonwealth, 66 Va. (25 Gratt.) 721,
Tender of an amount which corresponds to the amount owed for one type of tax is an implied direction by the taxpayer to credit that specific tax.

If it is evident that the amount tendered corresponds to an amount owed for a specific tax, the treasurer should interpret the tender as an implied direction by the taxpayer for application to the specific tax.

**TAXATION. PENALTIES. "NO-FAULT" DEFINED.**

January 31, 1984

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

You have asked whether a county treasurer can waive the imposition of penalties and interest for the tax due on amended returns for machinery and tools of a taxpayer in circumstances you have described as follows:

"A commercial quarry has a manufacturing operation partly in Botetourt County and partly in Bedford County. The company conducted an internal audit late last year which disclosed that it had been reporting capitalized costs to Bedford County which should have been reported to Botetourt County in the years 1980, 1981, 1982 and 1983. Amended tax returns for these years have been filed and show a tax liability of $26,841.85 due Botetourt County. The company represents that it is seeking a refund from Bedford County. All evidence indicates that the company has operated in good faith in terms of making its returns and paying its taxes."

You have indicated that Botetourt County has not adopted an ordinance under the authority of § 58-847 of the Code of Virginia which would permit the treasurer to waive both penalties and interest under certain circumstances.

In the absence of an ordinance adopted pursuant to § 58-847, there is no authority in the Code to waive interest on the late payment of taxes due. The only provision permitting waiver of penalty for late payment is contained in § 58-963 which provides that "[n]o penalty shall be imposed for failure to pay any tax if such failure was not in any way the fault of the taxpayer." In a prior opinion of this Office, 1981-1982 Report of the Attorney General at 393, it was noted that the no-fault standard of § 58-963 has not been interpreted by the Supreme Court of Virginia. As a consequence, that Opinion relied upon an Illinois case and concluded that for the failure to pay not to have been any fault of the taxpayer, the taxpayer "must not have purposefully failed in a duty or engaged in conduct that materially contributed to the problem complained of." See Garcia v. Rosewell, 43 Ill. App. 3d 512, 2 Ill. Dec. 392, 357 N.E.2d 559 (1976).

The determination whether the failure to pay was not in any way the fault of the taxpayer is a matter of fact for decision by the treasurer. See 1980-1981 Report of the Attorney General at 348.

If the treasurer believes from all the facts and circumstances that the taxpayer (1) did not "purposefully" fail in its duty to report and pay the taxes due or (2) did not engage in conduct that "materially contributed" to the failure to report and pay the tax when due, then the treasurer must waive the penalty under the authority of § 58-963.

To summarize, I am of the opinion that the Botetourt County Treasurer is not authorized to waive interest on the late payment of the taxes in question, but he may
TAXATION. PERSONAL PROPERTY. AUTOMOBILES OWNED BY FOREIGN STUDENTS SUBJECT TO PERSONAL PROPERTY TAXATION.

June 5, 1984

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

You have asked whether a foreign student, attending a university in Virginia, is entitled to an exemption from personal property taxation. Specifically, you present the situation wherein foreign students are attending Old Dominion University. You are currently exempting motor vehicles belonging to these students from local personal property taxation on the basis that such students should be treated in the same manner as "foreign nationals, assigned to NATO or some other foreign agency in Norfolk."

Section 58-834 of the Code of Virginia provides in pertinent part:

"The situs for the assessment and taxation of tangible personal property...shall in all cases be the county, district, town or city in which such property may be physically located on the tax day, except the situs for purposes of assessment of motor vehicles...as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked...."

It has been well established by this Office that an automobile operated by a student during the full school year within a jurisdiction wherein he resides while attending school is reportable for personal property tax purposes to that jurisdiction. See Reports of the Attorney General: 1973-1974 at 385; 1971-1972 at 410. In such a situation, the automobiles of students have acquired a taxable situs in a particular jurisdiction because they are actually there during and, by far, for the greater part of the year. See 1967-1968 Report of the Attorney General at 275. The jurisdiction wherein a student's automobile is operated during the school year is the proper place for its assessment and taxation, as long as its presence is not so temporary that it does not acquire taxable situs. See 1971-1972 Report of the Attorney General, supra. This test applies equally to foreign students.

Furthermore, Art. X, § 6 of the Constitution of Virginia (1971) sets forth the classes and types of property which may be exempt from State and local taxation. The personal property in issue does not appear to fall within any of these exemptions.

Article VI, Clause 2 of the United States Constitution provides that federal laws and treaties are the "supreme Law of the Land...." By virtue of this clause, an exemption provided by such law or treaty would supersede state law. Thus, foreign nationals who enjoy diplomatic immunity from personal property taxation do so by virtue of some internationally agreed status. For example, Article XI(2)(c) of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement, 4 U.S. Treaties Services 1792, 1812 gives an exemption to certain foreign nationals from any tax payable with respect to vehicles owned by a member of a military force or civilian component of NATO. Similar exemptions are provided in other international agreements such as the Vienna Convention on Diplomatic Relations. I am unaware of any such treaty generally exempting foreign students from payment of property taxes as may be assessed in states where the foreign students attend college.
Based on the foregoing, I am of the opinion that unless a foreign student is otherwise entitled to specified exemption, the automobile owned by the student is subject to personal property taxation.

TAXATION. PERSONAL PROPERTY. COMPUTER SOFTWARE SUBJECT TO LOCAL TAXATION.

September 8, 1983

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

You have asked whether computer software is tangible personal property subject to local taxation. You have supplemented your question with additional information narrowing your question to circumstances where the computer software is in tangible form, stored on discs or tapes, has been purchased or leased for exclusive use and not for resale, has been sold or leased separate and apart from a transaction involving the sale or lease of computer hardware and it consists of an applicational computer program as opposed to a basic operational program.

This is apparently a question of first impression in Virginia and represents, perhaps, only the beginning of a series of legal questions in a rapidly growing field of informational technology. It is, indeed, a field in which the law lags behind the creative forces of intellectual and commercial development. In view of this, I have reviewed definitional concepts, marketing techniques and practices and the status of emerging case development in other states before reaching my conclusions. Nevertheless, this subject of emerging interest and concern should require the attention of the General Assembly.

It is clear from this exhaustive and time-consuming review that, to the uninitiated, computer language is as "foreign" as it is sometimes devoid of form.

"Software" is an imprecise term which has no generally accepted meaning within the data processing business. For purposes of this opinion and in order to coincide with the facts which you have presented, "software" will mean computer instructions in a form which may be read by a machine from either a tape or disc storage medium.

"Applicational programs" may be characterized as computer software designed to do specific jobs such as bookkeeping, billing and statistical analysis. This type of software may be distinguished from basic operational programs which equip the computer's central processing unit with the essential instructions to control input and output of the computer and to schedule the priority of its functions.

Because the software has been sold apart from the sale of hardware, the sale or lease of the hardware and the software was not "bundled." That is, the initial transaction is not completed for a single price without differentiating the cost of the hardware and the software.

We may further describe the software according to one of three categories. It may be "canned" software, which is sometimes referred to as "prewritten," "off-the-shelf" or "standard" programs. This type of software is sold without significant alteration to a variety of customers and is often mass produced. The second category is described as "custom" software and it consists of original computer programs specially created to the customer's specifications. The third category is a hybrid of the first two known as "customized" software, also referred to as "rewritten" or "modified." This type of
software is usually "canned" software which is tailored to the needs of a specific customer. There may also be combinations and permutations of these three categories. Even canned programs will ordinarily require some adaption to meet specific needs.

Generally, if software constitutes tangible personal property, it will be subject to local taxation. If software is intangible personal property, it will either be subject only to State taxation or it will be exempt from both State and local taxation.

There are a number of law review articles analyzing the subject of ad valorem taxation of computer software. Taxation as tangible personal property is almost universally opposed by the writers of those articles who urge that such software is intangible personal property.

Some states have enacted specific legislation defining software as tangible personal property or as intangible personal property for certain taxes, principally in the sales tax area. Ignoring those distinctions, California prescribes the criteria for taxing software as tangible personal property in terms of applicational and basic operational programs. Virginia, unlike some other states, does not have legislation giving precise direction on the subject of the taxation of computer software.

We begin our examination of the Virginia statutes with Ch. 16, Title 58, §§ 58-829 et seq. None of the classification statutes in that chapter identifies computer software as a specific category or classification of tangible personal property. Section 58-830 provides:

"No property shall be assessed as tangible personal property which the law classifies as intangible personal property."

Intangible personal property is defined by §§ 58-405 and 58-833. Those sections do not specifically define or classify computer software.

Because the software you have described is personal property in tangible form, is not specifically defined as intangible personal property, and is not classified as a specific type of tangible personal property, I initially conclude that the software comes within the category of tangible personal property and is classified under § 58-829(M) which reads:

"All tangible personal property employed in a trade or business other than that defined as intangible personal property under Chapter 8 (§ 58-405 et seq.) of this title or § 58-833, or described in subsections A through L of this section or in § 58-831, which shall be valued by means of a percentage or percentages of original cost."

Without specific statutory guidance, however, we should look elsewhere to confirm the conclusion that this is the proper classification of software.

In the absence of specific statutory definition, a number of courts in sister jurisdictions have held software to be intangible personal property, claiming that it is the information which is desired, not the tangible personal property itself which has relatively insignificant value. Some of these decisions have relied upon prior decisions of the same courts in the context of sales tax imposed on the sale of tangible personal property.

A number of courts have discussed the necessity of the tangible personal property medium for transmitting the information as a basis for distinguishing personal property deemed tangible from that which is intangible. These courts have held sales taxes to apply to movie film because the tangible nature of the film is essential to the
transmission of the artists' performance. Conversely, the same courts find that tapes, cards, discs or drums are not essential to the transmission of software because the information contained thereon could be transmitted by purely intangible, electronic means. In the context of advanced technology, videotapes and videodiscs, this distinction is no longer tenable.

A very recent decision of the Supreme Court of Vermont likens "computer program tape" to other taxable personal property such as films, videotapes, books, cassettes and records. In each, their value lies in their respective abilities to store and later display or transmit their contents. A computer software tape is no different. Chittenden Trust Company v. King, _ Vt. _, _ A.2d _ (Docket No. 82-294, August 12, 1983). See, also, Comptroller v. Equitable Trust Company, _ Md. _, _ A.2d _ (Docket No. 147, August 11, 1983) slip op., p. 14. Decided the day before the Vermont decision, the Maryland decision also was unable to distinguish computer tapes from books, motion picture films, video display discs, phonorecords and music tapes.

I am persuaded that the view adopted by Vermont and Maryland is the better reasoned view, one free of artificial distinctions based upon intellectual property concepts. It is undisputed that intangible intellectual property developed by authors, musicians, inventors and similar occupations becomes tangible personal property when reduced to books, phonograph records or tapes, consumer products and other usable forms of property. Equitable Trust Company, supra, slip op., p. 13. As the Vermont Supreme Court noted, canned computer software is no different.

Maryland, with an ad valorem system of tangible and intangible property taxation similar to Virginia's, has also had its highest court express the view that software is tangible personal property subject to taxation under its law. Greyhound Computer Corporation v. State Department of Assessments and Taxation, 271 Md. 674, 679, 320 A.2d 52, 55 (1974).

The Supreme Court of Virginia has not decided a case involving the issue of whether computer software is tangible personal property or intangible personal property. Although caution must be exercised when seeking an interpretation relating to one type of tax by looking to an analogous interpretation in another tax, the comparison is often profitable. I am advised that the State Tax Commissioner has rendered administrative case decisions under the authority of § 58-1119 of the Code in which he held the sale of computer software to be subject to the Virginia Sales and Use Tax as a sale of tangible personal property. Under the appropriate facts and circumstances, such a determination is consistent with the "true object" test prescribed by the Supreme Court of Virginia in WTAR Radio-TV Corp. v. Commonwealth, 217 Va. 877, 234 S.E.2d 245 (1977). Moreover, the interpretation of a statute by the official charged with its administration is entitled to great weight. Commonwealth v. Research Analysis, 214 Va. 161, 163, 198 S.E.2d 622, 624 (1973).

Ohio courts are often looked to for decisions with respect to the Virginia Sales and Use Tax. WTAR Radio-TV Corp., 217 Va. at 883. The Ohio Supreme Court has applied the "true object" test to data processing services and enunciated the following distinction: if the real purpose of the acquisition is to acquire the processed data itself and not the personal services of the seller's programmers, then the transaction is the sale of tangible personal property. If the true object of the transaction is to acquire the personal services of the seller's programmers and the transfer of the tangible medium is an inconsequential element of the transaction, there is no sale of tangible personal property. Accountants' Computer Services v. Kosydar, 35 Ohio St. 2d 120, 298 N.E.2d 519 (1973). This ruling has been extended to computer software by the Ohio Board of Tax Appeals. NCR Corp. v. Lindley, Ohio Board of Tax Appeals, No. 78-D-221, August 4, 1980; The Cleveland Trust Company v. Lindley, Ohio Board of Tax Appeals, No. E-2011, August 30, 1977.
As I have indicated in footnote 11, the "true object" test is specifically applicable only to a sales transaction which involves mixed elements of value attributable to both tangible personal property and personal services. In the case of canned computer software, there is generally no element of personal service. The personal service which led to the development of the canned computer software was rendered at a time remote from the sale.  

The product is now mass-produced and sold off-the-shelf without the inclusion of any personal service. Thus, the intangible nature of a computer programmer's personal service does not affect the determination whether canned computer software is tangible personal property. See Chittenden Trust Company v. King, supra, slip op., p. 4 (Vermont's version of the "true object" test, the "focus of transaction" analysis, does not apply to sale of canned computer software); Comptroller v. Equitable Trust Company, supra, slip op., p. 13 (Maryland's version of the "true object test, the "dominant purpose" test, does not apply when personal services are not part of the transaction).

Both Vermont and Maryland rejected arguments of the taxpayer that the programs, though actually transferred in the tangible form of tapes, could have been transferred by an intangible medium such as telephone lines. If the programs are in tangible form, what might have been done is irrelevant to the tax consequences of the actual transaction. Chittenden Trust Co., supra, slip op., p. 5; Equitable Trust Company, supra, slip op., pp. 17, 31.

Lastly, some mention should be made of the arrangement where the transfer of the tangible tapes is effected pursuant to a licensing agreement under which the "seller" retains legal title to the computer program tapes. Such an agreement typically creates contractual limitations upon the purchaser's rights to use, copy or make further sale of the tapes. The Maryland high court rejected the argument that what passed between the parties were merely intangible rights. In fact, the court held that such licenses convey no intangible rights at all and that the property passing is purely tangible. Equitable Trust Co., supra, slip op., p. 10.

Under the facts and circumstances which you have presented, it is apparent that the buyer or lessee of a canned, applicational program has acquired the tapes or discs themselves and not the personal services of the programmers who originally created the program for mass production. The transfer of the tapes or discs provides an essential piece of equipment to be used with a computer, and the sale or lease does not merely incorporate an inconsequential transfer of personal property. Thus, it is my opinion that computer software, consisting of canned, applicational programs sold or leased in the form of discs or tapes, is tangible personal property subject to local taxation.

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1 Article X, § 4 of the Constitution of Virginia (1971); § 58-9 of the Code of Virginia.
2 Article X, § 6(a)(6) of the Constitution; § 58-10 of the Code.
4 See, e.g., Conn. Gen. Stat. § 12-407(2)(c) and (g) (tangible); Kan. Stat. § 79-3603(g) (tangible); Or. Rev. Stat. § 307.020(1) (intangible); and Tenn. Code Ann. § 67-3002(b) (tangible).
6 According to § 58-405(D), if the software were classified as intangible personal property other than inventory defined in § 58-405(A)(1), it would be exempt from taxation.
TAXATION. PERSONAL PROPERTY. DOMICILIARY SERVICEPERSON NOT EXEMPT FROM PERSONAL PROPERTY TAXATION IN HOME STATE.

May 9, 1984

The Honorable John H. Dressler
Commissioner of the Revenue for the City of Poquoson

You have asked whether certain motor vehicles, owned jointly by a husband and wife who are both in military service, may be subject to a tangible personal property tax in the following circumstances. The husband is a domiciliary of Colorado. Colorado does not impose a personal property tax on motor vehicles. The wife is a domiciliary of Virginia. The vehicles are registered in Virginia in the names of the husband and wife as co-owners. Both parties are stationed in Maryland in compliance with military or naval orders.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A. App. § 574, provides that "[f]or the purposes of taxation...personal property [of the nondomiciliary serviceman] shall not be deemed to be located or present in or to have a situs for taxation in such State [in which the property is physically located]."

Consistent with this statute, this Office has held that a Virginia locality cannot tax motor vehicles owned by nondomiciliary service people who are stationed in Virginia. See Reports of the Attorney General: 1981-1982 at 370; 1965-1966 at 196. With respect to a serviceperson domiciled in Virginia and stationed elsewhere, however, this Office has previously opined that such a serviceperson is amenable to local personal property taxes in Virginia although physical location of his or her property is outside of the Commonwealth during the period of military service. See 1972-1973 Report of the Attorney General at 410. Accordingly, if the motor vehicles were owned by the wife only, they would be subject to local personal property tax at the place of her Virginia domicile.

In the particular situation which you present, the automobiles are owned jointly by both a nondomiciliary husband and a domiciliary wife, each having an undivided interest therein. It has been noted by this Office that property jointly owned is assessed to all owners of the property, making them jointly and severally liable for the tax. See 1976-1977 Report of the Attorney General at 285. Thus, a Virginia locality is permitted to
impose a personal property tax against motor vehicles of which one co-owner is a domiciliary of Virginia.

In applying the rationale of these prior opinions to the situation where both husband and wife are in military service and one spouse is domiciled in Virginia and the other spouse is domiciled in Colorado, I am of the opinion that motor vehicles jointly owned by the couple are subject to local personal property tax in Virginia for the full amount of their assessed value.

TAXATION. PERSONAL PROPERTY. MAGISTERIAL DISTRICT OR TOWN NOT REQUIRED TO BE DESIGNATED IN TANGIBLE PERSONAL PROPERTY BOOK.

March 8, 1984

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County

You have asked whether you are required to prepare the personal property tax books in a form which is classified by magisterial districts and towns. You have noted that § 58-881 of the Code of Virginia does not include a requirement that personal property tax books identify property by magisterial district and town.

Section 58-881 provides, in pertinent part:

"In making out these books, the commissioner of the revenue shall arrange them alphabetically to show the persons chargeable with taxes with reference to the first and each subsequent letter of each name. When there are two or more persons of the same name, he shall use some distinguishing sign by which the taxpayer may be identified. The post-office address of each taxpayer shall be given."

Thus, the prescribed form for the personal property tax book does not include a requirement that property be classified according to magisterial district and towns within the county.

Unlike the statute prescribing the personal property tax book, § 58-804(c) does require the commissioner of the revenue to enter all tracts of land in the county "by magisterial or school districts and town lots...." That same subsection also provides:

"[T]he governing body of any county having sanitary districts may provide by resolution that land books, personal property books and other tax assessment records shall be entered and arranged alphabetically to show the persons chargeable with taxes in each such district. The sanitary district in which the property is located shall be designated by an appropriate coding which shall provide for the means of recapitulation by sanitary districts, setting forth the total assessment and tax levy for each such district." (Emphasis added.)

Thus, if there are sanitary districts in Wise County and the Board of Supervisors of Wise County has provided by resolution that the personal property books be classified by designating the sanitary district in which the property lies, that requirement must be met. Although the sanitary district designation may be required, I am aware of no authority to require the designation in the personal property books of the location of property by magisterial district and town.
TAXATION. PERSONAL PROPERTY. MOTOR VEHICLE OPERATED IN LOCALITY OTHER THAN WHERE NONDOMICILIARY SERVICEPERSON OWNER STATIONED EXEMPT FROM LOCAL TAXATION.

June 12, 1984

The Honorable John H. Dressler
Commissioner of the Revenue for the City of Poquoson

You have asked whether a certain motor vehicle owned by a serviceperson stationed in Arlington, Virginia in compliance with military orders is subject to personal property taxation. The serviceperson is a domiciliary of Texas and is the owner of record of the motor vehicle. The motor vehicle is registered with the State of Virginia and is normally garaged or parked in the City of Poquoson and used by the serviceperson's spouse who lives and is employed in the City of Poquoson. You suggest that the location of the serviceperson's motor vehicle is so distant from the military assignment that the exemption from personal property taxation provided by the Soldiers' and Sailors' Civil Relief Act would appear to be lost.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A. App. § 574, provides that "[f]or the purposes of taxation...personal property [of the nondomiciliary serviceman]...shall not be deemed to be located or present in or to have a situs for taxation in such State [in which the property is physically located]...." Consistent with this statute, this Office has held that a Virginia locality cannot tax motor vehicles owned by nondomiciliary service people who are stationed in Virginia. See Reports of the Attorney General: 1981-1982 at 370; 1965-1966 at 196.

In the particular situation which you present, the motor vehicle is owned solely by the nondomiciliary serviceperson. It is, however, located and operated in a Virginia locality other than the Virginia locality in which the serviceperson is stationed. A similar situation was presented in United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964). In that case, a naval officer, domiciled in New Jersey, was living with his family in Arlington, Virginia. Although he was assigned to sea duty outside of Virginia and New Jersey, he left his family and personal property in Arlington for a year and one-half after his assignment. Arlington County contended that his personal property ceased to be exempt from taxation when he was transferred pursuant to military orders to a post outside Virginia, but elected to leave his family and personal property in Arlington County. The lower court held for the county finding that the personal property was not in Virginia by virtue of the naval officer's military orders, and it was, therefore, subject to the same personal property taxes as other personal property located in Virginia. The United States Court of Appeals for the Fourth Circuit reversed this decision holding that the intent of the Soldiers' and Sailors' Civil Relief Act was to exempt a serviceperson from taxation on his personal property except by his "home" state. Thus, although a nondomiciliary serviceperson's personal property may be located in a jurisdiction other than the one in which the serviceperson is stationed pursuant to military orders, the property is still exempt from taxation in any jurisdiction of the host state.

Accordingly, I am of the opinion that the personal property in question is not subject to personal property taxation in the City of Poquoson.

1See, also, 1972-1973 Report of the Attorney General at 410 in which it was held that a domiciliary serviceperson is amenable to local personal property taxes in Virginia although physical location of his or her property is outside of the Commonwealth during the period of military service.
You have asked whether § 58-834 of the Code of Virginia permits your office to assess a particular tractor-trailer for personal property taxes. You explain (1) that a tractor-trailer driver whose domicile is in Madison County has a lease-purchase agreement on the tractor-trailer with North American Van Lines, Inc., an interstate common carrier of property, (2) that the tractor-trailer in question is garaged in Madison County when the driver is not on the road, and (3) that the driver has furnished your office with an indefinite-situs property tax return filed by North American Van Lines, Inc. with the State of Indiana.

Pursuant to § 58-20, tangible personal property is taxable to the owner of the property. Critical to a determination of ownership in the situation you have presented is whether the lease-purchase agreement is a "true lease" or a "sale." The courts have looked to the unique facts in each case in determining whether a document termed a "lease" or "lease-purchase agreement" constitutes a "sale" or "lease." In applying § 8.1-201(37) of the Code of Virginia, the United States District Court for the Western District of Virginia found that a lease of a loader-backhoe with an option to purchase was a conditional sale with the retention of title in the seller to secure payment. In re Joe Necessary & Son, Inc., 475 F.Supp. 610 (W.D. Va. 1979).

In construing statutory language in all pertinent parts identical to § 8.1-201(37), the Maryland Supreme Court looked at the following factors as characteristics indicating a document identified as a lease was, in fact, a sale with retention of a security interest: (1) a lease agreement which permits the lessee to become the owner of the property at the end of the lease term for a nominal or for no additional consideration, (2) the percentage that the option purchase price bears to the list price, especially if it is less than 25%, and (3) the existence of economic compulsion, i.e., the terms of the lease are such that the only practicable course for the lessee at the end of the lease term is to exercise the option. Crest Investment Trust, Inc. v. Atlantic Mobile Corp., 252 Md. 286, 250 A.2d 276 (1969). This same court found that a true lease is indicated by: (1) a provision specifying a purchase option price which is approximately fair market value at the time of exercise; (2) rental charges indicating an intention to compensate the lessor for depreciation; (3) a purchase price which is not too low; and (4) facts showing that the lessee acquires no equity interest during the lease term.

Prior Opinions of this Office have looked to several other factors in determining who has an ownership interest which will subject the person or entity to personal property tax liability. See 1982-1983 Report of the Attorney General at 573 and 1977-1978 Report of the Attorney General at 433 (holding legal title alone is not necessarily determinative of such an ownership interest). Thus, mere retention of legal title in the name of North American Van Lines, Inc. would not, in and of itself, confer the requisite ownership interest in the company versus the driver. A beneficial or equitable interest such as would exist in an executory contract of sale may be sufficient to confer ownership for tax purposes. See 1982-1983 Report of the Attorney General, supra. The bearer of the risk of loss would also be an indication of an ownership interest. Id.
I do not have sufficient information to resolve the considerations mentioned above. Accordingly, you will have to examine the lease-purchase agreement to determine whether the ownership interest in the tractor-trailer lies with the driver or company.

Turning to the situs provisions of § 58-834, that section provides, in pertinent part:

"[S]itus for purposes of assessment of motor vehicles...as personal property shall be the county, district, town or city where the vehicle is normally garaged...or parked; provided, however, that any person domiciled in another state, whose motor vehicle is principally garaged or parked in this State during the tax year, shall not be subject to a personal property tax on such vehicle upon a showing of sufficient evidence that such person has paid a personal property tax on such vehicle in the state in which he is domiciled...."

The truck driver is domiciled in Virginia and the tractor-trailer is normally garaged or parked in your jurisdiction. Accordingly, if you find that he holds a sufficient ownership interest in the tractor-trailer for personal property tax purposes, he would be liable for the tax.

On the other hand, North American Van Lines, Inc. does not appear to be domiciled in Virginia. Thus, if an examination of the facts indicates that the ownership interest in the tractor-trailer remains with the company, no personal property tax would be due your jurisdiction. This result assumes that the indefinite situs property tax return or other information provided to you satisfactorily shows that taxes on the vehicle were paid in the state in which the company is domiciled.

1This opinion assumes that the prohibitions of § 58-624 do not apply to your fact situation. Section 58-624 prohibits the imposition of local levies on the rolling stock of motor vehicle carriers subject to tax under Art. 11, Ch. 12 of Title 58. The tax of Article 11 is imposed on "certificated motor vehicle carriers." See §§ 58-618 to 58-622. This term is defined as "a common carrier by motor vehicle operating...under a certificate of public convenience and necessity issued by the [State Corporation] Commission." Section 58-628.1. Thus, the prohibition of § 58-624 is limited to motor carriers operating under such a certificate. These certificates are issued only to common carriers by motor vehicle engaged in intrastate commerce. See § 56-278 and East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953) (holding that local assessment of the rolling stock of a motor vehicle carrier was not prohibited by § 58-824 where the carrier was engaged exclusively in interstate commerce and consequently had no certificate of public convenience and necessity issued by the State Corporation Commission). Of course, if on further inquiry you find that the tractor-trailer in question is operating under a certificate of public convenience and necessity issued by the State Corporation Commission, no personal property taxes would be assessable.

2Section 8.1-201(37) defines "security interest" for purposes of the Uniform Commercial Code as "an interest in personal property or fixtures which secures payment or performance of an obligation." Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." Id.

3Such a lease is deemed intended as a security agreement versus a true lease as a matter of law. See § 8.1-201(37)(b). See, also, Collector of Revenue v. F & H Equipment
Co., 119 So.2d 631, 635 (La. App. 1960) (holding that a lease-purchase agreement was a sale where the total rental payments were almost exactly equivalent to the full value of the equipment, all rent was to be applied to the total purchase price and the lessee was granted an option to purchase the equipment at any time during the pendency of the lease).

4The court in Crest Investment Trust, Inc. held that under the facts at hand a true lease existed because the option price was approximately 55% of the purchase price, in no way a nominal amount.

5The "tractor truck" part of the tractor-trailer constitutes a motor vehicle. See §§ 58-829(D) and 46.1-1(15) and (32) pertaining to the definition of motor vehicles. See, also, 1982-1983 Report of the Attorney General at 615. This Opinion noted that while a trailer pulled by a tractor-truck is not a motor vehicle, it is made to move from place to place just as are motor vehicles. Accordingly, the Opinion held that trailers are subject to the same "situs for taxation" definition (where the trailer is ordinarily garaged or kept) as motor vehicles.

TAXATION. PERSONAL PROPERTY. PRORATION. REFUND OF TAXES, PAYABLE WHEN PROPERTY REMOVED FROM JURISDICTION, SHOULD BE MADE BY TREASURER OR TAX-COLLECTING OFFICER.

November 25, 1983

The Honorable Joseph T. Fitzpatrick
Treasurer for the City of Norfolk

You have asked several questions concerning proration of personal property taxes on motor vehicles, trailers and boats under the provisions of § 58-835.1 of the Code of Virginia. I will answer your questions in sequence.

In a case where the commissioner of the revenue has prorated and relieved a tax, you wish to know whether the treasurer makes the prorated tax refund under an ordinance adopted pursuant to the provisions of § 58-1152.1 or whether it is the city manager's responsibility under § 16-7 of the Norfolk City Code. Section 58-835.1(A) states that a local ordinance passed pursuant to that section shall "provide for relief from tax and a refund of the appropriate amount of tax already paid...." Further, the section provides that "[w]hen any person sells or otherwise transfers title to a motor vehicle, trailer, or boat with a situs in the locality after the tax day or situs day, the tax shall be relieved, prorated on a monthly basis, and the appropriate amount of tax already paid shall be refunded." The section does not say who shall make the refund.

Neither the ordinance under § 58-1152.1 of the Code nor § 16-7 of the Norfolk City Code is applicable in this case. Both sections refer to taxes "erroneously paid." The refund in this case is not for taxes erroneously paid because when paid they were justly due. The later removal of the property from the taxing jurisdiction simply invokes the right to a refund; it does not invalidate the tax as initially assessed.

Although § 58-835.1 does not prescribe responsibility for remitting the refund, clearly some procedure must be established. In my opinion the treasurer should pay the refund. The treasurer or tax-collecting officer received payment of taxes pursuant to § 58-961. Furthermore, in the case of an erroneous assessment, the treasurer or tax-collecting officer is required to make refunds. Sections 58-1142, 58-1150 and 58-1152.1 of the Code. Because he has the necessary apparatus in his office for making refunds, the treasurer is the officer best able to perform this function.
You next ask whether penalties and interest must be imposed by the treasurer as provided in both paragraph (B) of § 58-835.1 and the local ordinance in situations where the taxpayer is due a refund and is waiting for the refund before paying a prorated tax on a newly acquired vehicle, trailer or boat.

A governing body that has authorized the imposition of penalties on delinquent taxes by an ordinance adopted under § 58-835.1 must impose those penalties by ordinance adopted in accordance with the provisions of § 58-847. The penalties and interest may be waived "for failure to file a return or to pay a tax if such failure was not in any way the fault of the taxpayer." Both § 58-847 of the Code of Virginia and the Norfolk City Code, in § 16-8.1, provide for such a waiver of penalty and interest. This Office has held in prior opinions that § 58-847 is mandatory and that penalty and interest must be imposed in any case unless it is shown to the satisfaction of the commissioner of the revenue that failure to pay the tax was in no way the fault of the taxpayer. See Reports of the Attorney General: 1981-1982 at 393; 1979-1980 at 354. There is nothing in the Code that would permit waiver of penalty and interest on the ground that the taxpayer is awaiting a refund of a tax which has been relieved under a § 58-835.1 ordinance.

In your third question you wish to know whether there is any time limitation for remitting the refund to the taxpayer when the locality makes a prorated refund. No time limit is specifically set out in § 58-835.1 within which the locality must make the refund. The statute does authorize the ordinance to require that taxes shall be due "not less than thirty days after the date of the tax bill...." In the absence of a specific time period, the taxes should be refunded within a reasonable time, which is defined as "[s]uch length of time as may fairly, properly, and reasonably be allowed or required, having regard to the nature of the act or duty, or of the subject-matter, and to the attending circumstances." Black's Law Dictionary 1653 (rev. 4th ed. 1968). In my opinion, a reasonable time would approximate that amount of time which the ordinance gives the taxpayer to pay his tax after it has been assessed.

You next ask whether the statute implies or gives permission to the locality to credit the amount of the refund to another tax owed by the taxpayer in lieu of making a refund. In my opinion, the statute does not permit the locality to credit another tax owed by the taxpayer instead of making a refund. The statute specifically states that the taxes paid "shall be refunded." "Refund" is defined, by Black's Law Dictionary, as "[t]o return money in restitution or repayment." Black's, supra at 1446. A credit is far different because it does not involve the repayment of money. Because the language of the statute is limited to making a refund to the taxpayer, I am of the opinion that a credit would not be permitted.

Your remaining four questions assume the permissibility of a system of credits in lieu of refunds. Thus, my previous answer abrogates the necessity of an answer.

TAXATION. PERSONAL PROPERTY. SAVINGS AND LOAN ASSOCIATIONS TAXABLE. BANKS NOT TAXABLE ON CERTAIN TANGIBLE PERSONAL PROPERTY OWNED BY INSTITUTIONS.

August 4, 1983

The Honorable Henry L. Puckett
Commissioner of the Revenue for the City of Galax

You have asked whether tangible personal property owned by a savings and loan association is taxable as tangible personal property or whether it is exempt from the
personal property tax on the same basis that the tangible personal property owned by a bank is exempt.

Banks and savings and loan associations are two distinct types of financial institutions regulated by separate statutory provisions. Under laws adopted by the General Assembly, banks are regulated by the Virginia Banking Act, §§ 6.1-3 through 6.1-125 of the Code of Virginia. In addition, taxation of banks is addressed in Title 58, Taxation, Ch. 10.01, Banks and Trust Companies. On the other hand, the legislature has prescribed that savings and loan associations shall be regulated by the Virginia Savings and Loan Act, §§ 6.1-195.1 through 6.1-195.76. Property taxation of savings and loan associations is not specifically addressed in a separate chapter in Title 58, Taxation.

The exemption you mentioned for tangible personal property owned by banks arises because under the legislative scheme banks must pay an annual franchise tax measured by net capital in lieu of, inter alia, the personal property tax on tangible personal property. See § 58-485.04; 1955-1956 Report of the Attorney General at 212 (same result under the former bank stock tax, § 58-465 et seq., repealed). The term "bank" as used in § 58-485.04 does not include savings and loan associations. See § 58-485.01. Therefore, § 58-485.04 does not address the liability of a savings and loan association for the personal property tax. I am not aware of any other provision in the Code which would operate to eliminate the liability of a savings and loan association for personal property taxes.

The foregoing legislative arrangement indicates a carefully considered plan of taxation which distinguishes between these two types of financial institutions. Banks and trust companies are taxed on the value of their tangible personal property not held for lease by the inclusion of the book value of such property in the computation of net capital subject to the annual State franchise tax. See §§ 58-485.04 through 58-485.07. The capital stock measure of the annual State franchise tax for savings and loan institutions does not include their tangible personal property. See § 58-456. (Note that mutual associations do not issue capital stock.) Based upon that plan, it is my opinion that the tangible personal property of a savings and loan association is taxable as tangible personal property under § 58-829(M) which provides generally for the classification of tangible personal property employed in a trade or business.

1Section 58-485.04 reads as follows: "Every bank or trust company shall pay an annual franchise tax measured by its net capital as defined in § 58-485.07. Such tax shall be in lieu of all other taxes whatsoever for State, county or local purposes except the real estate and tangible personal property taxes enumerated in § 58-485.05, retail sales and use taxes under chapter 8.1 (§ 58-441.1 et seq., of Title 58, recordation taxes under § 58-54 et seq., motor vehicle sales and use taxes under chapter 12.1 (§ 58-685.10 et seq.) of Title 58, aircraft sales and use taxes under chapter 12.2 (§ 58-685.27 et seq.) of Title 58, taxes properly assessable upon users of utility services, and local license taxes in connection with the sale of tangible personal property sold by banks in connection with promotions or otherwise."

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TAXATION. PERSONAL PROPERTY. SITUS. KEY FACTOR WHERE SUCH PROPERTY ORDINARILY KEPT IN CONTRAST TO TRANSITORY OR CASUAL STATUS.
The Honorable N. Everette Carmichael  
Commissioner of the Revenue for Chesterfield County

You have asked what factors should be considered for determining the situs of tangible personal property for the purpose of assessment and taxation and whether the situation would change if the property is held by a lessee whose office is in another jurisdiction from that of the owner/lessor.

Under § 58-20 of the Code of Virginia, tangible personal property is taxable to its owner. This is true even where the property is leased to another.

With respect to determining the situs of the property, § 58-834 provides in pertinent part:

"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, except 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...and provided further that in the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property...."

(Emphasis added.)

The phrase "physically located on the tax day of the tax year" was interpreted by the Supreme Court of Virginia in Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957). The Court said:

"The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county." Id. at 735.

The key then to determining situs for the taxation of tangible personal property is the identification, as of tax day, of where the personal property in question is ordinarily kept so as to be fairly regarded as part of the property of a jurisdiction. Hogan, supra, 198 Va. at 735. Such a situs is to be contrasted to a transitory or casual situs. Some general guidelines can be garnered from prior Opinions of this Office.

Opinions of this Office have concluded that casual absence of the subject property on tax day would not, without more, negate situs in a particular jurisdiction. See 1973-1974 Report of the Attorney General at 385 (holding a car operated by a student during the full school year within a jurisdiction where he resided while attending school is subject to personal property tax of that jurisdiction although the car was not physically present there on January first). Additionally, it has been stated that the location of the office of a company in possession of property as either lessee or owner is immaterial if the subject property is normally kept or used elsewhere. See 1959-1960 Report of the Attorney General at 615.
Consideration should be given to the usual location both before and after January first, as well as over the past years, if possible. See the August 29, 1974, Opinion to the Honorable E. G. Heatwole, Director of Finance for Henrico County.

Location in one jurisdiction for a significant period of the year is also a factor in determining situs. In an Opinion found in the 1973-1974 Report of the Attorney General at 384, it was concluded that the situs for taxation of a boat, physically present in Franklin County from March to November and stored elsewhere for the remainder of the year, was in Franklin County because the boat was "normally" situated in that jurisdiction. See, also, 1979-1980 Report of the Attorney General at 353.

The 1982-1983 Opinion concluded that if the City of Salem is the location assigned by a company for certain trailers when they are not in use then they would be taxable in the city. The Opinion continues by stating, "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." Thus, regular return of property to one locality when the subject property is not in use would be a factor to be considered in a situs determination for personal property tax purposes.

The key factor remains the identification of where the property is ordinarily situated on tax day. Only in the event it cannot be determined where such property is ordinarily kept, will it be taxed in the jurisdiction of the owner. The final determination of such situs is a factual one which you must make.

TAXATION. REAL PROPERTY. MOBILE HOME WITH TRADITIONAL ROOF COMPLETELY ENCLOSED BY BRICK INDICATES INTENT TO ANNEX TO REAL PROPERTY.

April 24, 1984

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

You have presented two factual situations concerning double-wide mobile homes and have asked, in each case, whether the property should be taxed as tangible personal property or as real property.

First, you ask whether a double-wide mobile home which has been completely enclosed by brick and has a traditional roof should be taxed as real property. Section 58-829.3 of the Code of Virginia establishes mobile homes, as defined in § 36-71(4), as a separate classification for purposes of local taxation of tangible personal property. The facts and circumstances of a particular case, however, may compel a conclusion that the property must be taken out of the separate classification of tangible personal property and must be reclassified as real property. In my opinion to you, found in the 1981-1982 Report of the Attorney General at 368, I quoted from a previous Opinion of this Office stating that "mobile homes would be taxed as real or personal property depending on how the common law doctrine of fixtures would apply to the facts and circumstances of each case." See 1977-1978 Report of the Attorney General at 427. I also stated that the Virginia Supreme Court had set forth guidelines to aid in reaching that determination.

"Three general tests are applied in order to determine whether an item of personal property placed upon realty becomes itself realty. They are: (1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties. The intention of the party making the annexation is the chief test to
be considered in determining whether the chattel has been converted into a fixture."


In determining the intent of the parties making the annexation, numerous factors may be considered. I suggest that the following list is representative, but not exclusive, of the relevant factors:

1. The nature of the physical alterations which have been made to the exterior of the unit.
2. The nature of the utility connections to the unit.
3. The size of the lot upon which the unit has been placed.
4. The manner in which matters of title to the mobile home are handled.
5. The manner in which matters of title to the underlying real property are handled.
6. The manner in which the unit will be transported to the lot on which it will be placed.
7. The type of foundation upon which the unit rests.
8. The means by which the unit is secured to the foundation.
9. Whether individual units will be used in combination with other individual units to create the residential living space and how such units will be connected.
10. Any other factors not previously mentioned which will reduce or eliminate the likelihood that the unit may later be removed and transported to another location.

Based on these guidelines, it is my opinion that one who has completely enclosed his double-wide mobile home with brick and has installed a traditional roof has exhibited a definite intention to annex his home to the realty. This should not preclude consideration of other factors, however, as the facts and circumstances may differ in each case. Therefore, your determination must be made on a case-by-case basis.

Second, you ask whether double-wide mobile homes on permanent foundations with axles removed should be taxed as real property. You state that currently you consider these homes a separate classification of tangible personal property as provided in § 58-829.3. That section refers to § 36-71(4) for the definition of the classification (mobile homes).

"'Mobile home' means a structure, transportable in one or more sections, which in the travelling mode is 8 body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein." (Emphasis added.) Thus, a mobile home designed to be used with a permanent foundation, without more, is by definition a "mobile home" intended to be classified as tangible personal property by § 58-829.3.
The definition of "mobile home" quoted above is the result of a 1983 legislative rewrite of the prior definition. The prior definition referred to mobile homes "designed to be used, without a permanent foundation...." The new definition includes mobile homes "designed to be used...with or without a permanent foundation...." Under the old definition, several prior Opinions of this Office have held that removal of wheels and axles and placement upon a permanent foundation is insufficient evidence to compel the conclusion that a mobile home has been taken out of the separate classification of tangible personal property established by § 58-829.3. See Reports of the Attorney General: 1981-1982 at 368; 1977-1978 at 427; 1971-1972 at 406. The specific reference to mobile homes "designed to be used...with...a permanent foundation" shows legislative support for the previous Opinions of this Office.

Based on prior Opinions of this Office and the express intent of the legislature in the revised definition of mobile homes, it is my opinion that removal of axles and wheels and placement upon permanent foundation alone is not sufficient evidence to take the property out of the separate classification of tangible personal property established by § 58-829.3. As stated previously, one must consider all the facts and circumstances of each case in making a determination as to whether property is to be taxed as personal or real property.

TAXATION. PERSONAL PROPERTY. OWNERSHIP INTEREST IN MOBILE HOME DEPENDS UPON SEVERAL FACTORS.

May 24, 1984

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

You have asked whether personal property tax on a mobile home should be assessed in the name of the purchaser of the mobile home who has paid the purchase price in full and moved it to her property before January first, even though the seller has not yet delivered a certificate of title for it, or whether the tax should be assessed in the name of the seller who still holds the title on January 1, 1984, the tax day. Both the seller and purchaser are private parties. You also note that the purchaser of the mobile home is unable to obtain insurance for the home because she does not have the certificate of title.

Section 58-20 of the Code of Virginia requires that all tangible personal property be taxed to its owner. Section 58-835 provides that the status of ownership shall be determined as of January first of each year.

The answer to your inquiry turns upon a determination of which person has an ownership interest on January 1, 1984 that will subject him to tangible personal property tax liability. Several of the considerations for making such a determination are set forth in a prior Opinion of this Office found in the 1977-1978 Report of Attorney General at 433. This Opinion held, inter alia, that a person who is the holder of a beneficial or equitable interest in personal property may be subject to tax, and suggests that indicia of such an interest might include possession of the property or bearing of the risk of loss.

In an Opinion of this Office in which the question presented involved an ownership dispute over taxation of a motor vehicle, it was held that a taxpayer does not have to be the holder of title in order to possess an ownership interest sufficient to confer taxable status. See 1982-1983 Report of Attorney General at 573. Thus, the mere holding of the title is not dispositive. In addition, that Opinion noted that insurance or registration status does not govern taxability.
Based on the limited information that is supplied, I would conclude that the purchaser of the mobile home is the individual who should be assessed with the personal property tax. Resolution of the question, however, requires a complete factual determination by the local assessing officer.

TAXATION. REAL PROPERTY. PREPAYMENT. REFUND OF EARLY PAYMENT OF REAL ESTATE TAXES NOT REQUIRED OR AUTHORIZED WHERE ASSESSMENT NOT ERRONEOUS.

August 2, 1983

The Honorable Alfred C. Anderson
Treasurer of the County of Roanoke

You have asked whether the Treasurer or Board of Supervisors of Roanoke County is obligated to refund a prepayment of local real estate taxes upon the request of a taxpayer, or a loan company making payments on behalf of a taxpayer, under the following conditions: Roanoke County collects real estate taxes twice a year, on June 5th and December 5th. The total real estate taxes assessed were paid on the June 5th due date, i.e., the second half amount of taxes due on December 5th was prepaid. No erroneous assessment is involved.

The general rule is that taxes voluntarily paid cannot be refunded, absent a statute providing for such repayment. Barrow v. Prince Edward County, 121 Va. 1, 92 S.E. 910 (1917). See, also, Commonwealth v. Conner, 162 Va. 406, 174 S.E. 862 (1934). I am aware of no statute which provides for the refund of local taxes properly assessed but paid early. Accordingly, it is my opinion that neither the taxpayer nor the board of supervisors is legally required to refund prepaid real estate taxes and, in fact, no authority exists for making such a refund.

1Sections 58-1141, 58-1142, 58-1145 and 58-1152.1 provide for refunds of local levies erroneously assessed. These statutes are not applicable to the fact situation presented because the correctness of the assessment is not at issue.

TAXATION. REAL PROPERTY. TAXPAYER MAY CLAIM REFUND FOR PAYMENT TO JURISDICTION FOR REAL PROPERTY NOT LYING THEREIN.

July 26, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked for my opinion on the real property tax implications arising from the following circumstances:

A parcel of land comprised of approximately twelve acres straddles the boundary line between two cities. The boundary line was established pursuant to statute and recorded by a 1921 agreement. Approximately five acres of the parcel lie in city "V" and the remaining seven acres lie in city "C." However, the fact that the parcel was divided by the political boundary line was not realized until 1980. From 1921 until 1980, all plats and other documents of record indicated that the entire twelve acre
parcel lay wholly within city "V." From 1921 up through and including the tax year 1980, city "V" has assessed and collected real estate taxes on the entire twelve acre parcel. In 1980, it became apparent from surveys and plats made incident to the sale of the property that a portion of the twelve acres lay in city "C." As noted, city "V" assessed and collected the taxes on the entire twelve acres for tax year 1980, the year in which the error was discovered. City "C" neither assessed nor imposed real estate taxes on any portion of the parcel from 1921 through 1980. For tax years 1981 and thereafter, each jurisdiction has assessed and collected real estate taxes on that portion of the parcel actually lying within its territorial boundaries.

You wish to know if the property owner is entitled to a refund of any part of the tax assessed and paid to city "V" and, if so, for what period of time and for what proportion of the tax paid.

I am not aware of any constitutional or statutory provision which expressly limits the taxing powers of local governments to the territorial limits of their political boundaries. A reading of Art. VII, §§ 2 and 3, and Art. X, §§ 1 and 2 of the Constitution of Virginia (1971), however, makes it clear that that is precisely what is contemplated by the Constitution. Thus, an assessment and levy which imposes an extraterritorial tax is an ultra vires act and the assessment is clearly erroneous as to that portion of the property assessed which lies without the territorial boundaries of the political subdivision. The fact that the assessment and levy went unchallenged until the mistake of fact was discovered does not validate the ultra vires assessment.

The taxpayer may make application for correction of the erroneous assessment under either judicial or administrative remedies. Section 58-1145 of the Code of Virginia permits the taxpayer to make application to the circuit court for correction of the assessment and refund of the taxes paid within three years from the last day of the tax year. Under this statute of limitations, the taxpayer must make application to the circuit court of city "V" on or before December 31, 1983, to recover from city "V" taxes paid for the tax year 1980. He may only recover the taxes assessed on the fair market value of that portion of the parcel which actually lay in city "C." Refunds for all other tax years prior to 1980 are barred.

The only exception to the statute of limitations is provided by § 58-1147 for those instances where the taxpayer can show double taxation. According to the facts presented, city "C" neither assessed nor imposed a levy and collected taxes on any portion of the parcel lying within its territorial boundaries prior to tax year 1981. Thus, there has been no double taxation.

The fact that city "C" has not assessed and levied a tax on the property does not prevent the taxpayer from claiming a refund of the 1980 taxes from city "V" based upon the fair market value of the portion of the parcel lying within city "C." City "V" may not defend a claim on the ground that there has been no double taxation. On the other hand, § 58-1165 would still permit city "C" to assess the omitted taxes against the taxpayer for tax year 1980 on that portion of the parcel lying within its territorial boundaries. Such an assessment must be made not later than December 31, 1983.

Rather than pursuing the judicial remedy provided in § 58-1145, the taxpayer may pursue administrative relief from the commissioner of the revenue of city "V" by making application for correction of an erroneous assessment and refund under §§ 58-1141, 58-1142 and, if an ordinance has been adopted by city "V" under § 58-1152.1. The same three year period of time is applicable for purposes of the statute of limitations; hence, the refund application for tax year 1980 must be made not later than December 31, 1983. All other prior years are barred.
TAXATION. RECORDATION. DEED CONVEYING PROPERTY TO LENDING INSTITUTION ON DEFAULT OF PURCHASER IN LIEU OF FORECLOSURE SALE SUBJECT TO GRANTEE'S AND GRANTOR'S TAX OF §§ 58-53 AND 58-54.1.

September 20, 1983

The Honorable George B. Whitacre, Clerk
Circuit Court of Frederick County

You have asked whether the recordation taxes for grantees under § 58-54 and grantors under § 58-54.1 of the Code of Virginia apply to:

(1) the recordation of a foreclosure sale deed where the lending institution is the purchaser of the property as high bidder; and

(2) the recordation of a deed from the debtor to the lending institution in lieu of a foreclosure sale (hereinafter "the second conveyance").

As to the latter situation, you have also asked whether the subject taxes are charged on the fair market value of the property or the remaining amount due on the deed of trust. You ask further whether a notation need be made in the deed as to the circumstances of the second conveyance.

The grantee's tax provided by § 58-54 imposes a tax "[o]n every deed, except a deed exempt from taxation by law, which is admitted to record...." (Emphasis added.) This Office has previously expressed the view that the language of § 58-54 is all inclusive and is to be applied to every deed offered for recordation unless some other provision of law takes the deed from under the operation of that section. See 1949-1950 Report of the Attorney General at 229. I am unaware of any exemption which applies in these cases. Thus, the grantee's tax would apply to the two fact situations you have described.

The measure of the grantee's tax is the greater of "the consideration of the deed or the actual value of the property conveyed...." Section 58-54. In the second conveyance, the consideration is the cancellation of the debtor's mortgage debt. If this consideration is less than the fair market value, the grantee's tax should be calculated on the fair market value of the property.

The grantor's tax, found in § 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 one hundred dollars...." For the reasons set forth below, I find that the grantor's tax applies to both of the fact situations you have presented provided that the consideration or interest of the grantor exceeds $100. In the first instance, a sale
occurs, the foreclosure sale, with the purchase price constituting the necessary consideration. In the second situation involving the conveyance by the debtor (mortgagor) to the lending institution (mortgagee) in cancellation of the mortgage debt, the realty is also sold; the satisfaction of the debt constitutes the requisite consideration.

The grantor's tax of § 58-54.1 is computed on the actual consideration less any liens or encumbrances upon the property not removed by the sale thereof. Accordingly, the tax on the second conveyance should be calculated on the amount of unpaid mortgage debt. Finally, I am unaware of any reason why a notation of the circumstances of the second conveyance need be made in the deed.

Exemptions and exceptions from this tax are provided in §§ 58-56, 58-57, 58-60, 58-61 and 58-64.


This same conclusion was reached under similar facts at 1982-1983 Report of the Attorney General, supra. It assumes that none of the exemptions from the grantor's tax apply.

Id.


A deed of release, marginal notation on the subject deed of trust, or certification of satisfaction, would indicate that the mortgage debt had been satisfied.

TAXATION. RECORDATION. DEED OF TRUST SECURING LINE OF CREDIT TAXED ON MAXIMUM AMOUNT OF OBLIGATION WHICH MAY BE OUTSTANDING AT ANY ONE TIME.

November 21, 1983

The Honorable Rhea F. Moore, Jr., Clerk
Circuit Court of Tazewell County

You have asked whether the recordation tax assessable upon a deed of trust which secures a line of credit for the grantor should be calculated upon the maximum amount of credit authorized by the instrument or upon the actual amount of debt secured at the time the instrument is submitted for admission to record.

The instrument recites that it is a "CREDIT LINE SECOND LIEN DEED OF TRUST" which is "to secure to Lender the repayment of an indebtedness which may reach the maximum aggregate sum of Fifty Thousand Dollars ($50,000.00), which indebtedness is presently evidenced by Borrowers' note of even date herewith in the principal sum of Ten Dollars ($10.00)...." In other words, the instrument provides security for an open line of credit up to a maximum of $50,000.00 of which the borrowers have used only $10.00 at the time the instrument will be offered for recordation. You have also indicated that the first deed of trust secures a different lender.

Recordation taxes on deeds of trust are imposed by § 58-55 of the Code of Virginia, which states in part:
"On deeds of trust or mortgages the tax shall be 15¢ upon every $100 or portion thereof of the amount of bonds or other obligations secured thereby. In the event of an open or revolving deed of trust, the amount of obligation for purposes of this section shall be the maximum amount which may be outstanding at any one time." (Emphasis added.)

The underlined sentence, added by Ch. 805 of the Acts of Assembly of 1978, specifically addresses the facts you have presented. The instrument is an "open deed of trust" with a "maximum amount which may be outstanding at any one time" established at $50,000. The instrument is a second deed of trust, but it is not a "supplemental" or "wrap around" deed of trust to which the provisions of the fifth paragraph of § 58-55 apply. Neither is the purpose of the instrument to refinance or modify the terms of an existing debt with the same lender, which situation is addressed in the sixth paragraph of § 58-55. Thus, no other provisions of § 58-55 apply.

Based on the foregoing, it is my opinion that the tax assessable upon the recordation of the instrument is imposed by the first two sentences of § 58-55 and will be fifteen cents on every one hundred dollars of the maximum amount of the obligation which may be outstanding at any one time, which amount is recited in the instrument to be $50,000.

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TAXATION. RECORDATION. DEED OF TRUST SECURING LOAN BY LOCAL REDEVELOPMENT AND HOUSING AUTHORITY TAXABLE.

August 23, 1983

The Honorable Margaret W. White, Clerk
Circuit Court for the City of Staunton

You have asked whether deeds of trust given to secure loans made by the Staunton Redevelopment and Housing Authority (the "Authority") are subject to the recordation tax imposed by § 58-55 of the Code of Virginia. Your letter refers to a prior opinion of this Office, which held that deeds of trust given to secure loans made by the Virginia Housing Development Authority ("VHDA") are subject to this tax. The rationale of that opinion was that the incidence of taxation was upon the borrower, the grantor of the deed of trust, and not upon VHDA. 1975-1976 Report of the Attorney General at 96.

I assume that the Authority was created pursuant to Virginia's Housing Authorities Law set forth in § 36-1 et seq. I have examined these provisions and find nothing therein to cause different tax treatment for the recordation of a deed of trust to secure a loan given by the Authority from the treatment accorded the recordation of such a deed of trust related to a loan made by VHDA. Accordingly, it is my opinion that the prior Opinion controlling and the deeds of trust to the Authority would be subject to the recordation tax imposed by § 58-55.

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TAXATION. RECORDATION. EXEMPTION. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. WMATA COMES WITHIN MEANING OF "POLITICAL SUBDIVISION" AS USED IN § 58-54.1.

May 21, 1984

The Honorable Warren E. Barry, Clerk
Circuit Court of Fairfax County
You have asked whether the Washington Metropolitan Area Transit Authority [WMATA] is considered a "political subdivision" of either the Commonwealth or Fairfax County so as to be exempt from the grantor tax imposed by § 58-54.1 of the Code of Virginia.  

WMATA is an entity created by interstate compact among the governments of Virginia, Maryland and the District of Columbia and approved by Congress for the purpose of creating and operating a public transportation system in the Washington, D.C. Metropolitan area. As a creation of an interstate compact, WMATA's rights and responsibilities are set forth in the interstate compact. Except as found in the compact, WMATA is not subject to compliance with a signatory's laws and one of the signatories may not unilaterally subject WMATA to an obligation not found in the compact. See PEPCO v. State Corporation Commission, 221 Va. 632, 272 S.E.2d 214 (1980), and cases cited therein. Thus, one must examine the compact to ascertain the status of WMATA with respect to the exception contained in § 58-54.1.

Section 4 of Art. III of the compact describes WMATA as "a body corporate and politic" and "as an instrumentality and agency of each of the signatory parties hereto" of which Virginia, acting through the General Assembly, is one. See Ch. 2, Acts of Assembly of 1966. In PEPCO, supra, the Supreme Court relied upon the above quote from the compact and other indicia in the compact to conclude that WMATA was a governmental entity for purposes of being exempt from State Corporation Commission rate making jurisdiction under § 56-234.


Based upon the foregoing authority, I am of the opinion that WMATA, which the compact describes as an instrumentality and agency of Virginia, falls within the phrase "other political subdivision" for purposes of § 58-54.1 and, therefore, property conveyed by it or to it is exempt from the grantor's tax imposed by that section.

1Section 58-54.1 states, in relevant part, that "[t]he tax imposed by this section shall not apply to any deed conveying real estate from ... the Commonwealth or any county, city, town, district or other political subdivision thereof or to any conveyance of real property to the Commonwealth or any county, city, town, district or other political subdivision thereof...."

2The recent opinion in Morris v. Washington Metropolitan Area Transit Authority, No. 80-1307, (D.D.C. Apr. 16, 1984), in which WMATA was held to be an instrumentality of the Commonwealth rather than a political subdivision, was limited to the issue of whether WMATA could invoke Eleventh Amendment immunity, and is not in conflict with the definition of "political subdivision" for the purpose set forth in this Opinion.

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TAXATION. RECORDATION. REFINANCING. DEED OF TRUST TO REFINANCE EXISTING DEBT WITH SAME LENDER TAXED ONLY ON AMOUNT OF OBLIGATION SECURED IN ADDITION TO EXISTING DEBT, SO LONG AS TAX PAID FOR ORIGINAL DEED OF TRUST.

January 17, 1984

The Honorable Margaret W. White, Clerk
Circuit Court of the City of Staunton
You have asked about the recordation tax consequences of a transaction in which A sold to B and B assumed the existing loan. Some months later, B wishes to refinance the loan. You wish to know whether the documents recorded pursuant to the refinancing should be taxable only on that portion of the loan which is in addition to the original amount.

The initial assumption by B of the original loan was exempt from recordation tax by virtue of § 58-60 of the Code of Virginia, which states in part: "The assumption of a deed of trust shall not be separately taxable under §§ 58-54, 58-55, or § 58-58, whether such assumption is by a separate instrument or included in the deed of conveyance." The purchaser of the real estate "adopts the mortgage debt as his own and becomes personally liable for its payment." Black's Law Dictionary 113 (5th ed. 1979); see 1981-1982 Report of the Attorney General at 376. The effect of an agreement to assume an existing deed of trust is that "[t]he 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)...." See 1982-1983 Report of the Attorney General at 596. When, in your example, B assumed the loan, only the obligor changed; the debt itself remained the same. In an assumption transaction, no new deed of trust is required and the original deed of trust is not released.

The recordation tax consequences of the refinancing of a loan are covered by § 58-55, which states in pertinent part:

"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."

This section limits the amount of the tax imposed by § 58-55, provided that:

(a) the purpose of the deed of trust is to refinance or modify the terms of an 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. See 1982-1983 Report of the Attorney General at 595.

The copy of the instrument, which you have provided with your letter of January 5, 1984, indicates an express purpose to secure a loan of $44,000 to refinance an existing loan which originally was for the sum of $40,000. You indicated in a prior communication that the original loan was with the same lender. There is no requirement in § 58-55 that the borrower be the same on the refinanced loan as on the original loan.1

You also indicated, in prior communications, that the tax was paid at the time the original deed of trust was recorded with A as the obligor. Because this deed of trust was assumed by B, and is still the operative document, it fulfills the requirement that the debt to be refinanced be "secured by a deed of trust or mortgage on which the tax imposed hereunder has been paid."
Finally, the instrument states that "[t]he existing loan has a balance of $13,327.00." This meets the requirement that the document certify the amount of the existing debt.

Therefore, the instrument which you have submitted, under the facts outlined above, meets the requirements for a limitation on the amount of tax imposed, pursuant to § 58-55. I further note, however, that the statute exempts from the measure of the tax under this section only "the existing debt secured by a deed of trust or mortgage on which the tax has been paid" (emphasis added) and not the original amount which was secured. According to the document, the original amount of debt was greater than the existing amount. The words "on which the tax has been paid" appearing in § 58-55 refer to the "deed of trust or mortgage," not to the amount of the debt. The tax imposed by § 58-55 is a tax "on deeds of trust or mortgages," not on the debts underlying them.

Therefore, it is my opinion that the tax should be imposed on the amount by which the new obligation secured exceeds the amount of the existing debt remaining unpaid. In the example you have given, the measure of the tax is the amount of the debt secured by the new instrument, $44,000, less the amount of the existing debt secured by the old instrument which remains unpaid, $13,270. The correct tax is then based upon $30,730, the additional amount of debt secured.

1This is in contrast to § 58-55.1, "Construction loan deeds of trust or mortgages," which requires, among other things, that in order for a "permanent loan deed of trust or mortgage" to be exempt from recordation tax it must secure "an instrument made by the same persons who made the instrument which the construction loan deed of trust or mortgage secured...." (Emphasis added.)

TAXATION. RESIDENCY. VOTER REGISTRATION IN VIRGINIA BY MILITARY OFFICER DOES NOT PER SE ESTABLISH DOMICILE FOR PURPOSES OF PERSONAL PROPERTY TAX ASSESSMENT.

December 30, 1983

The Honorable M. W. Gayle
Commissioner of the Revenue for York County

You have asked whether a military officer stationed in Virginia established his domicile in Virginia for purposes of permitting York County to assess its personal property tax when he registered to vote and subsequently does vote regularly in Virginia elections.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (the "Act"), 50 U.S.C.A. app. § 574, provides that if a person on active duty with the armed forces of the United States is "absent from his place of residence or domicile solely by reason of compliance with military or naval orders," his personal property is not deemed to be present in a locality where he is stationed. Thus, the officer in your case would not be liable for the personal property tax on his automobile if he is "absent from his place of residence or domicile" only by reason of military order.

The taxpayer who is the subject of your inquiry claims his domicile is California and he has recited by letter to you several factors supporting his contention. You assert that by becoming a registered voter in Virginia, the officer changed his domicile from California to Virginia and consequently is no longer protected by the Act.
The Supreme Court of Virginia has stated that:

"To constitute a new domicil two things must concur--first, residence in the new locality; second, the intention to remain there. Until the new domicil is acquired, the old one remains and whenever a change of domicil is alleged, the burden rests upon the party alleging it. These principles are said to be axiomatic." Cooper's Adm'r v. Commonwealth, 121 Va. 338 at 347, 93 S.E. 680 at 682. (Emphasis added.)


The necessary intent to remain is a state of mind that must be proven by the surrounding facts.

"[Domicile] depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case.... It is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicil in one place would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another." Cooper's Adm'r, supra at 345, 93 S.E. at 682.

In an examination of the particular facts in Cooper's Adm'r, the Court did state that "[i]n doubtful cases particular significance should be attached to the repeated exercise of the right to vote...." Cooper's Adm'r, supra at 349. (Emphasis added.) Note, however, that this factor becomes significant "[i]n doubtful cases." The existence of other factors which tend to prove that one's domicile is not in the place where he is registered to vote cannot be overlooked. In your case, it appears that the military officer has shown several important facts that tend to prove his domicile is California. Chief among these is the fact that he paid nonresident tuition for his children to attend Virginia Tech and William and Mary. Also, he maintains a California driver's license and reports his income in California.

The question whether the officer's voter registration and exercise of the franchise was lawful in this case is not at issue. The fact that the officer did register is simply one factor among many that must be considered in determining his domicile for purposes of personal property tax assessment; it is not conclusive.

Each case must be determined after a consideration of all the facts. Because of the numerous indicia, including the payment of more expensive non-resident tuition to attend Virginia colleges, which indicate that this particular individual has not knowingly relinquished his domicile in California, it is my opinion that the individual in question has not established his domicile in Virginia for purposes of assessing the personal property tax solely by the fact that he registered to vote and did vote regularly in Virginia elections.

1The intent of the Act is to protect a serviceman from possible taxation by both the locality where he is stationed and the locality which is his "place of residence or domicile." In order to effect this intent, the term "place of residence" must be construed in this statute to be synonymous with the term "domicile." See Cooper's Adm'r v. Commonwealth, 121 Va. 338, 344, 93 S.E. 680, 681 (1917).
You have asked several questions concerning the Virginia taxes on tobacco products, §§ 58-757.1 et seq. of the Code of Virginia, and their application to the request from a cigarette manufacturer which wishes to market packages containing twenty-five cigarettes per pack. The manufacturer has asked the Department of Taxation (the "Department") to make available stamps for the twenty-five cigarette pack to wholesalers who desire to market this new package in Virginia. The Department currently distributes only one denomination of tobacco tax stamp and that is for a cigarette package containing twenty cigarettes.

You wish to know whether you have the statutory authority or duty under Title 58, Ch. 14.2, § 58-757.1 et seq., to: (1) purchase and supply stamps for the twenty-five-cigarette packages; (2) allow the statutory discount on the sale of the stamps to wholesalers who affix tobacco tax stamps for a carton of nine packs of twenty-five cigarettes each, or allow no discount for the nine-pack cartons, or prorate the discount; (3) implement an interim measure until twenty-five-cigarette tax stamps are available by utilizing the present twenty-cigarette stamp along with a procedure to levy and collect the tax on the extra five cigarettes through supplemental reporting requirements; and (4) implement an interim procedure without observing the requirements of the Administrative Process Act, § 9-6.14:1 et seq.

The Department is charged with responsibility to "administer and enforce" the Virginia taxes on tobacco products. See § 58-757.15. The Department is "authorized to provide for the use of any type of stamp which will effectuate the purposes of" the tobacco statutes and to "design the form and kind of stamps to be used and...[to] duly adopt and promulgate such form of stamps." See § 58-757.10. The Department is also "authorized and directed to have prepared and to sell stamps suitable for denoting the tax on all" tobacco products. See § 58-757.8. Reading all of these sections in pari materia, the Department not only has the authority, but has the responsibility, to develop and make available for sale such stamps as are necessary to carry out the purpose of the Virginia tax on cigarettes.

The Virginia tax on cigarettes is imposed under the authority of § 58-757.1:1(c) at the rate of "one and one-quarter mills on each cigarette...." Nowhere in the tobacco tax statutes is there any reference to the imposition of the tax on a basis other than a per cigarette basis. Consequently, there is no legal impediment to fixing the tax due and payable on a twenty-five-cigarette package which, based upon the current rate, would amount to $0.03125 per package as opposed to tax of $0.025 for a twenty-cigarette package.

The tobacco tax statutes clearly contemplate that the implementation of the tax will require stamps in different denominations. Section 58-757.1 provides, in part:

"The tax herein levied shall be paid through the use of stamps herein provided for. Stamps in denominations to the amount of the tax shall be affixed to the box or other container from or in which tobacco products taxed by this article are normally sold at retail.... In the case of cigarettes, and like products, sold at retail in packages, the required amount of stamps to cover the tax shall be affixed to each individual package or container." (Emphasis added.)
Section 58-757.2 provides, in part:

"Every wholesale or retail dealer in this State shall immediately after receipt of any unstamped...cigarettes, cause the same to have the requisite denominations and amount of stamp or stamps to represent the tax affixed as stated herein. (Emphasis added.)

It is further provided in §58-757.11 that:

"Every wholesale dealer in this State shall before shipping, delivering or sending out any one or more articles taxed herein, to any dealer in this State or for sale in this State, cause the same to have the requisite denominations and amount of stamp, or stamps, to represent the tax affixed as stated herein...." (Emphasis added.)

Language contemplating various denominations and differing numbers of stamps can be explained in part by the fact that the tobacco tax statutes originally applied not only to cigarettes but to little cigars, cheroots, stogies and cigars as well. To view this as the only explanation for the several references to different denominations and different numbers of stamps, however, would be too narrow a construction of the language.

I note that §58-757.5 grants the Department the authority to regulate the type of container and the methods of affixing stamps to such containers. The section provides, in part:

"It shall be provided by regulations of the Department of Taxation the...kinds of containers and methods of affixing stamps that shall be employed by persons, firms or corporations subject to the tax imposed by this article which will make possible the enforcement of payment by inspection...." (Emphasis added.)

The only time the Department may exercise this authority to regulate the type of container which must be used by persons subject to a tax is if such regulation can be justified on the grounds that it is necessary to the enforcement of payment of the tax by inspection. I am not advised of such necessity.

The only mention in the entire statutory scheme of the number of cigarettes per pack and the number of packs per carton is found in a provision of §58-757.8 which allows a discount to qualified wholesalers who purchase and affix tobacco tax stamps based upon the rate of $0.025 per carton. In the context of this discount, the statute provides the following definition: "As used herein 'carton' shall mean ten (10) packs of cigarettes, each containing twenty (20) cigarettes." Given the long-standing marketing practice of the tobacco industry to market cigarettes in packages of twenty cigarettes further packaged in cartons of ten packs, this 1973 statutory definition does nothing more than recognize packaging methods then in use. This limited purpose definition of "carton" may not be used to extrapolate a presumed legislative intent to limit the marketing of cigarettes to standard cartons of ten packs with twenty cigarettes per pack.

Based upon my review of these tobacco tax statutory provisions, it is my opinion that the Department is required by §58-757.8 to have prepared and sell stamps suitable for denoting the tax on packages containing twenty-five cigarettes per pack. That is not to say that the Department must prepare and sell a single denomination stamp for twenty-five-cigarette packages. The language of §§58-757.1, 58-757.2 and 59-757.11 makes it abundantly clear that compliance with the law can be achieved by affixing one or more stamps to cover the amount of the tax which must be paid. Thus, the existing twenty-cigarette-denomination stamp could be used along with a five-cigarette-denomination stamp on packages of twenty-five cigarettes.
The cost of administering the tobacco tax stamp statutes is required to be paid out of the general fund in accordance with § 58-757.25. That section also claims to appropriate to the Department "out of the general fund of the State treasury for such purpose, for each year of the biennium beginning July one, nineteen hundred sixty, a sum sufficient." This statute may not be relied upon to supplement the existing sum certain appropriation to the Department for administration of the tobacco tax revenue stamp program. Such a continuing sum sufficient appropriation is barred by Art. X, § 7 which provides in part that "no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same." In the absence of sufficient appropriations to support the additional cost of special tobacco tax stamps to accommodate twenty-five-cigarette packages, it would be necessary to seek the approval of the Governor for an appropriation transfer under the authority of § 4-1.03(a)(2), Part 4, Ch. 684, Acts of Assembly of 1982 (Appropriations Act).

Your second question concerns the allowance of a discount to qualified wholesalers on the sale of tobacco tax stamps at the statutorily prescribed rate of $0.025 per standard carton of ten packs of twenty cigarettes each. I am unaware of any basis upon which the discount can be limited only to cartons containing ten standard packages. In the event the number of cigarettes in a carton is changed from the present 200 to a different number, it is not clear whether the discount should be the same $0.025 discount that is prescribed for the standard carton containing 200 cigarettes. Some form of proration would seem to be in order. If the proration is based upon the number of packages of cigarettes, the discount should be smaller because of the fewer number of packages in a nine-package carton. On the other hand, if the proration is to be based upon the number of cigarettes, the discount allowed for the twenty-five-cigarette packages would be greater because there are 225 instead of 200 cigarettes per carton. While there may be fewer packages to stamp, the nonstandard packaging associated with the twenty-five cigarettes per package may create greater expense to wholesalers because of the need for additional machinery or for stamping by hand.

Before the amendment to § 58-757.8 by Ch. 3, Acts of Assembly of 1973, the discount was based upon a percent of the tax paid as opposed to an allowance per carton. The percentage method would seem to favor the conclusion that proration should be based upon the number of cigarettes sold. The flat allowance of $0.025 per carton regardless of the amount of tax paid for the cigarettes appears to favor the conclusion that the discount should be based on the number of packages per carton. Given this unresolvable ambiguity, the matter is more appropriately referred to the General Assembly for its decision.

Next you have asked whether the Department could implement an interim reporting procedure utilizing the twenty-cigarette-package tobacco tax stamp to levy and collect the tax on the additional five cigarettes in the pack until a stamp of proper denomination is made available.

Section 58-757.5 focuses attention on the method to be used in administering the tobacco tax stamp program "which will make possible the enforcement of payment by inspection...." With nothing to distinguish a twenty-cigarette-denomination stamp purchased for use with a twenty-cigarette package from the same denomination stamp purchased for use with a twenty-five-cigarette package, the adequacy of the visual inspection system must obviously be called into question.

While I recognize that other statutory provisions in the tobacco tax statutes would permit the validation by invoices, shipping documents and other records of the number of twenty-five-cigarette packages sold, the use of a twenty-cigarette-denomination stamp would most certainly weaken the integrity of the inspection system and cause it to be
much more cumbersome. Moreover, the language quoted earlier from §§ 58-757.1, 58-757.2 and 58-757.11 associating the proper denomination of stamp or stamps to represent the amount of tax to be paid would mandate the use of a stamp or stamps of the proper denomination. It is my opinion that you may not use a twenty-cigarette-denomination stamp on a twenty-five-cigarette package unless there is also affixed a five-cigarette-denomination tobacco tax stamp.

In view of my opinion on your third question, there is no present necessity to answer your fourth question asking whether the regulation process must follow the Administrative Process Act (the "Act"). I note, however, that the provision which previously exempted the development of tobacco tax regulations from the operation of the Act was expressly repealed by Ch. 633, Acts of Assembly of 1980, and that the State Tax Commissioner is required by § 58-48.6(B) to promulgate regulations in accordance with the applicable provisions of the Act with several modifications. The exception under § 58-46(C) allowing for general policy statements to be issued without complying with the Act does not allow policy statements to be accorded the weight appropriate to a regulation. Thus, at the time the Department is prepared to implement the tobacco tax stamp sales in a denomination or denominations to accommodate the marketing of the twenty-five-cigarette package, the rule-making process prescribed by the Act must be followed.

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1 In accordance with § 58-757.1:1(b), the tobacco tax on little cigars, cheroots, stogies and cigars expired on August 31, 1966, leaving cigarettes as the only tobacco product which continues to be taxed in the Commonwealth.

TOWNS. COUNCILS. EMPLOYEES. TOWN COUNCIL HAS AUTHORITY TO APPOINT OFFICERS AND EMPLOYEES; MAY DELEGATE APPOINTMENT AUTHORITY.

February 14, 1984

The Honorable William A. Truban
Member, Senate of Virginia

This is in reply to your request for my opinion concerning the authority of the Council of the Town of Edinburg, or of any of its members, to hire a policeman for the town. You relate that a member of the town council hired a full-time police officer without the concurrence of the town's personnel committee or of the full council.

Section 2 of Edinburg's charter states that the town "shall have and may exercise all power as now or hereafter may be conferred upon or delegated to towns under the Constitution and laws of the Commonwealth of Virginia...." Section 3-a(1) of the charter provides that the council, consisting of six members and a mayor, shall exercise all of the power conferred upon the town, subject to the Constitution, general laws of the state and other provisions of the charter. Section 3-a(4) provides that "[t]he council shall make such rules for its organization, government and order of business, appointment of committees, as it may deem proper..." and § 3-a(7) provides that "[e]xcept in dealing with parliamentary procedure, as set forth in the ordinances, the council shall act only by ordinance or resolution...."

Section 3-a(6) of the charter provides, in part, as follows:

"On the first day of July following the regular municipal election and organization of the council, or as soon thereafter as may be practicable, the council, in its sole
discretion, may appoint a treasurer, a chief of police, a town attorney, superintendent of water works, health officer, chief or captain of the fire department, and such other officers as the council may determine and may prescribe their duties. Such officers and their duties shall be consistent with general law. The prescribed duties shall be by ordinance. Such officers shall serve for two years, or at the pleasure of the council." (Emphasis added.)

Finally, § 15.1-797 of the Code of Virginia provides, in part, as follows:

"The council of every city or town of this Commonwealth having in its charter the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employees as the council may deem proper. Or any committee of such council, any municipal board, the mayor of the city or town, or any head of a department of such city or town government may also appoint such officers and employees as the council may determine. The duties and compensation of such officers and employees shall be fixed by ordinance. Such officers shall serve for two years, or at the pleasure of the council." (Emphasis added.)

Reading all of the above together, it is clear that the town has the authority to appoint a policeman and such other officers and employees as may be deemed appropriate. It is equally clear that such appointment authority vests in the town council as a body, which must act by ordinance or resolution in the manner prescribed in the charter. The council may delegate its appointing authority to a committee of the council, a municipal board, the mayor or any department head, but if it has not done so by ordinance or resolution, the actions of such other person or group in hiring a town employee would be of no effect. In the absence of more detailed information, I am unable to express an opinion on the validity of the particular act in question.

1 The charter was enacted in Ch. 16, Acts of Assembly of 1924.
2 Section 3-a was added to the charter by Ch. 583, Acts of Assembly of 1981, and was subsequently amended by Ch. 47.
3 See, also, § 15.1-7, which provides that "[u]nless otherwise clearly indicated by the context in which the provisions relating thereto are set forth, all powers granted to counties, cities and towns shall be vested in their respective governing bodies."
4 See, also, § 15.1-13 which provides as follows: "The governing bodies of cities and towns, for the purpose of carrying into effect the enumerated powers conferred upon them may make ordinances and prescribe fines or other punishment for violation thereof, keep a city or town guard, appoint a collector of its taxes and levies, and such other officers as they may deem proper, define their powers, prescribe their duties and compensation, and take from any of them a bond, with sureties, in such penalty as to the governing body may seem fit, payable to the city or town by its corporate name and with condition for the faithful discharge of such duties."
5 See §§ 3-a(7), 3-a(8) and 3-a(9).
This is in response to your request for my opinion whether a town employee may run for election to the town council and serve if elected. You further inquire whether, if elected, the member will be limited with regard to participation and voting on matters that come before the council. The correspondence attached to your inquiry indicates that the employee is a laborer for the Town of Narrows, running for election in May, 1984 to the town council.

The Hatch Act, 5 U.S.C. § 1501 et seq. is the federal law which prohibits participation in certain political activities by certain federal, state and local public employees. See Opinion to the Honorable Robert E. Russell, dated March 16, 1984. The limited facts which you provide do not enable me to state unequivocally whether the Hatch Act is applicable to the situation which you have presented. Assuming, however, that the town employee in question is a laborer whose employment is not financed in whole or in part by federal loans or grants, or the election is a non-partisan election, then the Hatch Act would not apply.

It has consistently been the opinion of this Office that a State employee is not precluded from running for or holding a county or State office. See 1973-1974 Report of the Attorney General at 41. See, also, 1978-1979 Report of the Attorney General at 47. Absent any town charter or personnel policy to the contrary, the same principle is applicable to this case. I am unaware of any State statute which would preclude a town laborer from running for or serving as a member of town council. A charter provision or local ordinance might exist which would prohibit such activities based upon personnel policy and, therefore, the individual involved should ensure that no such policy is being violated. See 1982-1983 Report of the Attorney General at 399. See, also, Opinion to the Honorable Charles G. Flinn, dated February 22, 1984. Thus, it is my opinion that a town laborer may run for election and serve as a member of town council, provided the town personnel policy does not prohibit such activities.

Your question on the limitation on participation and voting, if elected, is addressed in the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"). Section 2.1-606(A) of the Act prohibits certain contracts by members of town councils. This section states:

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."

The provisions of § 2.1-606(A) are not applicable to this town employee's personal interest in his contract of regular employment or any contracts for the sale by a governmental agency of goods or services available to the public at a uniform price. See § 2.1-606(B), (1) and (2).

The member must comply with the mandates of § 2.1-610. This section, in pertinent part, prohibits members of the governing bodies of towns from participating in any transaction on behalf of the town when the transaction has specific application to his personal interest. The section provides for a method of disqualification from the transaction by the member. It is the member's responsibility to comply with the requirements of § 2.1-610.
The Honorable John Patterson  
Treasurer for the City of Newport News  

You have asked whether you, as Treasurer for the City of Newport News, are required to disclose to the city manager and director of finance of the City of Newport News the daily bank balances at banks in which monies received by the city are deposited. For the reasons set forth below, I am of the opinion that you must supply the bank balance information to the named officials.

Under the charter of the City of Newport News, the city manager is given the responsibility to keep council advised of the financial condition of the city and to direct and control all departments of the city. See §§ 5.05(B) and 5.05(H) of the Charter of the City of Newport News, Ch. 45, Acts of Assembly of 1983, amending Ch. 576, Acts of Assembly of 1978. The charter also creates a Department of Finance to be headed by a director. The director, under the supervision of the city manager, is charged with the power and responsibility to supervise and control disbursements and expenditures of all monies coming into the city, to maintain a general accounting system for the city, each of its offices, departments and agencies, and to keep books for financial accounting control over each office, department and agency. See §§ 8.04(C) and 8.04(D) of the Charter of the City of Newport News, Ch. 76, Acts of Assembly of 1982, amending Ch. 576, Acts of Assembly of 1978. In order to perform these duties, the director of finance and the city manager must have a method to obtain detailed current financial information.

The duties of county and city treasurers are specified by statute. See §§ 58-916 et seq. These duties include the collection of revenue (§ 58-958), the deposit and safekeeping of city funds and keeping of accounts (§§ 58-924 and 58-958). Under § 58-924, a city treasurer must furnish a statement of his account "[a]s often and in such manner as may be required by...the council of his city...."

In consideration of the foregoing provisions of law, it appears that the treasurer is responsible for collecting revenue, depositing funds in banking institutions of the Commonwealth and keeping accounts, but he is also required to cooperate with the city manager and director of finance in order that those officials may perform the duties required of them. See 1973-1974 Report of the Attorney General at 349. In my opinion, such cooperation would include the furnishing of the daily bank balances to the director of finance, or his supervisor, the city manager.

1Your letter refers to the bank balances as "confidential" in nature. I find that they are "official records" as defined by § 2.1-341 of the Virginia Freedom of Information Act (the "Act") because they are papers or documents prepared for and in the possession of a public body in the transaction of public business. As "official records" they are not "confidential" but are subject to inspection and copying by citizens of the Commonwealth as provided for in the Act. See § 2.1-342. This right is limited on the secrecy of tax information by § 58-46 which prohibits any State or local revenue officer from divulging information acquired by him in the course of his public duties "in respect to the transactions, property...income or business of any person, firm or corporation...." The bank balances do not contain information within this prohibition and, accordingly, are not "confidential" within the terms of this Code section. See, also, § 58-919 and 1972-1973
Report of the Attorney General at 495 as to the rights of citizens and governing bodies to inspect the records of county treasurers.

The duties of city treasurers may also be specified by city charter. See 1979-1980 Report of the Attorney General at 359.

See 1974-1975 Report of the Attorney General at 535. This opinion is to the Honorable C. B. Covington, Jr., Treasurer for the City of Newport News, dated June 19, 1975, a copy of which you enclosed with your letter. You suggest that this opinion holds that treasurers have the sole responsibility and control of their jurisdiction's bank accounts. The Covington Opinion addressed the questions of who has the duty to invest idle city funds and who is liable for the loss of such city funds if deposited in out-of-state banks. The opinion held that the Treasurer has the sole responsibility for investment and deposit of city funds and would be held strictly liable for the loss of funds deposited in banks outside the Commonwealth. Accordingly, I find that the Covington Opinion is not applicable to the question of disclosing the bank account balances. See, also, 1977-1978 Report of the Attorney General at 467 and Opinion to the Honorable Esther F. Cousins, Treasurer for the City of Colonial Heights, dated December 16, 1983 (modifying the Covington Opinion as to a city treasurer's duty to invest idle funds).

TREASURERS. REPURCHASE AGREEMENTS. LEGAL INVESTMENTS PROVIDED GOVERNMENTAL SECURITIES PURCHASED AUTHORIZED UNDER CH. 18 OF TITLE 2.1.

June 26, 1984

The Honorable C. J. Boehm
Treasurer of Virginia

You have asked whether repurchase agreements are legal investments for State funds. Information provided by personnel in your office indicates that the repurchase transactions involve two formats. They are:

1. The agent format whereby (a) the State Treasurer notifies Bank "X" in Virginia that the State wishes to invest a given sum of money, (b) Bank "X", as agent for the State, purchases securities from banks or government securities dealers (seller) under a repurchase agreement, (c) the seller agrees to repurchase the securities at their purchase price at the time specified in the agreement or on demand plus interest at a rate determined by the current market rate for repurchase agreements and (d) payment by the State is made only upon delivery of the securities to Bank "X"; and

2. The principal format in which (a) Bank "X" sells securities which it owns to the State, (b) Bank "X" agrees to repurchase the securities on the same basis as provided in 1(e) above, and (c) the securities are delivered to the Federal Reserve Bank of Richmond on the same day as the State's account at Bank "X" is charged for the purchase.

As was stated in a prior Opinion of this Office, "[t]he transaction contemplated is essentially one of the purchase of bearer securities subject to a repurchase agreement with the seller...." 1973-1974 Report of the Attorney General at 418. See, also, 1982-1983 Report of the Attorney General at 638. Both of these opinions hold that repurchase agreements are legal investments for funds of localities provided that the securities are within the statutorily approved classes of governmental securities.

In concurrence with these earlier opinions, I find that State funds may legally be invested in repurchase agreements so long as the securities purchased are legal investments for the Commonwealth as set forth in Ch. 18 of Title 2.1 of the Code of Virginia.
Deliver may consist of physical delivery of the securities or appropriate book entry transfers in accordance with applicable Federal Reserve rules and regulations.

For the purpose of statutory borrowing limitations on national banks, the Comptroller of the Currency, United States Department of the Treasury, deems repurchase agreements to be in the nature of purchases of the securities transferred subject to an agreement by the seller to repurchase where "Type I Securities" are involved. See 12 C.F.R. § 32.103. "Type I Securities" are defined as obligations of the United States, general obligations of any State or political subdivision thereof as well as certain U.S. government agencies. See 12 C.F.R. § 1.3(c).

Cf. Union Planters Natl. Bank v. United States, 426 F.2d 115 (6th Cir.), cert. denied, 400 U.S. 827 (1970) where, in dictum, the court stated that, for property law purposes, the purchasing bank in a repurchase agreement transaction holds legal title to the securities although for federal income tax purposes the court deemed the repurchase agreement to be a secured loan and denied the bank an exclusion from its taxable income for interest on the municipal bonds purchased. See, also, 2 Fed. Taxes (P-H) ¶ 8248 for other tax cases deeming repurchase agreements to be a sale of the securities or a loan depending on the facts of the case; SEC v. Miller, 495 F. Supp. 465 (S.D.N.Y. 1980) (wherein the court in considering an alleged violation under the Securities Act of 1933 found that, from a purely economic perspective, a repurchase agreement is essentially a short-term collateralized loan and In re Lombard-Wall, Inc., 23 Bankr. 165 (Bankr. S.D.N.Y. 1982) (where, in the context of a compelling argument by the bankrupt that securities transferred under a repurchase agreement were critical to accomplish a reorganization under a Chapter 11 bankruptcy petition, the court ordered a stay of all transactions related to the securities, effectively treating the repurchase transaction as a secured loan).

Certain safeguards, some of which the Department of the Treasury already observes, should be utilized when dealing with repurchase agreements: (1) repurchase agreements should be entered only pursuant to a written agreement outlining the rights and responsibilities of the parties; (2) the State should know the financial condition of all the parties in the transaction; (3) no payment should occur until acceptable securities are delivered, as defined in footnote 1, to the State or an independent safekeeping agent; (4) registered securities should be in the name of the State; and (5) the seller should not be given the right to substitute securities because such a right may be construed as inconsistent with the State's ownership of the securities.

UNEMPLOYMENT COMPENSATION ACT. ARMED FORCES. RECEIPT OF MILITARY RETIREMENT OR DISABILITY PAY CAUSES REDUCTION OF UNEMPLOYMENT BENEFITS UNLESS PAY BASED SOLELY ON SERVICE-CONNECTED DISABILITY.

October 11, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You ask whether a payment made by reason of disability to a former member of the military in the service of the United States is a "pension, retirement or retired pay, annuity, or any other similar periodic payment..." within the meaning of § 60.1-48.1 of the Code of Virginia. That statute provides that receipt of such payments reduces, dollar-for-dollar, any weekly unemployment compensation benefits to which the recipient is entitled. For the reasons herein stated, your inquiry is answered in the negative if the disability payment is due to service-connected injury.
Section 60.1-48.1 is based, in part, upon 26 U.S.C. § 3304(a)(15)\(^1\) of the United States Code. As a condition precedent to federal funding of the administration of the Commonwealth's unemployment insurance and job placement programs, § 60.1-48.1 must substantially comply with its parallel federal legislation, as administered and interpreted by the United States Department of Labor.

On March 17, 1980, the United States Department of Labor issued Unemployment Insurance Program Letter ("UIPL") No. 24-80, containing a thorough analysis of 26 U.S.C. § 3304(a)(15). The federal position, as set forth in the Program Letter, is that for any reduction in unemployment benefits necessitated by receipt of retirement pay, such pay must be "based on the previous work of such individual...." This view likewise appears in State statutes.\(^2\)

Stated differently, only those forms of retirement pay conditioned upon, or enhanced by, the previous work of an individual cause the mandated reduction in unemployment benefits. Thus, persons who receive pensions based purely upon years of military service, and also those persons who elect disability retirement from military service based upon inability to continue to perform their work, must experience a reduction in any unemployment benefits to which they later become entitled. See UIPL 24-80. Conversely, payments to persons receiving service-connected injury benefits not keyed to salary or term of service are not subject to unemployment benefit reductions.\(^3\) These latter payments are administered not as most retirement pay through the United States Department of Defense, but through the Veterans Administration under the Veterans Benefits chapter of the United States Code.\(^4\)

In conclusion, I am of the opinion that retirement pay based upon salary, years of service or disability due to natural causes preventing continued employment, must cause an unemployment benefit reduction. Retirement pay based upon service-connected disability does not require a reduction in unemployment benefits.

\(^1\)The federal statute, 26 U.S.C. § 3304(a)(15), provides, in pertinent part: "the amount of compensation payable to an individual for any week...which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week...." (Emphasis added.)

\(^2\)Section 60.1-48.1: "The weekly benefit amount payable to an individual for any week which begins after September 30, 1979, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual, including payments received by such individual in accordance with §§ 65.1-54 or 65.1-55 of the Code of Virginia, shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity or other payment, which is reasonably attributable to such week...." (Emphasis added.)

\(^3\)The rationale for this is that the timing and amount of regular military pensions and even those awarded to persons who suffer disabilities from natural causes, i.e., disabilities that would occur, irrespective of where the employee may be employed, during their periods of service are based upon the previous work of the individual. Service-connected disabilities, however, are generally bodily injuries suffered suddenly and accidently. Awards made through the Veterans Administration are intended solely as compensation for the injury suffered, and are not keyed to the salary or duration of the person's military service. In reliance upon the Department of Labor program letter, the
Virginia Employment Commission has published its own Policy Bulletin, No. 4008 which implements reductions to benefits of former military personnel as described above.

UNITED STATES CODE, Title 38, Chapter 11.

UNEMPLOYMENT COMPENSATION ACT. OVERPAYMENT OF UNEMPLOYMENT BENEFITS. AS OF JULY 1, 1983, OVERPAYMENT AMOUNT IS "DELINQUENT DEBT" WITHIN MEANING OF SETOFF DEBT COLLECTION ACT, NOTWITHSTANDING THAT COMMISSION HAS ENTERED INTO REPAYMENT AGREEMENTS AND PAYMENTS ARE BEING MADE IN ACCORDANCE WITH AGREEMENTS.

May 24, 1984

The Honorable Ralph G. Cantrell, Commissioner
Virginia Employment Commission

You ask whether certain employee-claimants who are indebted to the Virginia Employment Commission (the "Commission") for overpayment of unemployment benefits would be considered as a "debtor having a delinquent debt" within the meaning of the Setoff Debt Collection Act, § 58-19.6 et seq. of the Code of Virginia (the "Act"). The Act requires all "claimant agencies" to forward to the Department of Taxation the names and other identifying information of such debtors for setting off against any tax refund due "the sum of any delinquent debt owed to the Commonwealth." Section 58-19.6.

Your specific inquiry is whether such information as to the following classes of claimants must be forwarded to the Department of Taxation: (1) claimants who have entered into a formal repayment agreement and are current in their payments; (2) claimants who have entered into a formal repayment agreement but are delinquent; (3) claimants who have not entered into a formal repayment agreement but are repaying on a regular basis and are current; (4) claimants who have not entered into a formal repayment agreement but have made irregular payments; and (5) claimants who have offered to repay a certain sum periodically when they can and are repaying in accordance with their offer.

I am informed that your inquiry is based on the 1983 amendment to § 58-19.8. Prior to the amendment, § 58-19.8(B) provided:

"All claimant agencies shall submit, for collection under the procedure established by this article, all delinquent debts which they are owed, except in cases where the agencies are advised by the Attorney General not to submit a claim because the validity of the debt is legitimately in dispute, and except in cases where an alternative means of collection is pending and believed to be adequate, or because such a collection attempt would result in a loss of federal funds." (Emphasis added.)

Effective July 1, 1983, the emphasized language was deleted.

Under § 60.1-132, any person who has received any sum of unemployment benefits to which he is not entitled is "liable to repay such sum to the Commission." The repayment obligation, therefore, arises by express operation of law. In many of those cases, the Commission has entered into repayment agreements, both written and oral, establishing a schedule for recouping the amounts overpaid.

Section 58-19.8 requires claimant agencies to submit "delinquent debts which they are owed." A "delinquent debt" is defined in the Act as "any liquidated sum due and owing any claimant agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding
judgment for that sum which is legally collectible and for which a collection effort has been or is being made." (Emphasis added.)

Because the repayment obligation arises by operation of law and not by virtue of the repayment agreement, it clearly is a "liquidated sum due and owing." Its character is not altered by the repayment agreement. Therefore, under the amended statute, information as to the persons falling within all five classes set out above must be forwarded to the Department of Taxation under the Act.

With respect, however, to repayment agreements approved and entered into by the Commission prior to July 1, 1983 (i.e., class (1)), I am of the view that these fall within the exclusion of former § 58-19.8(B) as "cases where an alternative means of collection is pending and believed to be adequate...." They need not, therefore, be submitted to the Department. The Act is clearly intended to apply to classes (2), (3), (4) and (5), even if the debt arose prior to July 1, 1983.

The claimants for unemployment benefits should not be confused with "claimant agencies" referred to in the Act.

UNEMPLOYMENT COMPENSATION ACT. TEACHERS. ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION.

January 27, 1984

The Honorable J. G. Overstreet
County Attorney for Bedford County

You ask whether a school teacher is entitled to unemployment benefits under the following factual situation:

"A non-tenured teacher is employed for one year by a school division and is notified prior to April 15 that his contract will not be renewed. The teacher completes his contractual obligations on June 15. From June 15 until August 15 the teacher has no reasonable assurance of employment for the next academic year; however, unexpectedly he is offered a contract on August 15 by another school division as a teacher for the upcoming academic year."

Your inquiry is governed by § 60.1-52.3(A) of the Code of Virginia which provides, in pertinent part:

"Benefits based on service in an instructional, research, or principal administrative capacity for an educational institution shall not be paid to an individual for any week of unemployment commencing during the period between two successive academic years, or during a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms." (Emphasis added.)
Where a statute is clear and unambiguous on its face, the plain meaning is to be accepted and applied without resorting to rules of statutory construction. *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

Given the facts, as stated by you, that the teacher had no contract or reasonable assurance that he would perform services as a teacher during the second academic term, I am of the opinion that the teacher is entitled to benefits for the period from June 15 through August 15 if he otherwise meets the eligibility requirements of the Virginia Unemployment Compensation Act (see § 60.1-52) and is not subject to the general disqualification provisions found in § 60.1-58. Necessarily, each case must be considered individually to determine whether a reasonable assurance of employment existed. See 1977-1978 Report of the Attorney General at 469.

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**UNFAIR SALES ACT. CONSTITUTIONALITY AND ENFORCEABILITY. ACT'S CONSTITUTIONALITY HIGHLY QUESTIONABLE AND HAS NEVER BEEN ENFORCED IN COMMONWEALTH.**

December 22, 1983

The Honorable Ford C. Quillen
Member, House of Delegates

You have asked for my opinion whether the Virginia Unfair Sales Act, § 59.1-10 et seq. of the Code of Virginia (the "Act"), is unconstitutional and, therefore, unenforceable. The Act was originally enacted in 1938, but I am unaware of any legal action taken to enforce it. Consequently, the constitutionality of the Act has never been tested in the courts of the Commonwealth. Similar acts have been held unconstitutional in Georgia, West Virginia, Ohio, New Jersey and Maryland. For the reasons set forth below, I believe that the decisions cast considerable doubt on the constitutional viability of the Virginia Act.¹

Virginia is one of approximately thirty states that have enacted unfair sales acts of general applicability. The purpose of these acts is to prevent the adverse effects of below cost pricing on the price cutter's competitors. Some states, in addition to general unfair sales acts, have enacted similar legislation relating to specific industries or products. Other states have enacted only industry or product-specific unfair sales acts. Although the language of these acts is not identical, most of the provisions of these acts are quite similar; hence all of these acts may be analyzed as a cohesive group.

The Virginia Act prohibits the advertisement, offer to sell, or sale of any item of merchandise at less than "cost to the retailer" or "cost to the wholesaler", as defined in the Act. Certain types of sales are exempt from the provisions of the Act. In addition, all types of sales to or purchases from, fertilizer companies are exempt from the Act. See § 59.1-20. The Act provides for injunctive relief and for enforcement by the Attorney General and by Commonwealth Attorneys. Violation of the Act is a misdemeanor.

There are a number of serious constitutional and enforcement problems with the Act. Although some state courts have upheld the validity of unfair sales acts, see, e.g., *Baseline Liquors v. Circle K Corp.*, 630 P.2d 38 (Ariz. 1981), cert. denied sub nom. 454 U.S. 969 (1981); *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. 1962); *May's Drug Stores v. State Tax Commission*, 45 N.W.2d 245 (Iowa 1950), I find persuasive the reasoning of the courts that have invalidated such legislation. These courts have generally found unconstitutional at least one aspect of each unfair sales act. The Virginia Act contains
several features that have been found constitutionally infirm by the courts of other states.

First, as a general matter, the Act presents serious due process problems by impairing the freedom to contract. Although the General Assembly has the authority to enact laws regulating businesses in order to protect the public, see, Reynolds v. Milk Commission, 163 Va. 957, 179 S.E. 507 (1935), an act that goes so far as to potentially affect the pricing of nearly all goods in the Commonwealth may violate the due process clause of the Fourteenth Amendment to the United States Constitution. This result has been reached with respect to the Georgia Unfair Cigarette Sales Act, Strickland v. Rio Stores, Inc., 255 S.E.2d 714 (Ga. 1979), the West Virginia Cigarette Sales Act, State v. Wender, 141 S.E.2d 359 (W.Va. 1965); and the New Jersey Unfair Cigarette Sales Act, Lane Distributors, Inc. v. Tilton, 81 A.2d 786 (N.J. 1951). In addition, unfair cigarette sales acts have been held in two states to be arbitrary, unreasonable and discriminatory, and violative of the due process and equal protection clauses. Serrer v. Cigarette Service Co., 76 N.E.2d 91 (Ohio 1947); Cohen v. Frey & Son, 80 A.2d 267 (Md. 1951)

The Act's presumption of criminal intent raises the most serious constitutional questions. Section 59.1-14 provides in relevant part:

"In any action brought pursuant to this chapter, whether civil or criminal, proof of advertisement, offering to sell or sale of any merchandise at less than cost as defined in this chapter shall be prima facie evidence of intent to divert trade from a competitor, to substantially lessen competition, and to unreasonably restrain trade." Thus, intent to violate the Act is presumed without the requirement of proof beyond a reasonable doubt. Nearly identical presumptions have been held unconstitutional in Connecticut, Mott's Super Markets, Inc. v. Frassinelli, 199 A.2d 16 (Conn. 1964) and Maine, Wiley v. Sampson-Ripley Co., 120 A.2d 289 (Me. 1956). In Wiley, the Supreme Judicial Court of Maine went so far as to hold the prima facie intent provisions of the Maine Unfair Sales Act unconstitutional in both criminal and civil contexts. The court stated:

"While we hold that the Unfair Sales Act is constitutional insofar as it seeks to prevent unfair competition and to that extent comes within the police powers of the State, we rule that the prima facie provisions of Section 2 (criminal prosecution), Section 4 (injunctive relief) and Subsection III of Section 4 (prima facie evidence, in civil actions, of intent to injure competitors and destroy competition) are unconstitutional.

In a criminal prosecution the prima facie rule established by this statute lifts from the shoulders of the State the burden of proving the crime, and has, in fact, the practical effect of removing the presumption of innocence and creating a presumption of guilt which the defendant must rebut or disprove in order to escape conviction. This is wholly contrary to, and destructive of well known law that one accused of crime is presumed innocent until proven guilty and that the State must prove beyond a reasonable doubt every element of the crime necessary to show violation and secure conviction." 120 A.2d at 291. See, also, Great Atl. and Pac. Tea Co. v. Erwin, 23 F.Supp. 70 (D. Minn. 1938).

There has been a great deal of scholarly criticism of unfair sales acts, particularly with respect to statutes, like Virginia's, that contain presumptions of criminal intent. One commentator has cogently stated:

"[T]he writer has tried to show that the requirement of wrongful intent bears no relation to the world in which the businessman operates, and therefore cannot be
defined in intelligible terms. If it is literally defined, it would invalidate nearly
every sale below cost because any businessman would have to admit that he set
prices in the hope of attracting customers, and that if he were successful he would
be taking business away from his competitors, thereby injuring them. Many courts
have refused to go this far and have then been forced to fall back on meaningless
verbal formulas in discussing intent. In practice this has meant that a large element
of arbitrariness has been introduced into the decisions. Since the whole issue is
meaningless, the courts are free to reach what results they please. They are aided in
this by the presence in the statute of undefined terms like 'unfairly diverting trade.'
It is not surprising then that neither the results of the cases nor the reasoning by
which those results are arrived at are consistent. This state of affairs is particularly
unfortunate because the courts are dealing with a statute which is supposed to guide
the conduct of businessmen in the day-to-day pricing and selling of goods. If a
lawyer or a judge cannot arrive at a rational principle from the statutes and cases,
the businessman will certainly be unable to decide whether in a given situation he is
entitled to price his goods below cost. He can only avoid risk by always selling above
cost. Thus in operation the statutory requirement of intent is even more of a fiction
than its treatment by the courts would indicate." See Statutory Restrictions on

Moreover, the Act's definitions of "cost" improperly shift the burden of proof to a
defendant. Section 59.1-11(2)(b) presumes a predetermined retail cartage cost "unless
the retailer claims and proves a lower cartage cost...." (Emphasis added.) Similarly,
§ 59.1-11(3)(c) presumes a predetermined wholesale cartage cost "unless said wholesaler
claims and proves a lower cartage cost...." (Emphasis added.) These statutory provisions
shift the burden of proof of an essential element of a crime to the defendant, arguably in
violation of the due process clause of the Fourteenth Amendment to the United States

Finally, the Act contains an exclusion for sales to or from fertilizer companies.
Because the Act does not include any explanation for the special treatment of fertilizer
companies, it is likely that the exclusion of fertilizer companies from the provisions of
the Act would be deemed an example of unconstitutional special legislation. Art. IV,
§ 14 Constitution of Virginia (1971). An exclusion for "grain and feed dealers" was held
unconstitutional by the Kansas Supreme Court in State v. Consumers Warehouse Market,
Inc., 1959 Trade Cas. (CCH) ¶ 69,429 (Kan. 1959).

Insofar as I am advised, the Act has never been enforced in the Commonwealth.
This lack of enforcement stems, I believe, not only from the Act's questionable
constitutionality, but also from the difficult problems of proof demanded by the Act.
Among these problems is the existence of the statutory presumptions within the Act
regarding the definitions of "cost." It would be extremely burdensome, and perhaps
impossible, for a prosecutor to effectively prove the true wholesale or retail "cost" in an
action brought pursuant to the Act.

I note that the Virginia Antitrust Act, § 59.1-9.1 et seq. provides a comprehensive
alternative to the Unfair Sales Act's goal: the protection of competition in the
Commonwealth. The existence of the Virginia Antitrust Act and its federal counterparts
provides an alternative--and more effective--means of dealing with predatory pricing
practices and the protection of competition in the Commonwealth. In light of this
conclusion, I would recommend that you bring this to the attention of the General
Assembly at its next session for its consideration.
This conclusion is not inconsistent with that of my predecessors. See letter to the Honorable Franklin M. Slayton of January 17, 1980.

Clearance sales, sales of perishable, damaged or discontinued goods, liquidation sales, sales for charitable purposes or to relief agencies, contract sales to government, accommodation sales, sales by order of court or by a trustee for the benefit of creditors and sales where the price of merchandise is made in good faith to meet lawful competition are among the sales exempted by § 59.1-20.


UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT. APPLICABLE TO CHESAPEAKE BAY BRIDGE TUNNEL DISTRICT.

December 2, 1983

The Honorable C. J. Boehm
Treasurer of Virginia

You ask whether a political subdivision of the Commonwealth, the Chesapeake Bay Bridge Tunnel District ("Tunnel District"), is exempt from the reporting provisions under the Uniform Disposition of Unclaimed Property Act, § 55-210.1 et seq. of the Code of Virginia (the "Act"), by virtue of the Tunnel District's trust indenture with Virginia National Bank as Trustee for bondholders. If the Tunnel District is not exempt, the unclaimed interest on its bonds 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 any unclaimed funds into the Literary Fund.

Section 55-210.9 provides that intangible personal property held by a governmental subdivision or agency which has been unclaimed for a period of one year is presumed abandoned. Section 55-210.12 requires that reports on such property be made to the State Treasurer. The Tunnel District entered into a trust indenture with Virginia National Bank which provides, inter alia, for a "Sinking Fund" to satisfy the interest accrued on the bonds. The indenture further provides that all unclaimed interest more than ten years past due shall be remitted by the Trustee to the Tunnel District. At this point, the Trustee has no further responsibility for the funds and the bondholders must look to the Tunnel District for interest payments.

The law is well-settled that attempts to avoid the application of unclaimed property laws by providing internal documents for alternate uses of unclaimed property are invalid. The case New Jersey v. Jefferson Lake Sulphur Co., 178 A.2d 329 (1962), involved an amendment to a corporate charter to provide that unclaimed dividends would revert to the corporation. This was held to be a "private escheat law" contrary to the public policy of the unclaimed property law. A provision in a Blue Cross insurance contract which voided the entitlement to benefits if not presented within a designated period was treated similarly. Blue Cross of Northern California v. Cory, 174 Cal. Rptr. 901 (Cal. App. 1981).

Virginia National Bank, as Trustee, is also subject to the reporting provisions of the Act. Section 55-210.8 requires fiduciaries to report funds which have remained dormant for the preceding seven years.

I am, therefore, of the opinion that §§ 55-210.9 and the reporting provisions of §§ 55-210.12 are applicable to the Tunnel District.
The recent amendment (Ch. 331, 1982 Acts of Assembly) to this statute included the fiduciary with the owner in the category of individuals or entities whose activity with respect to unclaimed funds can rebut the presumption of abandonment. Property held by a fiduciary which had been dormant for seven or more years prior to 1982, however, would not be affected by the 1982 amendment.

UNIFORM STATEWIDE BUILDING CODE. SPECIAL USE PERMITS CANNOT PREEMPT.

February 16, 1984

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked whether it would be consistent with the Uniform Statewide Building Code, §§ 36-97 through 36-119 of the Code of Virginia, for the City of Virginia Beach to impose, as conditions prerequisite to the issuance of special use permits, more stringent fire protection requirements than those mandated by the Building Code.

This question has been addressed in two earlier Opinions of this Office, as is noted in the correspondence attached to your letter. See Reports of the Attorney General: 1974-1975 at 548; 1973-1974 at 421. In each of these opinions it was concluded that a locality could impose more stringent fire protection requirements as conditions to the issuance of special use permits. Both of these earlier opinions, however, were issued prior to a significant change in the law.

Section 36-98 provides, in pertinent part, that the Uniform Statewide Building Code (the "Building Code") shall supersede the building codes and regulations of Virginia localities. Section 36-97(7) defines "building regulations" as:

"Any law, rule, resolution, regulation, ordinance or code, general or special, or compilation thereof, heretofore or hereafter enacted or adopted by the State or any county or municipality, including departments, boards, bureaus, commissions, or other agencies thereof, relating to construction, reconstruction, alteration, conversion, repair, maintenance, or use of structures and buildings and installation of equipment therein. The term does not include zoning ordinances or other land use controls that do not affect the manner of construction or materials to be used in the erection, alteration or repair of a building or structure." (Emphasis added.)

The emphasized portion of the statute was added by Ch. 423, Acts of Assembly of 1977; it was not part of the section when the two earlier opinions were issued. I believe that the 1977 amendment alters the conclusions of the earlier opinions to the extent that since 1977 the City of Virginia Beach could not impose a regulation which affects the manner of construction or materials to be used in the erection, alteration or repair of a building or structure by a special use permit. To the extent that the fire protection requirement attempted to affect the manner of construction or materials to be used in the erection, alteration or repair of a building or structure, I am of the opinion that it would be impermissible. Of course, to the extent that a special use permit is not a building regulation as that term is defined in § 36-97(7), but rather deals with legitimate zoning issues such as density, land use, or location of buildings, it would remain permissible.
UNIFORM STATEWIDE BUILDING CODE. SUPERSEDES LOCAL CODES OF BUILDING REGULATIONS WITH RESPECT TO BUILDINGS PLANNED OR CONSTRUCTED SUBSEQUENT TO EFFECTIVE DATE.

March 12, 1984

The Honorable James W. Robinson
Member, House of Delegates

You have asked whether the City of Norton is precluded from enforcing the City's Minimum Housing Standards adopted in 1969-1970, in light of § 36-98 of the Code of Virginia.

Section 36-98 states, in pertinent part, that the Board of Housing and Community Development (the "Board") shall adopt and promulgate a Uniform Statewide Building Code which "shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions...." Acting pursuant to the mandate of this section, the Board adopted a Uniform Statewide Building Code which became effective on September 1, 1973. Consequently, on that date the housing code previously adopted by the City of Norton was superseded by the Uniform Code with reference to all buildings or structures subsequently constructed. See Board of Supervisors v. Miller & Smith, Inc., 222 Va. 230, 279 S.E.2d 158 (1981).

Section 36-103 provides that, with reference to buildings or structures where a building permit was issued or construction had commenced prior to September 1, 1973, or for which working drawings had been prepared in the year prior to that date, local building regulations remain in effect. Accordingly, I am of the opinion that the local regulations remain in effect insofar as the "grandfather" provision of § 36-103 applies.

I point out, however, that § 36-103 was amended by Ch. 287, Acts of Assembly of 1982, to authorize the Board to adopt minimum regulations for the maintenance of existing buildings. I am advised that the Board is in the process of adopting such regulations. When those regulations are adopted, they will supersede the local regulations presently in effect in the City of Norton with respect to buildings for which a building permit was issued, construction commenced or working drawings prepared prior to September 1, 1973.

VENUE. COSTS REFERRED TO IN § 8.01-266 ARE COSTS TAXABLE TO LOSING PARTY, NOT LIMITED TO FILING FEES.

April 23, 1984

The Honorable Joseph E. Hess, Chief Judge
Buena Vista General District Court

This is in reply to your inquiries, first, whether the word "costs" in the last sentence of § 8.01-266 of the Code of Virginia refers to the $8.00 filing fee required under § 14.1-125(1), and, secondly, whether the clerk of a court to which venue is transferred is required to charge an additional $8.00 filing fee, or whether the imposition of the fee is at the discretion of the clerk.

In a venue contest, § 8.01-266 requires the court to award the prevailing party "an amount necessary to compensate [the] party for such inconvenience, expense, and delay" as he may have sustained by improper venue or by a frivolous motion to transfer venue.
These costs are to be awarded in an amount to reflect reasonable actual costs sustained. See Revisers' Note to § 8.01-266.

Your first inquiry relates to the last sentence of § 8.01-266, which provides: "The awarding of such costs by the transferor court shall not preclude the assessment of costs by the clerk of the transferee court." (Emphasis added.) In my opinion, the costs mentioned in the emphasized language refer not only to the $8.00 filing fee pursuant to § 14.1-125(1), but also to those costs which are ultimately taxable against a losing party by the clerk in accordance with Ch. 3, Title 14.1 (§ 14.1-177 et seq.).

In answer to your second question, it is my opinion that the language in § 8.01-266 "shall not preclude" operates as a legislative clarification that even though certain costs regarding litigation have been imposed prior to the transfer of the action, additional costs may be imposed in accordance with general law regarding the imposition of costs on final judgment. This language indicates that in a case involving a change of venue, the transferee court is not deprived of its ability to assess costs simply because certain costs may have been previously assessed in the transferor court. The clerk of the transferee court, of course, must follow the requirements of the provisions contained in Ch. 3, Title 14.1.

VIRGINIA COMPREHENSIVE CONFLICT OF INTERESTS ACT. .RESIDENT OF VIRGINIA PHARMACEUTICAL ASSOCIATION MAY SERVE ON STATE BOARD OF PHARMACY SUBJECT TO COMPLIANCE WITH PROVISIONS OF ACT.

June 27, 1984

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in response to your request for my opinion whether the President of the Virginia Pharmaceutical Association may serve as a member of the State Board of Pharmacy (the "Board") without violating the Comprehensive Conflict of Interests Act, § 2.1-599 through 2.1-634 of the Code of Virginia (the "Act").

The law specifically governing the Board is contained in §§ 54-524.5 through 54-524.20. The members of the Board are appointed by the Governor pursuant to § 54-524.6. Nothing in this section would preclude an officer of the Virginia Pharmaceutical Association from serving as a member of the Board.

An officer of a trade association is not a State or local officer for purposes of the Act. A member of the Board is a State officer pursuant to § 2.1-600.

It is my opinion that none of the provisions of the Act would specifically prohibit an officer of the Virginia Pharmaceutical Association from serving as a member of the Board. An individual serving in such a capacity should, however, take precautions against violating § 2.1-602 of the Act. Certain conduct of an "unethical nature" is prohibited by this section of the Act. For example, care must be exercised not to utilize information of a confidential nature for one's own benefit. Inasmuch as the Board is a regulatory board, the provisions of § 2.1-602 are particularly applicable.

In conclusion, the President of the Virginia Pharmaceutical Association may serve as a member of the Board subject to compliance, however, with the provisions of the Act.
June 27, 1984

The Honorable H. Douglas Hamner, Jr., Director
Department of General Services

You have requested my opinion on several questions regarding the Comprehensive Conflict of Interests Act as it relates to the disposition of State surplus property by the State Surplus Property unit of the Department of General Services, Division of Purchases and Supply (the "DGS/DPS"). You advise that surplus property in the possession of any State department, division, institution or agency (the "owning agency") is transferred, sold, exchanged or otherwise disposed of by DGS pursuant to § 2.1-457 of the Code of Virginia. When such property is sold, one of three methods is utilized: (1) sale at auction, (2) sale by sealed bid, or (3) sale by uniform set prices. Your questions are directed at purchases by officers or employees of the State, and the applicability of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act").

I shall answer your questions seriatim.

"1. May an officer or employee of the owning agency purchase surplus property when the sale is conducted by DGS/DPS?"

For reasons hereinafter discussed, this question is answered in the negative. Section 2.1-605(A) reads: "No officer or employee of any governmental agency of state government shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contact of employment." A personal interest in a contract is defined in § 2.1-600 as being a "personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in the firm, corporation, partnership or other business entity which is a party to the contract." Clearly, § 2.1-605(A) prohibits an officer or employee of DGS (the selling agency) from purchasing the surplus property, unless some exception provided in the Act applies. The probative question here is whether officers or employees of the owning agency would also have a "personal interest in a contract" with DGS. In my opinion, they would have such an interest.

Section 2.1-457 places the burden of disposing of State-owned surplus property upon DGS. Thus, by statutory directive, that Division acts as agent for each owning agency. Although the owning agency is not a party to the contract, the contract is, nonetheless, for the benefit of the owning agency because the proceeds therefrom are deposited to the credit of the owning agency. Therefore, I conclude that the sales are contracts of both DGS and the owning agency. Consequently, unless an exception applies, officers and employees of both the selling agency and the owning agency would have a prohibited personal interest in a contract with the governmental agency of which they are a part if they purchase surplus property from DGS.

"2. Does § 2.1-608 permit an officer or employee of either the owning agency or DGS/DPS to purchase surplus property up to $500?"

As indicated in the foregoing answer, there are exceptions to the prohibition in § 2.1-605. For example, the provisions of § 2.1-605 do not apply to contracts for the sale of services or goods at uniform prices available to the general public. See § 2.1-605(C)(3). Another exception is for contracts for the purchase of goods or services when
the contract does not exceed $500.\textsuperscript{2} See § 2.1-608(A)(6). Accordingly, an officer or employee of either the owning agency or the selling agency may purchase surplus State property if sold at uniform prices available to the public, or the sales price does not exceed $500, even though sold by some method other than at uniform prices.

"3. Where the Act prohibits an officer or employee from purchasing surplus property, may that officer's or employee's spouse or other relative residing in the same household purchase such surplus property?"

This question is answered in the negative. By definition, a "personal interest" means a personal and financial benefit or liability accruing to an officer or employee or to such person's spouse, or any other relative who resides in the same household. See § 2.1-600. Thus, the interest of the spouse, or relative residing with the officer or employee, is imputed to the officer or employee. Accordingly, if the officer or employee is prohibited from having a personal interest in a contract, the same prohibition applies to the spouse, or other relative residing with the officer or employee.

"4. In view of the fact that § 2.1-457 directs that surplus property sales be handled by the Division of Purchases and Supply, one of five different divisions within the Department of General Services, may an officer or employee of a division other than DGS/DPS purchase surplus property being sold by DGS/DPS?"

A governmental agency is defined as each component part of the legislative, executive or judicial branches of State and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty. See § 2.1-600. By virtue of this definition, each of the five divisions within DGS is a separate governmental agency for the purposes of applying the Act. Consequently, the officers and employees within DGS which are governed by the prohibitions in § 2.1-605(A) are those in DPS, the division which is charged with the statutory duty in § 2.1-457 to sell the surplus State property. Officers and employees of the other divisions within the department are governed by subsection (B) of § 2.1-605, which reads as follows:

"No officer or employee of any governmental agency of State government shall have a personal interest in a contract with any other governmental agency of state government unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiations as defined in § 11-37 of the Code of Virginia or (ii) is awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public."

By virtue of the foregoing provision, officers and employees of any of the five divisions within the department, other than those within DPS, the selling division, may purchase surplus property being sold by DPS, provided such sales are made: (a) by competitive sealed bidding or negotiation (§ 2.1-605(B)(i)); (b) after a determination that competitive bidding is not in the best interest of the public (§ 2.1-605(B)(ii)); (c) at uniform prices available to the public (§ 2.1-605(C)(3)); or (d) by contracts which do not exceed $500 (§ 2.1-608(A)(6)).

"5. May DGS/DPS or the owning agency, by internal policy directive or otherwise, impose more stringent restrictions than those mandated by the Act?"

This question is answered in the negative. Section 2.1-599 expressly provides that the Act shall "supersede all general and special acts, charter provisions and local ordinances which purport to deal with matters covered by this chapter." The legislative intent expressed in § 2.1-599 is to establish a single body of law applicable to all State and local government officers and employees on the subject of conflict of interests.
Consequently, governmental agencies are not empowered to promulgate additional restrictions which relate to conflict of interests, whether such restrictions be more or less stringent than those imposed by the Act.\(^3\)

\(^1\)For discussion on two of the exceptions, see question No. 2, infra.
\(^2\)Prior to the amendment of § 2.1-608 by Ch. 196, Acts of Assembly of 1984, this maximum was $100.
\(^3\)Section 2.1-599 was amended by Ch. 122, Acts of Assembly of 1984 to permit ordinances and regulations of any local government which govern the conduct of the officers and employees of that government, but such ordinances or regulations cannot be less stringent than the Act.

VIRGINIA EMERGENCY SERVICES AND DISASTER LAW. PUBLIC OFFICERS. BOARDS OF SUPERVISORS. BOARD OF SUPERVISORS MAY REMOVE AND REPLACE COUNTY DIRECTOR OF EMERGENCY SERVICES, AN APPOINTED OFFICER WITH NO FIXED TERM.

January 31, 1984

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in reply to your request for my opinion whether the newly elected Washington County Board of Supervisors may remove the present director of emergency services for the county and appoint another member of the board in his place. You relate that the past practice in the county has been to allow a member appointed as director of emergency services to continue in that office during his four-year term of office on the board of supervisors, and that the present director has approximately two years remaining on his term as a board member.

Section 44-146.19(b)(2) of the Code of Virginia, a part of the Emergency Services and Disaster Law of 1973, requires each county to have a director of emergency services, who shall be "a member of the board of supervisors selected by the board or the chief administrative officer for the county" with certain public powers and duties as specified in the other provisions of that law.

Article 1.1, Ch. 6 of Title 24.1 provides for the removal of public officers from office. A public office is a position created by law, with powers and duties specified by the constitution or statute. A frequent characteristic is a fixed term, although not essential. The county director of emergency services is a public officer in my opinion. See, e.g., Reports of the Attorney General: 1982-1983 at 397; 1979-1980 at 199; 1973-1974 at 272. Nothing in the law specifies a term of office for a county director of emergency services, and, accordingly, § 24.1-79.2, which provides, in part, as follows, applies:

"[A]n appointed officer, except an officer appointed to fill a vacancy in an elective office or appointed to an office for a term established by law and the appointing person or authority is not given the unqualified power of removal, shall be removed from his office only by the person or authority who appointed him...." (Emphasis added.)

The board's power to summarily remove the director of emergency services it has appointed is necessarily implied from the above statute. This is consistent also with the
general rule followed in Virginia, that the power to appoint an officer carries with it, as an incident, the power to remove such officer, in the absence of constitutional or statutory restraint. See McDougal v. Guigon, 68 Va. (27 Gratt.) 133 (1876); Ex Parte Bouldin, 33 Va. (6 Leigh) 639 (1836); see generally, 63 Am.Jur.2d Public Officers and Employees §§ 179, 180 (1972). Because there is no constitutional or statutory restraint of which I am aware on the board's implied power to remove and replace its director of emergency services, your inquiry is answered in the affirmative.

**VIRGINIA FREEDOM OF INFORMATION ACT. CHARGES FOR COPYING AND SEARCH TIME LIMITED TO ACTUAL COST IN SUPPLYING SUCH RECORDS.**

July 25, 1983

The Honorable Frank W. Nolen
Member, Senate of Virginia

This is in reply to your 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"). You have specifically asked:

"(1) what charges are reasonable charges for search time under the Freedom of Information Act; and (2) may a private citizen be charged with the full cost of compiling summaries of raw data through (a) manual review, (b) programming a computer, (c) correlating data when re-production (copying) of the raw data would be sufficient and when the local governing body also receives a permanent benefit from that work?"

Section 2.1-342(a) provides, in pertinent part:

"The public body may make reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost to the public body in supplying such records. Such charges for the supplying of requested records shall be estimated in advance at the request of the citizen."

The language of § 2.1-342(a) identifies what is meant by "reasonable charges for the copying and search time..." by specifically limiting the amount to the "actual cost to the public body in supplying such records." Therefore, assuming that the actual time and effort expended are reasonable under the circumstances, a "reasonable charge" is that which quantifies such time and effort. Factors to be taken into account in determining such costs include but are not limited to: number of hours reasonably necessary to compile, copy and assemble documents, cost of computer time used and costs of reproducing the records.

Your second question is also governed by § 2.1-342(a). This section of the Act requires that, except as otherwise provided by law, "official records" be available for public inspection and copying. If, however, the requested records contain information that by law may not be made public, then the Act would not require their disclosure. Additionally, the Act does not require that a document be prepared, e.g., a compilation or summary of data from several records, whether done manually or by computer, if such document does not already exist. Thus, if a document is created at the request of a citizen, even though the public body may receive a benefit from having permanent use of the document, it would not be unreasonable to pass on the expense of its production to the requestor if the requestor were notified in advance of the estimated cost of preparing the document. If, however, the compilation of data had already been prepared
for the benefit of the governing body, it would be deemed to be an "official record" subject to mandatory disclosure under the Act, and, although the governing body could properly charge for reproducing the document, the costs associated with its initial preparation would not be chargeable to the requestor.

1 Official records" is defined in § 2.1-341.
3 See 1982-1983 Opinion, supra.
4 See 1982-1983 Opinion, supra.

VIRGINIA FREEDOM OF INFORMATION ACT. COMMONWEALTH'S ATTORNEY NOT OBLIGATED UNDER § 2.1-346 TO REPRESENT A PRIVATE CITIZEN IN MATTERS RELATING TO VIRGINIA FREEDOM OF INFORMATION ACT.

May 9, 1984

The Honorable Lynn C. Brownley
Commonwealth's Attorney/County Attorney for Westmoreland County

This is in response to your request for my opinion regarding the Commonwealth's attorney's responsibilities pursuant to §§ 2.1-346 and 15.1-8.1 of the Code of Virginia. Specifically, you inquire whether the Commonwealth's attorney is obligated under § 2.1-346 to represent a private citizen in matters relating to the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act").

You indicate that it is your opinion that neither § 2.1-346 nor § 15.1-8.1 requires a Commonwealth's attorney to assist a private citizen in a request pursuant to the Act. I concur in your opinion. Section 2.1-346 does not require the Commonwealth's attorney to act on behalf of private parties in proceedings to enforce rights and privileges under the Act. That section merely permits the Commonwealth's attorney to act in his or her official or individual capacity to petition for mandamus or injunction just as a private citizen is permitted to take such action. Such an interpretation is consistent with the clear wording of the Act. Section 2.1-346 states: "Any person, including the Commonwealth's attorney acting in his or her official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by petition for mandamus or injunction...." This language permits a Commonwealth's attorney to obtain information subject to the Act in the same manner that individual citizens are given this right.

In conclusion, the Act does not create any responsibility on the part of the Commonwealth's attorney to assist in citizen requests. In fact, it is the Commonwealth's attorney or county attorney who might ultimately represent a county board or local government agency in an action to obtain records pursuant to the Act. It is unlikely that the General Assembly contemplated the Commonwealth's attorneys acting as private counsel for citizens in actions under the Act. Indeed, for those Commonwealth's attorneys having civil responsibilities under § 15.1-8.1 it would be inconsistent with their official duties under § 15.1-8.1 for them to represent private citizens under the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE OF OFFICIAL RECORDS. HANDWRITTEN PERSONAL NOTES OF PRINCIPAL CONSTITUTE "OFFICIAL RECORDS" AS DEFINED IN ACT.
November 15, 1983

The Honorable Adelard L. Brault
Member, Senate of Virginia

In your letter of November 1, 1983, you request my opinion on the applicability of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), to two types of documents consisting of a school principal's handwritten working notes and an anonymous complaint letter from a parent.

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."

I first consider the application of the foregoing quoted provision to the handwritten notes. The notes were prepared by the principal in connection with her personal observations of employees using the storage room next to her office from which school equipment had been disappearing. The principal categorizes the notes as "memory joggers" to be used in the event a pattern of conduct should develop which might provide her with sufficient information to call in the police authorities to commence an investigation. The principal states that she does not intend to use the notes as the basis of disciplinary action. One of the employees has requested access to all documents that in any way relate to him.

To be within the purview of the Act, the handwritten notes must fall within the definition of "official records" which includes:

"all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body, in the transaction of public business." Section 2.1-341(b).

The notes in question were recorded by the principal because she was diligently discharging her duties regarding administration of the school. Thus, they were clearly recorded in the transaction of public business. While the notes may be cryptic and serve as "memory joggers," the principal did deem it important to keep them. The notes became a record and, in my opinion, fall within the definition of "official records." See 1975-1976 Report of the Attorney General at 412 (holding that "notes" made by an official of a State agency as a part of his review of a federal report were records subject to disclosure). Perhaps the notes may be regarded as personnel records which are generally exempt from disclosure under § 2.1-342(a)(3) but even there, records must be disclosed to the person who is the subject thereof upon receipt of proper request.

I next turn to the anonymous letter received by a school administrator. The unsigned letter alleges that students have observed a school teacher smoking marijuana between classes. After the administrator began to monitor the activities of the teacher more closely, the teacher filed a request to see all documents that in any way related to him.

A letter addressed to the school administrator and retained by her, even though unsigned, becomes an official record received by the agency within the definition of "official records," which in § 2.1-341(b) specifically refers to letters among other items.
Official records must be disclosed unless (1) otherwise specifically provided by law (§ 2.1-342(a)) or (2) exempted from disclosure pursuant to the provisions of the Act itself. See § 2.1-342(b). I am aware of no other law which would exempt such a letter from disclosure. Paragraph (b) of § 2.1-342 enumerates those records which are exempt from mandatory disclosure under the Act. There is an exemption provided therein for personnel records. See § 2.1-342(b)(3). That exemption, however, expressly provides that "such access shall not be denied to the person who is the subject thereof...."

Arguably, the disclosure of the anonymous letter to the subject of that letter, like the disclosure of the notes, will serve no beneficial purpose; indeed, it could result in greater harm than good. Nevertheless, the Act is clear in this regard. Although not subject to mandatory disclosure to the public by virtue of the exemption in § 2.1-342(b)(3), the personnel record of the teacher is available to the teacher himself. See 1974-1975 Report of the Attorney General at 585. Accordingly, I am of the opinion that the school administrator must comply with the teacher's request to see the documents that relate to him, including the anonymous letter.

VIRGINIA FREEDOM OF INFORMATION ACT. DIVISION OF TOURISM MAY NOT PROTECT CONFIDENTIAL PRIVATE TRAVEL DATA FROM PUBLIC DISCLOSURE IN FILES OR BY CONTRACTING WITH UNIVERSITY, BUT MAY DO SO BY CONTRACTING WITH PRIVATE SUPPLIERS.

January 9, 1984

The Honorable Fred W. Walker, Director
Department of Conservation & Economic Development

You have asked whether the Virginia Division of Tourism (the "Division") of the Department of Conservation and Economic Development may lawfully collect from Virginia travel attractions and maintain in confidence certain proprietary information. You also asked whether the Division could assure such confidentiality by contracting to have the material received and handled by a university or by a private supplier.

It is my understanding that various private travel attractions and facilities around the Commonwealth are willing to provide sensitive business data such as sales information to the Division for use in compilation of consolidated reports. The latter are published by the Division in statistical form which protects the individual sources. These publications are of significant benefit and use to the Division in its work of promoting tourism in the Commonwealth. Industry sources, however, do not want confidential data in the files of the Division to be available to their competitors or to the public under the Virginia Freedom of Information Act, §§ 2.1-340 et seq., of the Code of Virginia (the "Act").

The Act requires all "official records" to be made available to citizens of the Commonwealth or to the media upon appropriate request. See § 2.1-342. "Official records" include any written materials in the possession of a public body, officer or employee in the transaction of public business. Section 2.1-341(b). There is no general exemption for proprietary or confidential business information, although § 2.1-342(b) sets out eighteen categories of records excluded from the general disclosure requirement. None of these exclusions applies to the situation you have described. Absent specific statutory authorization, it is my opinion that the material in question cannot be lawfully retained in confidence by the Division itself in the event of a request for disclosure.

The same reasoning would apply with respect to information furnished to a State university. State institutions of higher education are considered public bodies under
By definition, "public body" includes all governmental bodies, as well as organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds. The only exclusion even remotely relevant is § 2.1-342(b)(16) which covers:

"Data, records or information of a proprietary nature, other than financial or administrative, produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information have not been publicly released, published, copyrighted or patented."

I have previously concluded that to avoid frustrating the purpose of the Act, the latter should be liberally construed to promote public awareness of governmental activities. Exemptions should be narrowly construed. See 1982-1983 Report of the Attorney General at 708. I am, therefore, of the opinion that the exclusion stated above is designed to protect academic research and would not cover compilation of travel statistics by a university under contract to the Division.

With respect to the last portion of your question, I am unaware of any prohibition which would prevent the Division from contracting with a private entity to perform the work in question. I note, however, that if the private entity is supported wholly or principally by public funds, it may be regarded as a public body for purposes of the Act (see § 2.1-341); hence, its records would be subject to the Act. Assuming, however, that the private entity is not subject to the Act, then its records would not be subject to mandatory disclosure under the Act. Of course, if a report is submitted to the Division, then that report would become a part of the Division's records subject to disclosure under the Act.

As I indicated above, any agency action should avoid frustrating the purpose of the Act. While there may well be valid reasons for the Division's contracting with a private consultant to perform the work, it should not contract with a private party simply to avoid having to comply with the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. EFFECTIVE JULY 1, 1984. MEETINGS MAY NOT BE HELD BY TELEPHONE CONFERENCE CALL.

June 28, 1984

The Honorable Johnas F. Hockaday, Chancellor
Virginia Community College System

You ask whether the State Board for Community Colleges (the "Board"), or its committees, may officially take action upon the consensus of its constituent membership obtained by individual telephone calls to each member if such action is later confirmed or reported at a subsequent meeting of the Board, or its committee. For the reasons which follow, I must answer your question in the negative.

Your inquiry correctly assumes that House Bill 241, which amends the Virginia Freedom of Information Act (the "Act") will prohibit the members of the Board, or its committees, from conducting meetings by telephone conference call.

Although the Act, as amended, does not expressly require that all official Board or committee action be taken or authorized at a meeting of the membership, I am of the
view that such conclusion is inescapable when one considers the preamble to the Act, as well as the legislative intent manifested in enacting House Bill 24. Accordingly, any official action of the Board, or committee, as the case may be, must be taken or authorized at a meeting of the Board, or committee, where the membership thereof is physically present.

I further observe that State Board bylaws also appear to prohibit official action based only upon a consensus obtained pursuant to telephone calls. Sections 2.7 and 4.7 of your bylaws provide:

"The act of the majority of the members present at a meeting...shall be the act of the Board.

***

[3]Any action of that Committee to be effective must be authorized by the affirmative vote of a majority of the members thereof present at the meeting."

(Emphasis added.)

2Section 2.1-340 et seg. of the Code of Virginia.
3House Bill 24 provides, in pertinent part: "§ 2.1-341(a). No meeting shall be conducted through telephonic, video, electronic, or other communication means where the members are not physically assembled to discuss or transact public business...."
4§ 2.1-343.1. It is a violation of this Act for any public body to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled."

The bill may fairly be characterized as a legislative response to the Virginia Supreme Court's decision in Roanoke City School Bd. v. Times-World Corporation, 226 Va. 176, 307 S.E.2d 256 (1983). In Times-World, the Court held that telephone conference calls are not a violation of the Act because they do not constitute meetings of the members of a public body.

5Section 2.1-340.1 provides: "This chapter recognizes that the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. To the end that the purposes of this chapter may be realized, it shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person." (Emphasis added.)

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS.
DEFINITIONS. ACT DOES NOT PROHIBIT TAKING OF MINUTES DURING EXECUTIVE MEETING, NOR IS TAPE RECORDING BY MEMBER AT SUCH MEETING PROHIBITED.

January 27, 1984

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in response to your request for an opinion whether any provision of the Code of Virginia would prohibit a member of the board of supervisors from tape recording a duly called executive meeting of the board.
The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act") defines an "executive meeting" as "a meeting from which the public is excluded." See § 2.1-341(e). Section 2.1-344 specifies the purposes for which executive meetings may be held and the procedure involved. Although § 2.1-344 does not require that minutes be taken at executive meetings, it does not prohibit the taking of such minutes. In fact, the section implies that minutes will be taken, because in order for anything proposed, discussed and voted on in an executive session to become effective, it must be voted on at the public meeting and must "have its substance reasonably identified in the open meeting" prior to being put forward for a vote. See § 2.1-344(e). In order for the substance of such matters to be reasonably identified in the open meeting, it can be assumed that some form of notes or minutes may be kept at the executive meeting.

It is, therefore, my opinion that the Act does not prohibit the taking of minutes during an executive meeting. Because recording is an acceptable method of memorializing a meeting, it is reasonable to conclude that the Act does not prohibit the taping of an executive meeting by one of the members present at the meeting. This conclusion should not be construed to mean that such a recording is subject to required public disclosure. See 1978-1979 Report of the Attorney General at 313.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. BOARD OF EQUALIZATION. SECTION 58-903. BOARD OF EQUALIZATION SUBJECT TO REQUIREMENTS OF VIRGINIA FREEDOM OF INFORMATION ACT AND § 58-903. BOARD MUST HOLD PUBLIC MEETINGS. EXECUTIVE MEETINGS NOT PERMITTED FOR PURPOSE OF DISCUSSING ALLEGED INEQUITABLE ASSESSMENTS.

February 15, 1984

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

This is in response to your request for my opinion whether under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), the deliberations of the Greensville County Board of Equalization (the "Board") must be held in open session.

"Meeting" is defined for purposes of the Act as "the meetings, when sitting as a body or entity...of any legislative body, authority, board, bureau, commission, district or agency...of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties...and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds." See § 2.1-341. It is my opinion that Board meetings fall within the definition of "meeting" and are therefore subject to the requirements of the Act.

Section 2.1-343 states that except as otherwise provided by law or in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings." This section further provides that minutes are to be taken at all public meetings except in certain instances. Based upon the facts provided, it is my opinion that meetings of the Board must be held in public and minutes must be taken.

Section 2.1-344(a) provides the limited instances in which "executive" or "closed" meetings may be held by bodies subject to the Act. In order for the Board to meet in executive session, it would have to be for one of the purposes enumerated in § 2.1-344(a).
It appears that the only exception which could be applicable is § 2.1-344(a)(3). This section states that an executive meeting can be held if it is for "[t]he protection of the privacy of individuals in personal matters not related to public business." It is my opinion, however, that § 2.1-344(a)(3) does not apply to meetings of the Board because the assessments which the Board reviews are already in the public record and any consideration of the assessments are related to the public business. Therefore, it does not appear that any of the exceptions of § 2.1-344(a) would apply to the Board.

In addition to the Act, there are provisions in Title 58 which dictate that such Board meetings be held in public. Sections 58-895 through 58-915 deal with local boards of equalization. Section 58-903 (effective January 1, 1984) states, in pertinent part:

"Each board of equalization shall sit at and for such time or times as may be necessary to discharge the duties imposed and to exercise the powers conferred by this chapter. Of each sitting public notice shall be given at least ten days beforehand by publication...also by posting the notice at the courthouse and at each voting precinct. Such posting shall be done by the sheriff or his deputy. Such notice shall inform the public that the board shall sit at the place or places and on the days named therein for the purpose of equalizing real estate assessments in such county or city and for the purpose of hearing all complaints of inequalities including errors in acreage in such real estate assessments."

It is evident that this section sets out a specific method of informing the public of the time and place where the Board is going to meet. Public meetings are clearly contemplated.

To summarize, it is my opinion that §§ 2.1-343 and 58-903 dictate that the Board hold its deliberations in public. Accordingly, executive meetings would not be permitted for the purpose of discussing alleged inequitable assessments.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE SESSION. EXECUTIVE SESSION FOR LOCAL GOVERNING BODY TO DISCUSS STRATEGY FOR NEGOTIATION OF SITING AGREEMENT ACCORDING TO PROVISIONS OF PROPOSED VIRGINIA HAZARDOUS WASTE FACILITIES SITING ACT NOT CURRENTLY PROVIDED FOR IN ACT.

November 29, 1983

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

You have requested my opinion concerning the relationship between the Virginia Freedom of Information Act, § 2.1-340 through § 2.1-346.1 of the Code of Virginia (the "FOIA"), and the proposed Virginia Hazardous Waste Facilities Siting Act (which you provided). You indicate that the Solid Waste Commission may recommend this legislation for consideration by the 1984 session of the General Assembly.

Your first inquiry is whether the FOIA as currently written permits the use of executive sessions and the confidential treatment of documents by local governing bodies under the circumstances contemplated by the draft bill. Your second inquiry is whether the FOIA must be amended in conjunction with the enactment of the proposed draft bill to allow the use of executive sessions and confidential treatment as provided in the draft bill.
The draft bill contains the following language concerning executive sessions and documents:

"Section 10-185.9(B). Notwithstanding the provisions of the Virginia Freedom of Information Act, a governing body:

1. May hold executive sessions to discuss strategy with respect to the negotiation of a siting agreement or to consider the terms, conditions and provisions of a siting agreement if doing so in an open meeting may have a detrimental effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement. Negotiations with the applicant or its representatives may be conducted in a closed meeting or executive session.

2. May hold confidential, except as otherwise provided in §10-186.12(A)(3), any documents so long as disclosure of them would have a detrimental effect upon the negotiating position of a governing body or the establishment of the terms, conditions and provisions of the siting agreement."

Included in the proposed legislation you submitted for my review are the following amendments which would create exemptions to the public disclosure requirements and public meeting requirements of the FOIA:

"§ 2.1-342(b)(17) Documents as specified in the Virginia Hazardous Waste Facilities Siting Act (§§ 10-186.1 et seq.)

§ 2.1-344(a)(11) Discussion of matters exempted under the Virginia Hazardous Waste Facilities Siting Act (§§ 10-186.1 et seq.)"

It is my opinion that the provision for executive sessions embodied in proposed §10-186.9(B)(1) is not currently provided for in the FOIA. Section 2.1-344(a)(2) now provides that a governing body may discuss, in executive session, the acquisition or use of real property for public purpose or the disposition of publicly held property. Inasmuch as the proposed legislation will be applicable to both publicly owned and privately owned sites, I do not believe that present law, §2.1-344(a)(2), encompasses all situations contemplated by proposed §10-186.9(B)(1).

Similarly, §2.1-344(a)(4) provides that a governing body may go into executive session to discuss a prospective business or industry where no previous announcement has been made of a business' or industry's interest in locating in a community. The proposed legislation provides for previous public notification of an intent to seek site certification (§§ 10-186.8 and 10-186.10 of the proposed bill); hence, unless amended, §2.1-344(a)(4) would not allow a governing body to enter executive session to discuss the negotiation of a siting agreement or its terms.

I am also of the opinion that the provision for confidential treatment of documents embodied in proposed §10-186.9(B)(2) is not currently provided for in the FOIA. Section 2.1-342(b) sets out those exemptions to required document disclosure under the FOIA. None of the exemptions currently found in the FOIA is equivalent to the exemption in proposed §10-186.9(B)(2).

You further inquire whether proposed §§2.1-342(b)(17) and 2.1-344(a)(11), contained in the draft bill amendments to the FOIA, are necessary in view of the inclusion of proposed §10-186.9(B). Section 2.1-342(a) provides that all official records shall be open for public inspection except as "otherwise specifically provided by law," and §2.1-343 provides that all meetings shall be public meetings except as "otherwise provided by law." In my opinion, enactment of §10-186.9(B) as part of the proposed siting bill would create exemptions "otherwise specifically provided by law," thus making the proposed
amendments to the FOIA unnecessary. Inclusion of the provisions in the FOIA as well as in the proposed Virginia Hazardous Waste Facilities Siting Act would, however, reinforce the intent of the General Assembly to exempt those specific meetings and documents from the FOIA.

1Proposed § 10-186.12(A)(3) provides that an application for site certification submitted to the siting Board shall include a copy of any executed siting agreement. The section further provides that if no agreement has been executed, transcripts of meetings classified as confidential under § 10-186.9(B)(2) shall not be disclosed to any party other than the siting Board.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE SESSIONS. PROCEDURE FOR CONVENING. NO PROVISION FOR RECONVENING IN EXECUTIVE SESSION SUBSEQUENT TO ADJOURNMENT.

November 28, 1983

The Honorable Theodore V. Morrison, Jr.
Member, House of Delegates

This is in response to your request for my opinion relating to the Freedom of Information Act. Your specific inquiry is whether the law permits executive sessions being adjourned from one date to a subsequent date without first reconvening in public meeting to state the reason for going into executive session.

Section 2.1-343 of the Code of Virginia, a portion of the Virginia Freedom of Information Act ("the Act"), provides that "[e]xcept as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings." Section 2.1-344(a) enumerates the purposes for which executive or closed meetings may be conducted by public bodies. Section 2.1-344(b) provides:

"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...."

I am unaware of any court decision which addresses the question here presented. The Act itself does not specify the duration of "executive meeting." I, therefore, rely upon my perception of the intent of the General Assembly in mandating open meetings unless specifically otherwise provided. Section 2.1-340.1 expresses the legislative intent as follows:

"It is the purpose of the General Assembly by providing this chapter to ensure to the people of this Commonwealth...free entry to meetings of public bodies wherein the business of the people is being conducted...[t]o the end that the purposes of this chapter may be realized, it shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government."

Given the fact that the Act is to be liberally construed so as to promote public awareness, and the fact that a clear and unburdensome procedure is set forth in the Act to be followed in convening executive sessions, I am of the opinion that executive meetings should not be continued from one date to a subsequent date when the business before the body cannot be completed on the scheduled date. Rather, the public body
should reconvene in a public meeting and follow the procedure set forth in § 2.1-344(b) if the public body is to again meet in executive session.

VIRGINIA FREEDOM OF INFORMATION ACT. FINANCIAL DATA. DEFINITIONS. FINANCIAL DATA COLLECTED FROM RETAIL ESTABLISHMENT BY STATE INSTITUTION OF HIGHER LEARNING FOR PURPOSE OF BUSINESS RESEARCH OR PUBLICATION NOT EXEMPT FROM ACT.

January 27, 1984

The Honorable George W. Grayson
Member, House of Delegates

This is in response to your recent request for my opinion as to whether financial data collected from retail establishments by a state institution of higher learning, for the purpose of business research or publication in the form of a business index or a business report would be exempt from the provisions of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You referred to gross sales as an example of the data collected.

Section 2.1-341 defines "official records" for purposes of the Act as:

"all written or printed books, papers, letters, documents...reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public entity in the transaction of public business."

If the financial data which a state institution of higher learning would be collecting from retail establishments is collected and held in the possession of the institution in the transaction of public business, it would be considered "official records" for purposes of the Act. Section 2.1-342 provides that all official records shall be open to public inspection, unless otherwise specifically provided by law. Therefore, unless an exception is provided by law, the financial data here in question is subject to the disclosure provision of § 2.1-342.

Section 2.1-342(b)(16) exempts "data, records or information of a proprietary nature, other than financial or administrative, produced or collected by or for faculty or staff of state institutions of higher learning" (emphasis added) in certain instances. I am not certain that gross sales data are "of a proprietary nature." Even if they are so categorized, the data would not fall within the exemption if they are "financial" in nature.

Based upon your description of the data as "financial," I must conclude that the data would not be exempt from the disclosure provisions of the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. JAIL REGISTER OR LIST OF THOSE INCARCERATED SUBJECT TO DISCLOSURE UNDER PROVISIONS OF ACT, EXCEPT FOR NAMES OF JUVENILES ARRESTED AND CHARGED.

May 8, 1984

The Honorable Lawrence W. Simpson, Jr.
Sheriff for the City of Lynchburg
This is in response to your request for my opinion whether the news media may inspect the jail register or list which contains the names of those incarcerated in the facility. The applicable law is the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

The same inquiry was addressed by this Office in a prior Opinion found in the 1974-1975 Report of the Attorney General at 583. That opinion held, based upon the law which existed at the time, that a county sheriff's jail book is an "official record" for purposes of the Act and would be subject to the public disclosure requirements pursuant to § 2.1-342(a), unless specifically exempt under one of the provisions of § 2.1-342(b). The opinion further held that no exemption or exception applied and, therefore, the news media and public were entitled to disclosure pursuant to the Act.

Since that opinion, the General Assembly amended §2.1-342(b) to codify the holding of the 1975 opinion except as to juveniles. As amended, § 2.1-342(b) now reads in pertinent part:

"The following records are excluded from the provisions of this chapter: (1) Memoranda, correspondence, evidence and complaints related to criminal investigations...and all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, shall not be excluded from the provisions of this chapter." (Emphasis added.)

In summary, it is my opinion that the jail register or list of those incarcerated is subject to disclosure under §§ 2.1-342(a) and 2.1-342(b)(1) of the Act. The only applicable exemption is that portion of § 2.1-342(b)(1) which excludes the names of juveniles who have been arrested and charged.
should reconvene in a public meeting and follow the procedure set forth in § 2.1-344(b) if the public body is to again meet in executive session.

VIRGINIA FREEDOM OF INFORMATION ACT. FINANCIAL DATA. DEFINITIONS.
FINANCIAL DATA COLLECTED FROM RETAIL ESTABLISHMENT BY STATE INSTITUTION OF HIGHER LEARNING FOR PURPOSE OF BUSINESS RESEARCH OR PUBLICATION NOT EXEMPT FROM ACT.

January 27, 1984

The Honorable George W. Grayson
Member, House of Delegates

This is in response to your recent request for my opinion as to whether financial data collected from retail establishments by a state institution of higher learning, for the purpose of business research or publication in the form of a business index or a business report would be exempt from the provisions of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You referred to gross sales as an example of the data collected.

Section 2.1-341 defines "official records" for purposes of the Act as:

"all written or printed books, papers, letters, documents...reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public entity in the transaction of public business."

If the financial data which a state institution of higher learning would be collecting from retail establishments is collected and held in the possession of the institution in the transaction of public business, it would be considered "official records" for purposes of the Act. Section 2.1-342 provides that all official records shall be open to public inspection, unless otherwise specifically provided by law. Therefore, unless an exception is provided by law, the financial data here in question is subject to the disclosure provision of § 2.1-342.

Section 2.1-342(b)(16) exempts "data, records or information of a proprietary nature, other than financial or administrative, produced or collected by or for faculty or staff of state institutions of higher learning" (emphasis added) in certain instances. I am not certain that gross sales data are "of a proprietary nature." Even if they are so categorized, the data would not fall within the exemption if they are "financial" in nature.

Based upon your description of the data as "financial," I must conclude that the data would not be exempt from the disclosure provisions of the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. JAIL REGISTER OR LIST OF THOSE INCARCERATED SUBJECT TO DISCLOSURE UNDER PROVISIONS OF ACT, EXCEPT FOR NAMES OF JUVENILES ARRESTED AND CHARGED.

May 8, 1984

The Honorable Lawrence W. Simpson, Jr.
Sheriff for the City of Lynchburg
This is in response to your request for my opinion whether the news media may inspect the jail register or list which contains the names of those incarcerated in the facility. The applicable law is the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

The same inquiry was addressed by this Office in a prior Opinion found in the 1974-1975 Report of the Attorney General at 583. That opinion held, based upon the law which existed at the time, that a county sheriff's jail book is an "official record" for purposes of the Act and would be subject to the public disclosure requirements pursuant to § 2.1-342(a), unless specifically exempt under one of the provisions of § 2.1-342(b). The opinion further held that no exemption or exception applied and, therefore, the news media and public were entitled to disclosure pursuant to the Act.

Since that opinion, the General Assembly amended §2.1-342(b) to codify the holding of the 1975 opinion except as to juveniles. As amended, § 2.1-342(b) now reads in pertinent part:

"The following records are excluded from the provisions of this chapter: (1) Memoranda, correspondence, evidence and complaints related to criminal investigations...and all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, shall not be excluded from the provisions of this chapter." (Emphasis added.)

In summary, it is my opinion that the jail register or list of those incarcerated is subject to disclosure under §§ 2.1-342(a) and 2.1-342(b)(1) of the Act. The only applicable exemption is that portion of § 2.1-342(b)(1) which excludes the names of juveniles who have been arrested and charged.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS IN HANDS OF GOVERNOR'S ADVISORY BOARDS EXEMPT FROM MANDATORY DISCLOSURE REQUIREMENTS OF ACT.

August 24, 1983

The Honorable Wayne F. Anderson
Secretary of Administration and Finance

This is in reply to your recent letter requesting an 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"). You have asked the following:

"First, in developing the Governor's general fund revenue estimates, does the sharing of the Department of Taxation's staff estimates with the Governor's official review boards constitute a public disclosure under the Freedom of Information Act? And second, does the law require that the meetings of these advisory boards be open to the public?"

You have advised that after the Department of Taxation (the "Department") has prepared alternative general fund revenue estimates, the Department mails written materials containing alternative revenue estimates and supporting data to members of the Governor's Advisory Board of Economists and the Governor's Advisory Board on
Revenue Estimates two weeks prior to their respective meetings. The Governor chairs these meetings.

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."

The alternative revenue estimates and supporting data would be deemed to be "official records" 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 whether there are any specific exemptions either under the Act or elsewhere in the Code which apply to the records 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 office of the Governor...."

I am of the opinion that the documents requested, if in the possession of the Department of Taxation or the Office of the Secretary of Administration and Finance, can be categorized as memoranda, working papers and correspondence held or requested by the Office of the Governor, and as such, are excluded from the provisions of the Act. This exemption, however, does not apply to similar records held by others outside of the Office of the Governor. A determination must be made, therefore, whether the Governor's Advisory Board of Economists and the Governor's Advisory Board on Revenue Estimates are within the Office of the Governor.

The Governor's Advisory Board of Economists was created by Executive Order No. 18 (82). You have advised that the Governor's Advisory Board on Revenue Estimates has been in existence since the 1960's but is reconstituted annually by an invitation from the Governor. Both boards exist for the purpose of reviewing and evaluating the revenue estimates used by the Governor in preparing the Governor's Budget Bill. Accordingly, I am of the opinion that both advisory boards are deemed to be within the Office of the Governor and, therefore, the annual revenue estimates and supporting data distributed to board members two weeks prior to their respective meetings would not lose the exemption accorded by § 2.1-342(b)(4).

Your second question deals with whether the Act requires that meetings of these advisory boards be open to the public.

Section 2.1-341(a) and (e) define 'public body' to include, inter alia, "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth...and other organizations, corporations or agencies...supported wholly or principally by public funds." It is my opinion that the advisory boards would fall within such definition and, thus, be subject to the open meeting requirement of the Act. Section 2.1-343 provides that all meetings be public meetings unless a specific statutory exemption applies. I am unaware of any provision contained in the Act or elsewhere in the Code which would exempt the Governor's Advisory Board of Economists or the Governor's Advisory Board on Revenue Estimates from this provision or permit the boards to go into executive session to discuss revenue estimates or other matters which pertain to the general business outlook in Virginia. Accordingly, I am of the opinion that the meetings of these advisory boards must be public meetings pursuant to the Act.
The Honorable James F. Almand  
Member, House of Delegates  

This is in response to your request for my opinion as to the applicability of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act") to a local school board policy involving teacher evaluation ratings. You advise that it is the policy of the superintendent of a particular school division to provide a written report to the school board each year of teacher evaluation ratings by school (but not by name). You have indicated that the local chapter of an education association has filed a request with the superintendent pursuant to the Act asking for a copy of the report. The request was refused on the grounds that the record was compiled in confidence for use at an executive meeting and that the report is a personnel record, as provided by §§ 2.1-342(b)(3) and 2.1-342(b)(5). You have indicated that it is your understanding that the teacher evaluation ratings are divided by school and do not refer to individual teachers by name or otherwise provide a method by which the individual teachers may be identified in conjunction with a particular rating.

Section 2.1-342(a) states that: "(e) xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizen of this Commonwealth...." Official records for purposes of the Act are "all written or printed books, papers, letters, documents...reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business." See, § 2.1-341(b). A written document summarizing teacher ratings by school prepared by the superintendent and distributed to the school board is clearly an official record subject to the Act.

Section 2.1-342(b)(3) excludes "personnel records" from the mandatory disclosure provisions of the Act, except that the person who is the subject of the records is entitled to access to them. There is no definition of "personnel records" in the Act. This Office has consistently interpreted the exclusion for personnel records to apply only to records that pertain to identifiable individual employees. See 1979-1980 Report of the Attorney General at 382; see, also, 1976-1977 Report of the Attorney General at 317. Based upon your explanation of the document given to the school board members, it appears to be a record which is divided by school but which does not identify individual teachers by name or other information. Moreover, the policy itself indicates that the teachers' names are not used in the report by the superintendent to the board and that the document in question is divided by school, not by specific teachers.
It is, therefore, my opinion that, as long as the individual teacher whose rating is being disclosed is not identifiable by name or other information in the reports, the information is not a personnel record for purposes of the Act. This means that the exclusion provided in § 2.1-342(b)(3) is not applicable, and, unless another exclusion applies, the information is subject to the disclosure requirements of the Act.¹

You indicate that the superintendent stated the report was prepared for an executive meeting. There are two separate provisions in § 2.1-342(b) which exclude records which are compiled for executive meetings. Section 2.1-342(b)(5) excludes from the provisions of the Act "[m]emoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344 and material furnished in confidence with respect thereto." In order to fall within the exclusion, the report must be material compiled specifically for use in litigation or as a part of an active administrative investigation properly the subject of an executive or closed session. Section 2.1-342(b)(11) provides an exception for "[m]emoranda, legal opinions, working papers and records recorded in or compiled exclusively for executive or closed meetings lawfully held pursuant to § 2.1-344." (Emphasis added.)

Section 2.1-344(a)(1) authorizes executive meetings for the purpose of "[d]iscussion or consideration of employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body...."

The material which you have provided does not contain enough factual information about the teacher evaluation ratings to determine whether the document is part of an active administrative investigation, or if the material was compiled exclusively for an executive meeting. If it is material which is not a part of an active administrative investigation which is properly the subject of an executive or closed session, then the exclusion in § 2.1-342(b)(5) would not apply. Similarly, if the material was not compiled exclusively for an executive meeting, the exclusion in § 2.1-342(b)(11) would not apply.

To summarize, the report prepared by the superintendent is a public record, subject to disclosure, unless it falls within the ambit of the exception in §§ 2.1-342(b)(5) or 2.1-342(b)(11) as above described.

¹This conclusion that the report is generally available under the Act unless one of the specific exemptions applies is similar to an Opinion found in 1974-1975 Report of the Attorney General at 581 in which it was held that a report summarizing, on a school-by-school basis, the results of scholastic achievement tests administered to students was available under the Act.

VIRGINIA MARINE RESOURCES COMMISSION. UNDER "DOCKOMINIUM" CONCEPT, RESPONSIBILITY FOR PERMIT COMPLIANCE STILL RESTS WITH PERMITTEE.

July 27, 1983

The Honorable William A. Pruitt, Commissioner 
Marine Resources Commission

You have asked for my opinion concerning the sale of boat slips in a privately owned marina under the condominium, or "dockominium," concept. You point out that these slips will be located over State-owned bottom. You further advise that pursuant to
§ 62.1-3 of the Code of Virginia, the Marine Resources Commission (the "Commission") issues permits to build slips to the owner of the riparian property to which the pier structure is appurtenant. In this instance, you foresee issuing the permit initially to the developer and, if requested, transferring it to the condominium association. You pose the following questions:

1. What are the legal implications of the "dockominium" concept?

2. What real property and what rights, if any, does an individual purchaser acquire?

Condominiums in Virginia are governed by the Condominium Act, (the "Act") §§ 55-79.39 through 55-79.103. The Act provides for a collective form of real estate ownership. For a marina such as that you describe to be a condominium, purchasers must have individual ownership and use of distinct units, and must also own undivided common interests in the common elements. See §§ 55-79.41(y) and 55-79.41(d). The common elements are defined as all elements of the condominium other than the units. See § 55-79.41(a). Both individual unit ownership and ownership of undivided interests in the common elements must exist for real property to be a condominium.

Apparently, the common way by which marina condominiums have been created in other states is to construct individual residential or commercial units to which slip space is appurtenant. This slip space would be assigned to the individual units as limited common elements, i.e., common elements reserved for use of one or more, but not all, of the units. See § 55-79.41(q). (In addition, there would have to be other common elements for the marina to be a condominium.)

From information you have furnished me, I note that the specific marina about which you inquire does not appear to be organized along the lines set forth in the preceding paragraph. Rather, there are no residential or commercial units established on the appurtenant riparian land, and the only area of the project in which "ownership," as defined by the Act, is possible will be the slip space itself. It is clear that various recreational facilities on the appurtenant land would constitute "common elements" if the project were a condominium. This leaves the question of whether a sufficient property interest is possible in the slips for them to be "units" under the Act.

Where, as here, slip space is built over State-owned bottom, the builder of that slip space must acquire a permit from the Commission to construct it pursuant to § 62.1-3. In my opinion this permit would give the builder an exclusive right to use the bottom for the purpose of building and maintaining a pier, although title to the bottom would, of course, remain in the Commonwealth. See 1981-1982 Report of the Attorney General at 245. The right to use the State-owned bottom would be a compensable property interest and could be transferred to another entity if the Commissioner approved the transfer. I believe that this exclusive and compensable property interest would be a sufficient interest to constitute a "unit" under the Act, and that therefore the marina so constituted would be equated with a condominium.

The most significant legal implication of issuing a permit to a condominium to construct slip space over State-owned bottom is that the Act compels the declarant to turn over control of the condominium to the unit owners association, at which time the permit too would have to be transferred. The time at which this must be done is specified in the condominium instruments and may not exceed certain maximum periods set forth in the Act. See § 55-79.74. Pursuant to § 62.1-3, the Commission may issue permits only to the owners of land appurtenant to the slip. Because the Commission commonly imposes as a condition of the permit that the Commissioner must approve the transfer of the permit, before the Commission initially approves the declarant's permit application it should expressly make this clear to the developer. In order to comply with the Act it will be necessary to convey all land appurtenant to the slips, and full
responsibility for permit compliance, to the unit owners' association. Without such a conveyance the Commissioner could not transfer the permit to the unit owners association.

Turning to your second inquiry, under § 55-79.41(d) a condominium is a form of real property ownership. Accordingly, a slip purchaser obtains those rights that are transferred to him in accordance with the condominium instruments. These instruments include the declaration, the by-laws and the plats and plans. See § 55-79.41(e). Collectively, they set forth the nature and extent of the condominium, and the procedures for its government by the unit owners. Conveyance of the interests created by the declaration cannot result in the transfer to the purchaser of any greater right than the transferor possessed. In the case of a "dockominium," as noted above, the interest conveyed would be an exclusive and compensable right to use State-owned bottom for building and maintaining a pier.

Finally, you expressed some concern as to whether responsibility for permit compliance rests solely with the permittee and who must pay the royalties.

I am of the opinion that the permittee would have sole responsibility for permit compliance and royalty payment, whether the permittee be the declarant or the unit owners' association.

1Section 55-79.41(y) defines a condominium "unit" as "a portion of the condominium designed and intended for individual ownership and use."

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT. OPERATION OF RETAIL OUTLET BY "PRODUCER OR REFINER" NOT PROHIBITED PER SE BY § 59.1-21.16:2.

August 22, 1983

The Honorable Elmon T. Gray
Member, Senate of Virginia

You have asked three questions regarding the application of the Virginia Petroleum Products Franchise Act to Southland Corporation in the event of that corporation's acquisition of a refinery. These questions are:

"1. Will the Southland Corporation, after the purchase of a refinery, be prohibited from company operation of its gasoline retail outlets as provided by Section 59.1-21.16:2?"

2. To what extent, if any, will the provisions in Section 59.1-21.16:2(D) apply to the Southland Corporation's operation of gasoline retail outlets in Virginia?

3. To what extent is injunctive relief available to aggrieved persons under the Virginia Petroleum Products Franchise Act?"

With respect to your first question, § 59.1-21.10 of the Code of Virginia, which is part of the Virginia Petroleum Products Franchise Act, provides, in pertinent part, the following definition:

"As used in this chapter, the terms (a) 'producer or refiner' means any person engaged in the refining and subsequent sale, consignment or distribution of petroleum
products to retail outlets which it owns, leases, controls or with which it maintains a contractual relationship for the sale of such products and shall include a subsidiary or other entity in which such person has more than a fifty percent beneficial interest; but shall not include (i) a person engaged in the general retail business whose total volume of sales consists of more than ninety-five percent of nonpetroleum products, where the sale of petroleum products is from the same premises or commercial complex or shopping center...." (Emphasis added.)

If the Act is to apply, Southland must be determined to be a "producer or refiner" under the terms set out above. I do not have sufficient information to make that determination. I note, however, that under the Act the decision will have to be made on an outlet-by-outlet review to determine whether the necessary percentage has been obtained.

I turn to your second inquiry. You inquire whether Southland would be prohibited by § 59.1-21.16:2(D) of the Act from company operation of its gasoline retail outlets. For the limited purpose of this inquiry, I will assume that Southland is a "producer or refiner."

Section § 59.1-21.16:2 provides, in pertinent part, as follows:

"A. After July 1, 1979, no producer or refiner of petroleum products shall operate any major brand, secondary brand or unbranded retail outlet in the State of Virginia with company personnel, a parent company or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner; provided, however, that such producer or refiner may operate such retail outlet with the aforesaid personnel, parent, person, firm or corporation if such outlet is located not less than 1 1/2 miles, as measured by the most direct surface transportation route, from the nearest retail outlet operated by any franchised dealer; and further provided, that once in operation, no producer or refiner shall be required to change or cease operation of any retail outlet by the provisions of this section.

D. The provisions of this section shall not be applicable to retail outlets operated by producers or refiners on July 1, 1979." (Emphasis added.)

Section 59.1-21.16:2(A) does not prohibit the operation per se of a retail outlet by a "producer or refiner." That statute does require that if a "producer or refiner" begins operation of a retail outlet after July 1, 1979, such producer or refiner owned outlet must be located more than 1 1/2 miles from the nearest retail outlet operated by a franchised dealer. See 1979-1980 Report of the Attorney General at 390. The statute alsograndfathers existing retail operations, including those begun after July 1, 1979, provided they were lawfully initiated in conformance with the statute.

Until the present, Southland has operated retail outlets unrestricted by the statute as to their location. Should Southland be deemed a "producer or refiner" at some future date it would have to comply with the statute from that date forward.

In my opinion, the provision in the last clause of § 59.1-21.16:2(A) quoted above specifically addresses the status of Southland's retail outlets which began operation prior to the date that Southland is considered a "producer or refiner." That language is as follows: "once in operation, no producer or refiner shall be required to change or cease operation of any retail outlet by the provisions of this section."

By virtue of the foregoing, I am of the opinion that any retail outlets being operated by Southland Corporation at the date it is first considered to be a "producer or
refiner" would not be in violation of the restriction in the statute. Of course, any retail outlets which Southland begins to operate after that date would have to comply.

In answer to your third question, injunctive relief is available to aggrieved persons under § 59.1-21.12. This Office also has authority under § 59.1-68.2 to determine whether to bring an action to enjoin any violation of the Act.

1 For the definition of "person," the Act refers to § 1-13.19 which provides that "person" may extend to and include bodies corporate.

2 As defined by § 59.1-21.10(b): "Dealer" means any person, other than an agent, parent, employee or subsidiary of, or party to a fee arrangement with, a producer or refiner, which person is engaged in the retail sale of petroleum products under a franchise agreement as defined in this chapter but shall not include a person engaged in the general retail business whose total volume of sales consists of more than ninety-five percent of nonpetroleum products, where the sale of petroleum products is from the same premises or commercial complex or shopping center...."

3 A statute in general and comprehensive terms and prospective in operation applies not only to situations existing at the time of its enactment, but to situations and subjects which may come into existence thereafter. Great A.&P.T. Co. v. Richmond, 183 Va. 931, 33 S.E.2d 795 (1945).

4 As defined by § 59.1-21.10(i).

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VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT. PRODUCER OR REFINER PURCHASING FROM ANOTHER PRODUCER OR REFINER RETAIL OUTLET EXEMPT FROM PROVISIONS OF § 59.1-21.16:2 ENTITLED TO BENEFIT OF PREDECESSOR'S GRANDFATHER RIGHTS.

May 10, 1984

The Honorable Robert E. Russell
Member, Senate of Virginia

You have asked for my opinion regarding the scope of "grandfather" rights\(^1\) under § 59.1-21.16:2(D) of the Code of Virginia, a portion of the Virginia Petroleum Products Franchise Act (the "Act"). You have posed the following fact situation:

A retail outlet, as defined in the Act, is presently owned and operated by a producer or refiner. The existing relationship predates July 1, 1979 and, therefore, is not subject to the provisions of § 59.1-21.16:2 because of the grandfathering clause found at subsection (D)\(^2\). The present owner of the retail outlet wishes to sell the outlet to another producer or refiner who would continue to operate it. You ask whether the transferee can claim the grandfather rights of its predecessor. It is my opinion that it can.

Section § 59.1-21.16:2 provides, in pertinent part, as follows:

"A. After July 1, 1979, no producer or refiner of petroleum products shall operate any major brand, secondary brand or unbranded retail outlet in the State of Virginia with company personnel, a parent company or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner; provided, however, that such producer or refiner may operate such retail outlet with the aforesaid personnel, parent, person, firm or corporation if such outlet is located not less than 1 1/2 miles, as measured by the most direct
surface transportation route, from the nearest retail outlet operated by any franchised dealer; and further provided, that once in operation, no producer or refiner shall be required to change or cease operation of any retail outlet by the provisions of this section.

D. The provisions of this section shall not be applicable to retail outlets operated by producers or refiners on July 1, 1979.\(^1\) (Emphasis added.)

In my opinion, the intent of the General Assembly in enacting this statute was to restrict the number of retail outlets operated by producers or refiners to such number as existed on July 1, 1979; and, secondarily, in the attainment of that objective, to take care not to put out of business any outlets which were actually in business on that date. The language of § 59.1-21.16:2(D) is clear and unambiguous. It grandfathers retail outlets, which were operated by producers or refiners on July 1, 1979, from the other provisions of the section. The focus of subsection (D) is upon the retail outlet, and not upon the individual producer or refiner who operates it. In this regard I am in agreement with my predecessor who stated in an earlier Opinion that "[t]he intent of the Act is to control the method of operation and not the ownership of the land." See 1979-1980 Report of the Attorney General at 390. The General Assembly could have provided that the limitations of § 59.1-21.16:2 were to become applicable to retail outlets, exempt as of July 1, 1979, when subsequently purchased by transferee producers or refiners, but it did not.

My conclusion is supported by the decisions of the Supreme Court of Virginia in the cases of Harbor Cruises v. Commonwealth, 217 Va. 458, 230 S.E.2d 248 (1976) and Cowardin v. Burrage, 195 Va. 54, 77 S.E.2d 428 (1953).

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1"Grandfather" clauses have a definite significance in a new law or regulation, being designed to permit a continuation of that which is otherwise prohibited by the new law or regulation.

2I am assuming for the purposes of this opinion that the retail outlet in question is located less than 1-1/2 miles from the nearest retail outlet operated by a franchised dealer, as defined by statute.

VIRGINIA PUBLIC PROCUREMENT ACT. BOARDS OF SUPERVISORS. LOCAL PREFERENCE NOT AUTHORIZED.

October 11, 1983

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

This is in response to your inquiry whether a county board of supervisors has authority to adopt a procurement policy for the county which requires purchase of locally produced goods and services if the bid price of those goods does not exceed the low bid by more than a certain percentage.\(^1\) Such a policy is also known as local preference.

When confined to the private sector, such a policy may have obvious socio-economic benefits to Virginia and her citizens. Nevertheless, after careful review of the legislative history of the Virginia Public Procurement Act and the provisions of the Code of Virginia, it is clear that the General Assembly has not conferred upon boards of supervisors the general authority to adopt policies requiring local preferences in county
procurement practices. Indeed, as recently as its 1983 session, the General Assembly declined to enact a bill which would have required such a policy. Accordingly, for the reasons which follow, I must conclude that, as a general proposition, a board of supervisors lacks the authority under existing law to mandate such a governmental policy. I note in your letter that you have reached the same conclusion.

After considerable study, the General Assembly enacted the Virginia Public Procurement Act in 1982. See § 11-35 et seq. of the Code of Virginia. The Assembly clearly stated its intent with respect to the new Act in § 11-35(G):

"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." (Emphasis added.)

While § 11-35(D) permits localities to exempt themselves from compliance with certain provisions of the Act, they may do so only by adopting procurement policies and procedures "which are based on competitive principles...." Thus, localities are given some flexibility in devising the details of their procurement procedures but only upon the condition that they adhere to "competitive principles."

The term "competitive principles" is not defined by the Act, but, in accordance with the legislature's statement of intent, those principles must be implemented in such a manner to expand the opportunities for competition. As stated by the Study Committee:

"Competition affords every qualified vendor a fair opportunity to obtain public business. It avoids favoritism. It ensures that the public body is informed of the alternatives available, and provides the best chance that the expenditure of public funds will be made wisely." (Emphasis added.)

Study Committee Final Report, p. 3.

Guidance in the meaning of "competitive principles" may be obtained by reference to § 11-37 which defines "competitive sealed bidding" and "competitive negotiation." That section states that in competitive sealed bidding bids may be evaluated by analysis of the special qualifications of potential contractors, life cycle costing, value analysis, and other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. The Act's definition of "competitive negotiation" contemplates discussions "with all offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence...." (Emphasis added.) The section then requires a ranking of "two or more offerors whose professional qualifications and proposed services are deemed most meritorious." (Emphasis added.)

As is abundantly clear, all of the listed factors are those customarily associated with competition and are generally related to the cost of the work, quality of the work, and capability of the vendor to comply with the bid documents. There is no indication in the Act that "competitive principles" includes non-work related factors. In this regard, the Act continues as the policy of the Commonwealth the holding of the Supreme Court
of Virginia in *Taylor v. County Board*, 189 Va. 472, 483; 53 S.E.2d 34 (1949). In that case, the Court, nearly thirty-five years ago, stated that in awarding bids local governments may consider the experience of the bidder previous in the particular field of work, the quality of the bidder's previous work, the quality of the goods proposed to be provided and the cost.

The general issue of local preferences was carefully considered by the Study Committee and there are two occasions in the Act in which local preferences are permitted. In its Final Report, the Study Committee recommended that preferences be given to Virginia firms in very limited situations but declined to suggest that the State generally impose a price differential against all out-of-state bidders.

In this regard, the Committee noted that "such preferences are generally condemned." As adopted, however, the Act limits preferences to Virginia firms even more narrowly than the Study Committee's recommendation. Section 11-47 permits a Virginia preference only in the case of a tie bid (thus it serves simply as a tie breaker) or, in the event a bidder is a resident of a state which gives preference to its residents, then a "like" preference may be given to the lowest responsible Virginia bidder.

Another indication of the policy of the Commonwealth is the General Assembly's action on House Bill 776 at its 1983 session. That bill would have required, in essence, that preference be given to products manufactured in Virginia or the United States. The legislature declined to adopt that bill.

In sum, the factors to be considered here in determining whether a locality may adopt a general policy of local preferences in procurement are the Virginia Public Procurement Act, the absence of any indication in the Code that localities have authority to grant preferences except as may be permitted in that Act, and the refusal of the legislature to adopt a proposal to require Virginia preferences. The Act clearly limits to two narrow situations the occasions in which preferences are permissible. While localities may exempt themselves from compliance with the details of the procedures prescribed in the Act, they must follow competitive principles. There is nothing in the concept of competitive principles which permits the establishment of a general procurement policy which would require purchase of locally produced goods and services when the local vendor has not submitted the low bid.

The foregoing discussion makes it clear that the legislature has not conferred authority on local governments to adopt general policies granting local preferences, and that such a policy would be inconsistent with the requirements of the Public Procurement Act, and also inconsistent with the policy of the Commonwealth. While it may be within the policy making discretion of the General Assembly to confer authority upon localities to grant local preferences, this is a "singularly political question." Cf., *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 581, 232 S.E.2d 30 (1977). Until the Assembly acts to confer such authority upon Virginia's boards of supervisors, I must conclude that they do not possess the authority to adopt a policy of local preferences in their procurement practices.

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1For example, if the price differential policy is 15%, and a local vendor bids $114 for the sale of certain goods to the county and a non local vendor bids $100 for the sale of the same goods, then, under the policy, the county would purchase the goods from the local vendor and pay $14 more than the low bid.

2The Act is primarily the result of recommendations made to the General Assembly by the Virginia Procurement Law Study Advisory Committee which was created pursuant to
1983-1984 REPORT OF THE ATTORNEY GENERAL


Sections 15.1-105 and 15.1-108 concerning county purchasing agents prescribe that all purchases of, and contracts for, supplies, materials, equipment and contractual services for the county government shall be in accordance with Ch. 7 of Title 11 which is the Virginia Public Procurement Act.

In commenting on the meaning of "special qualifications," the Study Committee gave as examples experience in work similar to that being bid or the ability to provide service promptly. Final Report, p. 32. The Committee also referred to an Opinion of this Office, 1972-1973 Report of the Attorney General at 107, which held that the term "lowest responsible bidder" is not limited "in its meaning to financial resources and ability but extends to the skill and competence of the bidder and to the quality of the work intended." Obviously, if such factors are to be considered, they should be identified in the Invitation to Bid or Bid Specifications.

In support of its conclusion, the Study Committee quoted from the Third Interim Report of the Special Grand Jury of the Circuit Court of the City of Richmond investigating procurement practices of the State Division of Purchases and Supplies, issued October, 1979, as follows: "The idea that the Commonwealth ought to deal with local vendors because they will provide the best service is nonsense. The State should deal with anyone who provides the best product and service at the lowest possible price." Final Report, p. 5.

The General Assembly has permitted a preference in the area of construction contracts for the use of domestic steel products. See Ch. 4.1 of Title 11 (§ 11-23.6 et seq.). That chapter provides that local governments may adopt the provisions of the chapter by ordinance mutatis mutandis. That chapter will expire, by its own terms, on June 30, 1986.

As noted previously, for a limited period of time and in limited circumstances, State and local governments may require the use of domestic steel in public works contracts.

In Virginia, local governing bodies have only those powers which are expressly conferred upon them, or which may be necessarily or fairly implied from powers expressly conferred upon them, or which are essential and indispensable. Commonwealth v. Arlington County Bd., 217 Va. 558 (1977).

VIRGINIA PUBLIC PROCUREMENT ACT. COMPETITIVE BIDDING IN COMPETITIVE NEGOTIATION REQUIRED FOR ALL PUBLIC CONTRACTS UNLESS OTHERWISE AUTHORIZED.

August 4, 1983

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your letter requesting an opinion whether the City of Manassas may contract with a government relations firm to monitor and advise the city concerning federal regulations and legislation. You advise that the firm would not be a policy-making body in any way. You have asked whether such a contract would pose any problems under the Virginia Public Procurement Act, the lobbying laws of Virginia or the conflict of interests laws of Virginia.

Section 11-41 of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"), provides in part:

"A. All public contracts with nongovernmental contractors for...the purchase of services...shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law."
Pursuant to the Act, neither competitive sealed bidding nor competitive negotiation is required: (a) if a determination is made in writing that only one source is practicably available (§ 11-41(D)), (b) if a written determination is made that an emergency exists (§ 11-41(E)) or (c) if the contract is not expected to exceed $10,000 and there exists a written small purchase procedure providing for competition wherever practicable (§ 11-41(F)).

Competitive negotiation, rather than competitive sealed bidding, may be used if (a) professional services (as defined in § 11-37) are being procured (§ 11-41(B)) or (b) if a written determination is made that competitive sealed bidding is either not practicable or not advantageous to the public (§ 11-41(C)). Accordingly, I am of the opinion that the particular circumstances will dictate whether competitive sealed bidding or competitive negotiations would be required by the Act.

Chapter 2.1 of Title 30 governs activities of lobbyists who seek to influence members of the General Assembly on legislative matters. Because the consulting firm you describe would be dealing with the United States Congress rather than with the Virginia General Assembly, I am of the opinion that the Virginia lobbying laws would not apply. Further, I am of the opinion that the federal lobbying laws, contained in 2 U.S.C.A. § 261 (1977) et seq. do not prohibit or restrict the employment of lobbyists by public bodies.

The Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "CCOIA") governs the conduct of officers and employees of agencies of government. Members of the consulting firm (which is deemed to be an independent contractor of the city) would not be employees of the city and, therefore, not governed by the CCOIA. If a member of the consulting firm also served as an officer or employee of government, however, the provisions of the CCOIA including, inter alia, the ethical standards, contracting restrictions, disqualification provisions and disclosure requirements, would apply to such officer or employee.

To summarize, the proposed contract does not appear to create any conflicts with the lobbying laws or the conflict of interests laws, but the manner by which the contract is awarded will be governed by the Act.

1 See § 30-28.1:1.
2 See Wells v. Whitaker, 207 Va. 616, 151 S.E. 2d 422 (1966) for the criterion of determining whether a relationship is one of principal-agent or master-servant rather than that of an independent contractor.

VIRGINIA PUBLIC PROCUREMENT ACT. PROCUREMENT RULE MAKING AUTHORITY OF DIVISION OF PURCHASES AND SUPPLY, § 2.1-442.

February 10, 1984

The Honorable Alan A. Diamonstein
Member, House of Delegates

This is in reply to your letter of February 8, 1984, requesting an opinion related to the procurement of word and data processing equipment.
Your first inquiry is whether the Code establishes the authority for the Division of Purchases and Supply (the "Division") to review and approve the procurement policy utilized at the Department of Management Analysis Systems Development ("MASD").

Section 2.1-442 of the Code of Virginia grants procurement rule making authority to the Division with the following words:

"All purchases made by any department, division, officer or agency of the Commonwealth shall be made in accordance with Chapter 7 of Title 11 and such rules and regulations as the Division may prescribe... The Division shall have authority to make, alter, amend or repeal regulations...and may specifically exempt purchases below a stated amount or particular agencies or specified materials, equipment, nonprofessional services, supplies and printing." (Emphasis added.)

The rule making authority given in § 2.1-442 contains within it an inherent power to establish procurement policy so long as that policy is compatible with Chapter 7 of Title 11, the Virginia Public Procurement Act. If this were not so, the Division would be limited to merely reiterating the Public Procurement Act. This authority, in conjunction with the statutory requirement that all purchases by any department, division, officer or agency shall be made in accordance with the rules prescribed by the Division, leads me to the conclusion that it is the intent of the statute that the Division shall also have the authority to review and approve or disapprove the procurement policy utilized in State purchases.

Your second question asks whether MASD has the statutory authority to establish a separate appeals process and appeal board for complaints arising from their procurement practices.

Section 11-71(A) states that a public body may establish an administrative procedure for hearing various types of disputes which could arise in the procurement process. Such administrative procedures shall provide for a hearing before a disinterested person or panel, i.e., an appeals board. Section 11-37 defines the term "public body" to mean, inter alia, any legislative, executive or judicial body, agency or department created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the procurement activities described within the Virginia Public Procurement Act. That definition is so broad that each department of the executive branch of State government, including MASD, is a "public body" and under § 11-71 could establish an appeals board. Exercising its authority under § 2.1-442, however, the Division promulgated its "Vendor's Manual" (2nd ed. dated January, 1983) in which Chapter 11 creates a Procurement Appeals Board. Section 11.2 of the Vendor's Manual establishes the Board's jurisdiction:

"The Board may review appeals from procurement decision on the purchase of goods made by any agency of the Commonwealth required to follow the purchasing procedures set forth in this Vendor's Manual...."

The Division has, however, exempted MASD from following the Vendor's Manual by providing:

"The purchase of automated data processing and word processing equipment and related services will be made in accordance with the MASD Data Processing Procurement Manual."

Thus, because MASD is not required to follow the purchasing procedures set forth in the Division's Vendor's Manual, it does not fall within the jurisdiction of the Procurement Appeals Board established by the Division and is free to establish its own appeals board pursuant to § 11-71. The Division could, of course, by amendment of its Vendor's Manual,
include MASD within the jurisdiction of the Procurement Appeals Board which it has created.1

1It should be noted that § 11-71 does not mandate that a public body create an appeals board, but merely authorizes it to do so if it chooses. In the absence of an appeals board to hear protests of procurement decisions by a public body such as MASD, a bidder, offeror or contractor having a dispute with the body may still bring an action in the appropriate circuit court challenging that decision pursuant to § 11-70.

VIRGINIA PUBLIC PROCUREMENT ACT. SCHOOL BOARD USE OF COMPETITIVE NEGOTIATION TO PROCURE CONSTRUCTION CONTRACTS PURSUANT TO §§ 11-41, 11-37 and 11-41.1.

May 22, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether a local school board may select a contractor to perform construction work by the "competitive negotiation" method set forth in § 11-37 of the Code of Virginia.

The basic requirement for the use of competitive procurement procedures is set forth in § 11-41(A) as follows:

"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." (Emphasis added.)

Such an authorization to use competitive negotiation is found in § 11-41(C) which permits the procurement of construction by competitive negotiation if the procuring public body makes a written determination that competitive sealed bidding is either "not practicable or not advantageous to the public...." The basis for this determination must be also documented. Therefore, if adequate justification exists for the use of competitive negotiation and a proper written determination is made, competitive negotiation may be used for the procurement of construction by any public body, including a school board.1

The foregoing discussion has been based upon an assumption that the school board in question has not adopted alternative procurement policies and procedures as is permitted by § 11-35(D). If it were to do so, § 11-41 would not be among those mandatory sections of the Virginia Public Procurement Act which § 11-35 would require the school board to follow. Nevertheless, § 11-35(D) requires any alternative policies and procedures to be based upon competitive principles. Obviously, competitive negotiation is based upon competitive principles and would qualify.2

In summary, I am of the opinion that a local school board may procure construction contracts by use of competitive negotiation if it follows the correct statutory procedures.
1The definition of "competitive negotiation" in § 11-37 sets forth an outline of procedures to be followed in three subparagraphs. The third subparagraph has two alternative sets of procedures, the first, found in subparagraph (3)(a), to be used for the procurement of professional services and the second, in subparagraph (3)(b), to be used for procurements other than for professional services. Because construction is not included in the § 11-37(3)(a) definition of "professional services," and is specifically defined in subparagraph (3)(b), the procedures of that paragraph rather than those in subparagraph (3)(a) should be used. For a description of these procedures under which competitive negotiation is to be accomplished, see § 11-37(3)(b).
2Even if the school board's construction project were one which involved State aid of $10,000 or more, § 11-41.1 would permit the use of either competitive sealed bidding or competitive negotiation.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM. WORKERS' COMPENSATION ACT. LAW ENFORCEMENT OFFICERS EMPLOYED BY CHESAPEAKE BAY BRIDGE AND TUNNEL COMMISSION NOT ENTITLED TO PRESUMPTION PROVIDED BY § 65.1-47.1.

October 14, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether a person employed as a law enforcement officer by the Chesapeake Bay Bridge and Tunnel Commission is entitled to the presumption afforded by § 65.1-47.1 of the Code of Virginia (a portion of Workers' Compensation Act) with respect to a disability claim based on hypertension or heart disease.

Section 51-111.31 of the Virginia Supplemental Retirement Act provides that a commission may, by resolution, elect to participate in the Virginia Supplemental Retirement System ("VSRS"). I am advised that the Chesapeake Bay Bridge and Tunnel Commission ("Commission") made such an election, and became a participating employer on November 1, 1964.

Section 51-111.56(b) provides that an individual may retire, within a specific time limit, if he is disabled from a cause compensable under the Virginia Workmen's Compensation Act. Section 65.1-47.1 of the Compensation Act provides, in pertinent part:

"The death of, or any condition or impairment of health of...any member of the State Police Officers Retirement System, or of any member of a county, city or town police department, or of a sheriff, or of a deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, caused by hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this Act unless the contrary be shown by a preponderance of competent evidence...." (Emphasis added.)

This statute creates a rebuttable presumption that hypertension or heart disease is an occupational disease for certain categories of individuals. The list of eligible individuals includes members of the State Police Officers Retirement System which is separate and distinct from the VSRS. See § 51-143 et seq. This list, however, does not include members of VSRS.
It is a recognized principle of statutory construction that a statute which mentions one thing implies the exclusion of another. See 1976-1977 Report of the Attorney General at 199. In view of the fact that the officers in the present case are not members of the State Police Officers Retirement System or any county, city or town law enforcement department enumerated in § 65.1-47.1, it is my opinion that they are not entitled to the hypertension presumption provided by the statute. I enclose a copy of a recent opinion by a Deputy Commissioner of the Industrial Commission that reaches the same conclusion with respect to a corrections officer for the Department of Corrections.

WATER. STATE WATER CONTROL BOARD. SOIL AND WATER CONSERVATION COMMISSION. AUTHORITY TO IMPOSE CONTROLS ON STORM WATER RUNOFF TO PROTECT WATER QUALITY.

June 27, 1984

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

This is in reply to your request for advice concerning the ability of the Soil and Water Conservation Commission and the State Water Control Board, under existing regulatory authority, to control water quality impacts from storm water. You note that storm water runoff can affect water quality by increasing erosion, by carrying pollutants such as sediments, grease, oils, and heavy metals, by altering the flow regime of a stream, and by altering the temperature and salinity regimes of a stream.

Under the authority of the Erosion and Sediment Control Law, §§ 21-89.1 et seq. of the Code of Virginia, the Virginia Soil and Water Conservation Commission has adopted standards, guidelines and criteria for the effective control of soil erosion, sediment deposition, and nonagricultural runoff. See Virginia Erosion and Sediment Control Handbook (1980). These standards establish Statewide minimum requirements for land disturbing activity. The law defines land disturbing activity to include, with some exceptions, "any land change which may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the State." Section 21-89.3(a). Most land disturbing activity under the statute involves construction.

Although the exposure of soil during land disturbing activity ordinarily will be temporary, the effect on storm water runoff will continue following the completion of construction. The temporary erosion and sedimentation effects will be concluded when the activity is terminated. The activity, however, will usually result in the construction of roofs, paved areas, or the like. Such changes in drainage on a site can lead to continuing changes in the quantity and speed of storm water runoff, in the pollutants borne by that runoff, and in off-site erosion and siltation.

Viewed narrowly, the "land change" in "land disturbing activity" is the exposure of erodable soil during the course of the activity. Viewed more broadly, the land change also includes the construction of roofs, paved areas, etc. In this broader view, the Commission's minimum standards could regulate the permanent effects of the land change upon erosion and sedimentation. Under both views, the General Assembly has authorized the Commission to regulate erosion and sedimentation, but not the other water quality effects of land disturbing activity.

As you note, the Commission has developed standards to control the temporary effects of sediments generated during the land disturbing activity itself and to control the temporary and continuing effects of erosion caused by storm water runoff. It has traditionally been the Commission's view that this is the limit of its authority under the
Erosion and Sediment Control Law. Accordingly, the Commission has not sought to otherwise regulate the continuing transport of other pollutants from the site once the land disturbing activity has been concluded and the project completed.

The construction of a statute by the State official charged with its administration is entitled to great weight. Dept. of Taxation v. Prog. Com. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975). Here, the Commission's interpretation of the Erosion and Sediment Control Law is consonant with the purpose of the law to control "soil erosion, sediment deposition, and nonagricultural runoff...." Section 21-89.4. It is, therefore, my opinion that the Erosion and Sediment Control Law and the regulations under it address storm water runoff only as it affects water quality by fostering increased sedimentation or off-site erosion either during or after the land disturbing activity.

The State Water Control Law authorizes the State Water Control Board to "exercise general supervision and control over the quality...of all state waters...." Section 62.1-44.15(1). The Board is authorized to establish standards of quality and policies for State waters, consistent with the general policy set forth in the State Water Control Law. Section 62.1-44.15(3)(a). The Board may adopt regulations to enforce its general water quality management program. Section 62.1-44.15(10).

Under the authority of §§ 62.1-44.15(5), 62.1-44.15(10), 62.1-44.16, 62.1-44.17, 62.1-44.19 et al., the Board has established extensive regulations and permit requirements for point source discharges of pollutants. See State Water Control Board Regulation No. 6, National Pollutant Discharge Elimination System Permits (1981). Water pollution, however, does not arise solely from point sources. Nonpoint sources of pollution, such as storm water runoff from agricultural, silvicultural, and urban areas, account for more than half of the pollutants that are in our nation's waterways. United States Comptroller General, "National Water Quality Goals Cannot Be Attained Without More Attention to Pollution from Diffused or Nonpoint Sources," CED-78-6 (General Accounting Office, 1977) at i. Pursuant to § 208 of the Federal Water Pollution Control Act, 33 U.S.C. § 1288, and to § 62.1-44.15(13) of the Virginia Code, the Board has developed areawide waste treatment management plans that address nonpoint source pollution control. The plans contemplate a voluntary program for the implementation of Best Management Practices ("BMP's"). BMP's are means for preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with Virginia's water quality goals. The Water Control Board has developed BMP handbooks for agriculture, forestry, mining, urban areas, hydrologic modifications, and sources affecting groundwater. Many of the BMP's discussed in these handbooks address questions of erosion and sediment control and storm water runoff. See Best Management Practices Handbook, Urban, State Water Control Board Planning Bulletin 321 (1979).

The State Water Control Board has designed its urban nonpoint source planning to incorporate the Soil and Water Conservation Commission's regulatory activity under the Erosion and Sediment Control Law. Thus, the Board's Urban BMP Handbook incorporates the Commission's Erosion and Sediment Control Handbook for application to new construction. The remaining BMP's adopted by the Board apply only to maintenance of or improvements to existing facilities, not to new construction. There is no requirement that the recommendations be implemented. Thus, except for the Commission's requirements governing off-site erosion, neither the Commission nor the Board has sought to regulate the adverse impacts of storm water from completed projects or to require permanent runoff controls as part of new construction.

The Erosion and Sediment Control Law recognizes that "the application by local governing bodies of land use control measures is the most effective means by which erosion and sediment damage can be minimized." See 1973-74 Report of the Attorney General at 82. Similarly, the Water Control Board recognizes that zoning and other land use controls can be effective to apply BMP's and other techniques to control nonpoint
pollution. See, Best Management Practices Handbook, Management, State Water Control Board Planning Bulletin 322 (1981), at IV-5. Both agencies thus have deferred to Virginia's municipal governments and to such authority as those local governments may have to require control of nonpoint pollution.

While it is arguable that the water control law is broad enough to confer upon the Board authority to adopt specific nonpoint source regulations, it should be noted that the General Assembly has not granted such specific authority to the Board while it has granted the Board particular authority, cited above, to regulate point source discharges of sewage, industrial wastes, or other wastes.

Similarly, it is clear from a review of the Board's authority that the Board has specific authority to adopt regulations to enforce its general point source water quality management programs (§62.1-44.15(10)), but no explicit authority to control, by regulation, the water quality effects of nonpoint storm water runoff. Beyond its development of BMP's as part of its areawide plans, the Board has not attempted to construe this general authority to authorize it to regulate storm water runoff. In the light of (1) this lack of specific authority of the Board, (2) the particular program for storm water management under the Erosion and Sediment Control Law, (3) the long standing use of zoning and other land use controls to regulate storm water runoff, and (4) the Board's nonassertion of such authority, I have grave reservations whether the General Assembly intended for the Board to directly regulate storm water runoff. If a challenge to such regulations without the General Assembly's approval is made, I doubt that they could be successfully defended. As set out above, the Commission's authority ends at erosion and sediment control.

Accordingly, if the General Assembly should wish for either the Board or the Commission to undertake a mandatory, regulatory program to regulate other water quality impacts of storm water runoff, it would be appropriate to enact a statute specifically authorizing the new program.

WATER. WATERCOURSES. OBSTRUCTION BY ARTIFICIAL MEANS. AUTHORITY TO REMOVE NATURAL CONDITIONS WHICH IMPEDE FLOW OF WATER.

May 29, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

You have requested my opinion concerning the following questions:

"Where an owner of land has acquired the prescriptive right to drain his lands into a natural or man made stream or ditch over the lands of another:

a. May the downstream property owner obstruct by artificial means the natural flow of the stream or ditch?

b. Does the upstream property owner have the right to maintain the natural drainage over the property of the downstream owner, even if it requires going upon the lands of the downstream owner to remove natural conditions which obstruct the flow of water?" (Emphasis added.)

In the case of Mullins v. Greer, 226 Va., 311 S.E.2d 110 (1984), the Supreme Court of Virginia has confirmed that the modified common-law rule on surface water is applied in Virginia. Under this rule, surface water is considered a common enemy to all
landowners, and each landowner may fight it off as best he can, provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly.

There are recognized exceptions to this rule which have been formulated by the Court over the years. One of these is that the owner of land may not injure another by interfering with the flow of surface water in a natural channel or watercourse which has been worn or cut into the soil. See McGehee v. Tidewater R. Co., 108 Va. 508, 62 S.E. 356 (1908); Cook v. Seaboard Ry., 107 Va. 32, 57 S.E. 564 (1907); Norfolk &c. R. Co. v. Carter, 91 Va. 587, 22 S.E. 517 (1895). I believe this exception applies in the factual situation posited by you. Accordingly, your first question is answered in the negative. For a discussion of the rule and exceptions, see 1978-1979 Report of the Attorney General at 135.

The second part of your inquiry must also be answered in the negative. As stated above, a property owner may use whatever means are available to him to fight off water on his property. In my opinion, however, this does not give an upstream property owner the right to enter a downstream owner's property in order to attempt to remove a naturally created barrier.

WATER AND SEWER AUTHORITIES. BOARDS OF SUPERVISORS. PUBLIC OFFICERS. BOARD OF SUPERVISORS HAS NO AUTHORITY TO DISSOLVE WATER AND SEWER AUTHORITY OR TO REMOVE MEMBERS; RENEWAL OF AUTHORITY CONTROLLED BY § 2.1-79.1 ET SEQ.

December 12, 1983

The Honorable Joseph L. Howard, Jr.
County Attorney for Washington County

This is in reply to your request for my opinion concerning the dissolution by a county board of supervisors of a water and sewer authority previously established pursuant to the Virginia Water and Sewer Authorities Act (the "Act"), § 15.1-1239 et seq. of the Code of Virginia. You ask the following questions:

"1. Does a board of supervisors have authority to dissolve a water and sewer authority it has created pursuant to § 15.1-1241?

2. If the answer to the preceding question is in the affirmative, what is the proper method for a governing body to dissolve a water and sewer authority it has created and which has those powers enumerated in § 15.1-1250?

3. May the board of supervisors by resolution remove all members of the water and sewer authority en masse, and thereafter appoint replacements?

4. If the answer to the preceding question is in the negative, what method is available to the board of supervisors to remove one or more members of a water and sewer authority?"

Section 15.1-1241, relating to creation of an authority, provides in pertinent part as follows:

"The governing body of a political subdivision may, by ordinance or resolution...create a water authority, a sewer authority, a sewage disposal authority, or a garbage and refuse collection and disposal authority, or any
The ordinance or resolution must include articles of incorporation for an authority, setting forth, inter alia, the purpose or purposes for which it is created, and the articles must then be filed with the State Corporation Commission. See §§ 15.1-1242 to 15.1-1245. Upon issuance of a certificate of incorporation or charter by the State Corporation Commission, the authority is conclusively deemed to have been properly created and authorized to exercise its powers under the Act. See § 15.1-1246.

Section 15.1-1250, which lists the powers of an authority, states in subsection (a) thereof that each such authority is empowered "[t]o have existence for a term of fifty years as a corporation, and for such further period or periods as may from time to time be provided by appropriate resolutions of the political subdivisions then members of the authority...." Finally, § 15.1-1269.1 provides as follows with regard to dissolution of an authority:

"Whenever an authority shall determine that the purposes for which it was created have been completed or are impractical or impossible of accomplishment or that its functions have been taken over by one or more political subdivisions and that all its obligations have been paid or have been assumed by one or more of such political subdivisions or any authority created thereby or that cash or United States government securities have been deposited for their payment, the authority shall adopt and file with the governing body of each political subdivision which is a member of the authority a resolution declaring such facts. If all of such governing bodies adopt resolutions concurring in such declaration and finding that the authority should be dissolved, they shall cause to be filed with the State Corporation Commission appropriate articles of dissolution. If one or more of the governing bodies refuses to adopt resolutions concurring in such declaration, then the authority may petition the circuit court of any county or municipality which is a member of the authority to order the governing body of one or more of the political subdivisions to create a new authority. The circuit court may order the governing body of the county or municipality requesting dissolution of the existing authority to adopt an ordinance establishing a new authority to which the provisions of §§ 15.1-1241 through 15.1-1244.1 shall not apply and thereafter that the assets be divided among the authorities and, subject to the approval of any debt holder, require the assumption of a proportionate share of the obligations of the existing authority by the new authority.

Notwithstanding the provisions of § 15.1-1250(a) an authority shall continue in existence and shall not be automatically dissolved because the term for which it was created, including any extensions thereof, has expired, unless and until all of such authority's functions have been taken over and its obligations have been paid or have been assumed by one or more political subdivisions or by an authority created thereby or cash or United States government securities have been deposited for their payment." (Emphasis added.)

It is apparent from the above quoted statutes that the water and sewer authority stays in existence for at least fifty years from the time of its creation or until the conditions of § 15.1-1269.1 are met.1 By the terms of that statute, a dissolution of the authority prior to the end of its fifty year term of existence must be initiated by the authority itself, with the role of the county governing body being one of reaction. Although the Act reserves certain specific powers to the governing body in relation to the authority,2 it nowhere empowers the board of supervisors, on its own motion, to dissolve the authority, nor does any other provision of law of which I am aware.3
Accordingly, I am of the opinion that the board does not have such authority, and your
first question is answered in the negative.

In light of the above conclusion, your second question requires no answer.

With regard to questions 3 and 4, I direct your attention to Art. 1.1 of Ch. 6 of Title
24.1, relating to removal of public officers from office. Article 1.1 applies to all
elected or appointed public officers, except those whose removal from office is
specifically controlled by the Constitution of Virginia and one appointed to an office with
no fixed term and whose appointing authority has the unqualified power of removal. Section 24.1-79.6 thereof provides as follows:

"Any officer appointed to an office for a term established by law may be removed
from such office, under the provisions of § 24.1-79.5, upon a petition filed with the
circuit court in whose jurisdiction the officer resides signed by the person or a
majority of the members of the authority who appointed him if such appointing
person or authority is not given the unqualified power of removal. (Emphasis added).

Section 24.1-79.5 allows removal of an officer for "incompetency, neglect of duty or
misuse of office when such incompetency, neglect of duty or misuse of office has a
material adverse effect upon the conduct of such office." Sections 24.1-79.7 to 24.1-
79.10 provide the procedures for removals and appeals therefrom.

Because nothing in the Water and Sewer Authorities Act gives a county governing
body the unqualified power of removal of appointed members of an authority, your third
question is answered in the negative. In answer to your fourth question, the only method
available to the board of supervisors to remove one or more authority members is that
provided in § 24.1-79.6 et seq. for the reasons specified in § 24.1-79.5.

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1You relate that the Washington County Service Authority received a Certificate of
Incorporation in March, 1953, which was amended in December, 1976. (See SCC Charter
File No. 66553.)

2See, e.g., § 15.1-1247, which prohibits an authority from undertaking projects other
than those specified in the articles of incorporation, unless the governing body adopts
ordinances authorizing additional projects. See, also, §§ 15.1-1242, 15.1-1249, 15.1-
1250.01 and 15.1-1261.

Note, however, that, pursuant to the 1976 charter amendment, the county governing
body here effectively relinquished much of its power under § 15.1-1247 to limit authority

3Compare 1981-1982 Report of the Attorney General at 450 (consistent with the
Dillon Rule of strict construction of local government powers, a local governing body
which establishes a water and sewer authority is not empowered to adopt an ordinance
detailing the operations of an authority).

*Membership on the Authority meets the enunciated criteria for a "public office" as a
position created by the Constitution or statutes, filled by election or appointment, with a
designation or title, duties concerning the public assigned by law, and a fixed term of
General at 322.

4See § 24.1-79.1.

5See § 24.1-79.2.

6See § 24.1-79.3.

7See § 15.1-1249 as to the terms of five of water and sewer authority members.
You have requested my opinion whether a municipality, such as the City of Manassas Park, which purchases water and sewerage services from water and sewer authorities and resells the services to private consumers is bound by the statutory provisions applicable to water and sewer authorities. You are specifically interested in knowing if the city is bound by the provisions of § 15.1-1250 of the Code of Virginia relating to charges for service and the limitation on the refusal to reconnect service until delinquent accounts are paid.

Subsequent to your request, you furnished copies of agreements between the City of Manassas Park and the Yorkshire Sanitary District for the purchase of the water, and between the city and the Upper Occoquan Sewage Authority for the purchase of sewage services. There is no reference to the city's authority for purchasing such utility services, for which it bills the customers. I presume, therefore, that it does so by virtue of the authority in the city charter which incorporates by reference the powers conferred by Ch. 18 of Title 15.1. See § 2.1 of Ch. 722, Acts of Assembly of 1976. The pertinent provisions in Ch. 18 of Title 15.1 are §§ 15.1-875 and 15.1-876, which provide in pertinent part as follows:

"A municipal corporation may provide and operate within or without the municipal corporation water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of the inhabitants of the municipality; may contract with others for such purposes and services...."

"A municipal corporation may provide and operate within or without the municipal corporation sewers, drains, culverts and sewerage transmission, treatment and disposal systems, facilities and appurtenances for the purpose of furnishing sewerage disposal services for the inhabitants of the municipality; may contract with others for supplying such services...."

The city's powers pursuant to the foregoing provisions are in addition to the power any city or county has pursuant to Ch. 2 of Title 21 to create sanitary districts, and the power to create water and sewer authorities pursuant to Ch. 28 of Title 15.1.

The statute to which you made specific reference, § 15.1-1250, is a part of Ch. 28 of Title 15.1, the Virginia Water and Sewer Authorities Act. That section provides in part as follows:

"(i) To fix, charge and collect rates, fees and charges for the use of or for the services furnished by any system operated by the authority. Such rates, fees, rents and charges shall be charged to and collected from any person contracting for the same; or lessee or tenant, or some or all of them, who uses or occupies any real estate which is served by any such system.

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Notwithstanding any other provision of this chapter to the contrary, where the use of any water or sewer systems described in this section is contracted for by an occupant who is not the owner of the premises and where such occupant's premises are separately metered for service, the owner of any such premises shall be liable only
for the payment of delinquent rates or charges applicable to three delinquent billing periods but not to exceed a period of ninety days for such delinquency. No authority shall refuse to service other premises of the owner not occupied by an occupant who is delinquent in the payment of such rates or charges on account of such delinquency provided that such owner has paid in full any delinquent charges for which he would be responsible for paying. No authority shall refuse to service or unreasonably delay reinstatement of service to premises where such occupant who is delinquent has vacated the premises and a new party has applied for service provided such owner has paid in full such delinquent charges as he would be responsible for paying."

The powers and obligations conferred upon authorities are separate and distinct from the powers and obligations which may be conferred upon the cities creating the authorities. Consequently, the foregoing quoted provisions are applicable only to the authorities created pursuant to § 15.1-1241, not to the city which creates the authority. Moreover, as I understand the factual situation, the private consumer contracts only with the city for the desired services and not with the authority. Your question is, accordingly, answered in the negative.

WATER AND SEWER AUTHORITIES. LIEN FOR DELINQUENCY. AUTHORITY TO PLACE LIEN ON PROPERTY FOR DELINQUENT BILLS FOR SERVICES INCURRED BY TENANT.

November 4, 1983

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your letter of October 18, 1983, with enclosures relating to a dispute between a constituent and the Fairfax County Water Authority ("FCWA") over a delinquent account for water services provided to a lessee of premises owned by your constituent. From the documents enclosed, it appears that FCWA has made demand on the property owner for the amount due for services, and has given a notice that a lien would be filed against the property on November 4, 1983, if the amount due is not paid by that date.

You have asked several questions relating to the dispute, including (1) an interpretation of statutory powers under the Code of Virginia, (2) the legal remedies that must be followed by the FCWA before a lien is filed against the property, (3) the constitutionality of using landlords as collection agents for overdue bills and (4) the constitutionality of filing a lien against property for the amount due when the contract is between the FCWA and a lessee.

I will answer your questions in the order asked.

1. If the FCWA is required by law to obtain a deposit for water and sewer service, can the local governing body legally rescind that requirement?

Water and sewer authorities are public bodies politic and corporate, created pursuant to the Virginia Water and Sewer Authorities Act, § 15.1-1239 through 15.1-1270. Such authorities are created by the governing body of a political subdivision by ordinance or resolution as provided in § 15.1-1241. The general powers of an authority are enumerated in § 15.1-1250. Among those powers is the authority to issue revenue bonds, payable solely from revenues, to pay all or part of the cost of a water system or other systems which may be authorized. Section 15.1-1262 provides that any resolution or trust agreement providing for the issuance of revenue bonds may require the authority
to take lawful action as may be necessary to enforce the charges imposed for the use of
the services and may require the owner, tenant or occupant of each lot or parcel of land
who is obligated to pay such charges to make a reasonable deposit with the authority in
advance to assure the payment of such charges.

If the FCWA acted pursuant to the foregoing authority to require a deposit from
the user of the services provided, I am of the opinion that the governing body of the
locality is without power to rescind that requirement.

2. What are the legal remedies that must be followed by the FCWA before a lien is
filed against the property owner?

Section 15.1-1263 provides in pertinent part that there shall be a lien upon real
estate for the amount of any fees, rents or other charges by an authority to the owner or
lessee or tenant of such real estate for the use and services of any system of the
authority by or in connection with such real estate from and after the time when such
fees, rents or charges are due and payable. However, no such lien shall be placed by an
authority unless the authority or its billing and collection agent (i) shall have advised the
owner of such real estate at the time of initiating service to a lessee or tenant of such
real estate that a lien will be placed on such real estate if the lessee or tenant fails to
pay any fees, rents or other charges when due for services rendered to such lessee or
tenant; (ii) shall have mailed to the owner of such real estate a duplicate copy of the
final bill rendered to such lessee or tenant at the time of rendering the final bill to such
lessee or tenant; and (iii) shall employ the same collection efforts and practices to
collect amounts due the authority from a lessee or a tenant as are employed with respect
to collection of such amounts due from customers who are owners of the real estate for
which service is provided.

Although the statutory lien imposed by the foregoing section is automatic, the
statute imposes certain duties upon the authority as conditions precedent to placing a
lien on the property. Additionally, § 15.1-1250(p) places a limitation on the powers of an
authority as to the amount which may be collected from an owner of the premises when
the owner is not the user of the service. That provision reads in part as follows:

"Notwithstanding any other provision of this chapter to the contrary, where the use
of any water or sewer systems described in this section is contracted for by an
occupant who is not the owner of the premises are separately metered for service,
the owner of any such premises shall be liable only for the payment of delinquent
rates or charges applicable to three delinquent billing periods but not to exceed a
period of ninety days for such delinquency."

3. May an authority require a landlord to act as a collection agent without his
consent for overdue or uncollected bills from tenants?

Section 15.1-1250 empowers an authority to enter into contracts with others for the
purpose of collecting charges, but I am aware of no authority for imposing that obligation
upon an owner of property against his will. If the tenant's account becomes delinquent,
however, the landlord will be liable as set out in the answer to question 2 above.

4. Is it constitutionally permissible for an authority to file a lien against a landlord
for amounts due even though the contract for service is between the authority and a
third party?

As indicated in response to question 2, § 15.1-1263 imposes a statutory lien against
the property served for delinquent charges and § 15.1-1250 limits the amount of such
liability against the owner of premises where the use of the system is contracted for by
an occupant who is not the owner. The constitutionality of such a statutory lien has been
upheld by the Supreme Court of Virginia in the case of Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577 (1954). In that case, the Court stated:

"Lastly it is contended that the enforcement of sewerage connections, the collection of charges and the creation of a lien therefor as provided by §§ 15-764.23, 15-764.24 and 15-764.25 may deprive landowners of their property without due process of law. These sections1 provide that the owner, tenant or occupant of a parcel of land upon which is a building for residential, commercial or industrial use, which parcel abuts upon a street containing a sanitary sewer which is part of or served by the sewer system, may be required, with the consent of the local government, to connect his building with the sewer and cease to use any other method of sewage disposal. If the charges for the use of the system are not paid within 30 days after becoming due, the Authority may disconnect the premises from the water and/or sewer system, or otherwise suspend services and recover the amount due in a civil action. It is provided that there shall be a lien upon the real estate served by the sewer system for unpaid charges which shall be superior to the interest of the owner, lessee or tenant, which, however, shall not affect a subsequent purchaser for value without notice except from the time the lien is recorded.

"Such provisions are necessary implements of a sanitary system constructed and operated by an agency of the State which was created and organized for the public good pursuant to § 147 of the Constitution, and, as declared in § 15-764.12 'exercising public and essential governmental functions to provide for the public health and welfare.' We hold the provisions in question to be constitutional as being a reasonable exercise of the police power of the State and bearing a substantial relation to the protection and preservation of the public health." 196 Va. at 70, 82 S.E.2d at 587.

In view of the express statutory provisions imposing a lien against the premises where service is furnished, and the Supreme Court's decision upholding the constitutionality of that statute, I am of the opinion that the FCWA may constitutionally impose a lien against the premises, subject to the limitations expressed above as to amount and conditions precedent, irrespective of whether the owner of the premises was a party to the contract for services. The rationale used by the courts in upholding statutory liens against the property in cases where the service is furnished to a tenant is the theory that the lease was made with reference to provision of such service and the owner, therefore, is bound under implied contract. See Etheridge v. Norfolk, 148 Va. 795, 139 S.E. 508 (1927); 19 A.L.R.3d 1227, 1245.

You also requested my advice as to the best way to amend the law to eliminate problems of the type herein involved. It will, of course, be necessary to amend the Water and Sewer Authorities Act to alter the method of contracting between an authority and a user, as well as the procedures for collecting delinquent accounts. To accomplish this, however, care must be exercised to avoid interfering with existing contracts, particularly the vested rights of an authority's bond holders. I suggest that your proposal be submitted to the Division of Legislative Services as contemplated in § 30-28.18 in sufficient time for the Division to consider the ramifications of such statutory amendments.

1In the recodification of Title 15.1, §§ 15-764.24 and 15-764.25 became §§ 15.1-1262 and 15.1-1263 respectively.
WELFARE. ADOPTION. FINAL ORDER OF ADOPTION NOT AVAILABLE TO ADOPTEE ABSENT COURT ORDER PURSUANT TO § 63.1-235.

November 28, 1983

The Honorable Patsy Testerman, Clerk
Circuit Court of the City of Roanoke

You have asked whether a clerk is barred by § 63.1-235 of the Code of Virginia from giving a copy of a final order of adoption to an adoptee who has requested it in person.

Section 63.1-235 generally requires a clerk of any court having jurisdiction in adoption cases, with the approval of the judge of said court, to establish and maintain a separate and exclusive order book, file and index of adoption cases. That section further provides as follows:

"none of [these] shall be exposed to public view but which shall be made available by such clerk to attorneys of record, social services officials, court officials, and to such other persons as the court shall direct in specific cases by order of the court entered in accordance with § 63.1-236."

Section 63.1-236 allows an adult adoptee to review all reports, information and recommendations concerning his or her adoption. Any information with respect to the identity of the biological family of the adoptee, however, may be released only pursuant to a circuit court order entered after good cause has been shown and after other certain prerequisites in § 63.1-236 have been met.

Because neither § 63.1-235 nor § 63.1-236 specifically allows an adoptee to have direct access to the order book in adoption cases, I am of the opinion that a clerk is barred from giving a copy of a final order of adoption to the adoptee, absent a court order entered pursuant to § 63.1-236.

WELFARE. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

November 10, 1983

The Honorable Robert F. Ward, Judge
Pittsylvania Juvenile and Domestic Relations District Court

You have asked whether it is proper for a court to assume financial responsibility for a child it may order be placed in another state following a custody study, in the event that the placement of the child eventually is unsuccessful. If it is proper for a court to assume such responsibility, you then ask what funding sources are available to discharge any resulting obligation.

The Interstate Compact on the Placement of Children ("ICPC") generally controls placement of children out of state. See §§ 63.1-219.1 through 63.1-219.5 of the Code of Virginia. The ICPC consists of ten articles which describe the persons and legal entities to whom the Compact is applicable, the method of placement for a child out of state, and the Compact's limitations. See, generally, § 63.1-219.2.

Financial responsibility for a child placed pursuant to the Compact is determined by Article V of the ICPC. See § 63.1-219.3. Article V states, in part, that "[t]he sending agency shall continue to have financial responsibility for support and maintenance of the
child during the period of placement." (Emphasis added.) The term "sending agency" is defined in Article II of the compact as:

"a party state, officer or employee thereof...a court of a party state...or other entity which sends, brings, or causes to be sent or brought any child to another party state." (Emphasis added.)

If a court causes a child to be sent to another state for placement, I am of the opinion that it properly may be financially responsible for that child pursuant to the ICPC.

I am not advised as to whether there is an available funding source to discharge any resulting obligation. I suggest the question be submitted to the Executive Secretary of the Supreme Court of Virginia for an appropriate response. To further that purpose, I am sending a copy of this Opinion to Mr. Robert N. Baldwin, Executive Secretary, for his review and assistance.

WILLS AND ADMINISTRATION. STATEMENT IN LIEU OF ACCOUNTING. PERSONAL REPRESENTATIVES WHO ARE SOLE DISTRIBUTEES OR LEGATEES MAY DISTRIBUTE RESIDUE AFTER ALL KNOWN CREDITORS PAID.

June 5, 1984

The Honorable H. F. Haymore, Jr., Clerk
Circuit Court of Pittsylvania County

You have asked the meaning of the phrase "after the time required by law" in § 26-20.1 of the Code of Virginia. That section authorizes a personal representative who is the sole distributee of the estate or the sole beneficiary of the will of the decedent to file a statement under oath that he has "paid all known charges against the estate and, after the time required by law, deliver [sic] the residue of the estate to himself...."

The statute suggests that distribution can occur only after a period of time fixed by law has elapsed. The concept of a waiting period was instituted for the protection of creditors. See Bliss v. Spencer, 125 Va. 36, 99 S.E. 593 (1919). Generally, collection of debts of the decedent from an estate under the control of the personal representative is a routine matter. Once the assets have been distributed to the distributee(s) or legatee(s), however, collection becomes more difficult. When the personal representative and the legatee or distributee are the same person, the usual concerns of a personal representative as to his personal liability, if he makes the distribution before all debts of the estate have been paid, are not applicable. He will be liable for a valid debt of the estate in his capacity as distributee or legatee, whether or not he is liable as personal representative. See II Smith, Harrison on Wills and Administration § 448 (2d ed. 1961). Therefore, the statutory procedures (which require a waiting period before distribution) that relieve a personal representative from personal liability when he distributes assets to the distributees or legatees are useless in this case. See § 64.1-171 et seq. and § 64.1-177.

As a practical matter, a commissioner of accounts should not accept the statement unless a reasonable time for receiving creditors' claims has elapsed. I am informed by several commissioners of accounts that they believe six months is a reasonable time to allow for outstanding bills to come to the attention of the personal representative. When all known creditors have been paid, neither statute nor case law prohibits the personal representative from distributing the estate. In Bliss, supra, the Supreme Court of Virginia said that "where there are no creditors, there is nothing in our statute law [as of 1919] to forbid an administrator from distributing the personal estate within the year."
The Court went on to say that "the true policy of the law...would seem to favor a reasonably prompt distribution among those entitled." 125 Va. at 57.

I am unaware of any other statutory provision or any case law that specifies a fixed period of time a personal representative is required to wait before distributing the residue of the estate. Therefore, it is my opinion that "after the time required by law" refers to a period determined reasonable by the commissioner of accounts in light of general law governing creditors' rights and the particular circumstances of the case.

Section 26-20.1 reads, in part: "In lieu of the settlement of accounts required by § 26-17, the personal representative, or representatives if there be not more than three, of a decedent who is also the sole distributee, or only distributee, of the estate or sole beneficiary, or only beneficiaries, of the will of a decedent may file with the commissioner of accounts a statement under oath that he has, or they have, paid all known charges against the estate and, after the time required by law, deliver [sic] the residue of the estate to himself, or themselves, as such distributee, distributees, beneficiary or beneficiaries." (Emphasis added.)

"Deliver" should read "delivered." See Ch. 428, Acts of Assembly of 1960. The suffix "ed" has not been deleted by subsequent legislative amendment and its absence from the Code appears to be a printing error. The error first appeared in Ch. 192, Acts of Assembly 1975. Therefore, the statement should not be filed until after distribution has occurred.

ZONING. FLOODPLAIN REGULATIONS. CONSTITUTIONAL LAW. FLOODPLAIN REGULATIONS IN LOCAL ZONING ORDINANCE WHICH RESTRICT PROPERTY DEVELOPMENT NOT FACIALLY INVALID.

May 4, 1984

The Honorable Peter K. Babalas
Member, Senate of Virginia

This is in reply to your request for my opinion concerning the constitutionality of two ordinances enacted by the Council of the City of Virginia Beach, relating to floodplain regulations and determination of buildable lot area under the City's Comprehensive Zoning Ordinance. You ask in particular whether the ordinances have the effect of taking private property without just compensation, in that they restrict property owners in altering land contours to allow water to drain from their properties.

Section 1200 of the Virginia Beach Zoning Ordinance, which sets forth the legislative intent of the city's floodplain regulations, was amended by ordinance dated December 5, 1983, to read as follows (additions are emphasized):

"The purpose of this section is to establish and identify those areas to be known as the floodplain and which would be subject to special regulations. The purpose of establishing such areas would be to protect life and property, to reduce public costs for flood control, rescue and relief efforts, and construction and maintenance of manmade drainage facilities, to preserve the highest possible level of water quality in the waterways of the area, and to support and conform to the National Flood Insurance Program."

By the same ordinance of December 5, 1983, the following language was added to the zoning ordinance as subsection 1293(c):
Floodplains subject to special restrictions. Notwithstanding provisions of this ordinance to the contrary, there shall be no filling permitted for the purpose of altering the contour of the land and that would decrease the flood storage capacity or adversely affect stormwater flow conditions as determined upon review by the City Engineer except for the purpose of roadway construction or other similar public works construction, and except to provide the minimum amount of fill to assure adequate functioning of a septic tank system, in any of the following floodplains: (1) North Landing River and its tributaries south of Lynnhaven Parkway; (2) West Neck Creek and its tributaries south of Ships Corner Road and London Bridge Road; and (3) Bays and creeks comprising the Back Bay system south of Dam Neck Road and east of Princess Anne Road.

Finally, another ordinance dated December 5, 1983, amended § 200 of the zoning ordinance to read as follows (additions are emphasized, deletions are stricken with dashes):

"Lot area. For purposes of determining allowable dwelling unit or lodging unit density the gross area of a zoning lot shall be the total area within the lot lines of the zoning lot, including (1) public and private utility easements, but exclusive of rights of way, (2) easements for ingress or egress in favor of others, of easement for major drainage channels (3) natural flood fringes, (4) manmade drainage areas constructed primarily for storage or retention of stormwater runoff from the lot, (5) those parts of drainage easements above the normal level of water contained therein, and (6) the entirety of drainage easements, including water, that cover streams whose average normal width while traversing the lot is less than ten (10) feet; but not including (1) the floodway portion of any natural floodplain, (2) any body of water except as mentioned above, (3) any manmade drainage areas such as borrow pits constructed primarily for purposes other than storage and retention of stormwater, and (4) wetlands. In addition, for purposes of satisfying minimum lot size requirements for all districts except the AG 1 and AG 2 Districts no part of the required lot area shall not be in water, marsh, or wetlands; or permanently or intermittently inundated below an elevation of six (6) feet above mean sea level; provided, however, that in the case of the R-1 District not more than forty (40) percent of the required area and in the R-2 District not more than twenty (20) percent of the required area may be in water, marsh or wetlands or permanently or intermittently inundated or located below an elevation of six (6) feet above mean sea level."

The city's floodplain zoning regulations were adopted under the authority and responsibility conferred in Ch. 11, Title 15.1 of the Code of Virginia, relating to Planning, Subdivision of Land and Zoning, and in the Flood Damage Reduction Act, contained in Ch. 3.5 of Title 62.1. Section 15.1-486 authorizes a city council to adopt a zoning ordinance classifying the city's territory into districts and within each district to "regulate, restrict, permit, prohibit, and determine...[the] use of land, buildings, structures and other premises for agricultural, business, industrial, residential, floodplain and other specific uses." (Emphasis added.) Section 15.1-489 declares the general purpose of zoning ordinances to be the promotion of the health, safety or general welfare of the public, and provides that such ordinances shall be designed, among other objectives, to provide for safety from flood and other dangers, to facilitate the provision of adequate flood protection, and to protect against loss of life, health or property from flood or other dangers. Section 15.1-490 requires that zoning ordinances and districts be drawn with reasonable consideration for, among other things, the preservation of floodplains.

Section 62.1-44.109, a part of the Flood Damage Reduction Act, declares the policy of the Commonwealth and the purpose of the Act to be "to reduce flood damage through management of floodplain use by such means as floodplain zoning, and to insure that land
uses in flood hazard or floodplain areas are appropriate." This "policy and purpose" section states that the responsibility and authority for zoning, including floodplain zoning, rests with the city council and lists as an intent and purpose of the Act "to encourage local governmental units to adopt, enforce and administer sound floodplain management ordinances...."

Section 62.1-44.112 lists the powers and duties of the State Water Control Board under the Act, among which are included the duties "[t]o assist local political subdivisions in their management of floodplain activities..." and "[t]o carry out the provisions of this chapter in a manner which will insure that the management of floodplains will preserve the capacity of the floodplain to carry and discharge a hundred year flood." (Emphasis added.)

All of the above demonstrates the policy of the Commonwealth to preserve the capacity of floodplains to carry and discharge floods to the end of protecting the public from the hazards to life, limb and property associated with floods. The primary responsibility and authority to adopt regulations to implement that policy vests by law in the local governing body, as part of its zoning powers. Any such regulation, therefore, should be tested against the standards utilized by the Supreme Court of Virginia to determine the validity of other zoning regulations.

In Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E.2d 390 (1959), the Supreme Court expressed the applicable standards in the following words:

"The general principles applicable to a judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained...[citations omitted]. The exercise of the police power is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear...." (Citation omitted.) (Emphasis added.)

To the same effect see, e.g., Board of Supervisors v. IFS, 221 Va. 840, 275 S.E.2d 586 (1981); Fairfax County v. Jackson, 221 Va. 328, 269 S.E.2d 381 (1980); Loudoun County v. Lerner, 221 Va. 30, 26 S.E.2d 100 (1980); Byrum v. Orange County, 217 Va. 37, 225 S.E.2d 369 (1976).

A zoning regulation which bears a rational relationship to a permissible state objective as expressed in enabling legislation, and which does not in its terms arbitrarily discriminate, will not be declared unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation. See, e.g., City of Manassas v. Rosson, 224 Va. 12, 294 S.E.2d 799 (1982), appeal dismissed, 103 S.Ct. 809 (1983); Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961). If the application of a zoning regulation has the effect of completely depriving a property owner of the beneficial use of his property by precluding all practical uses, the regulation may be unreasonable and confiscatory as applied and may be held invalid as to that property. Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971). If the regulation permits a landowner to use his property in a reasonable manner, although it may be a manner other than that which he desires, the application of the regulation to that particular property is not unconstitutional. Southern
Applying the above standards to the zoning amendments in question here, I observe, first, that they appear to have a rational relationship to a permissible state objective as expressed in the statutes, that is, the protection of the public from flood hazards through regulation of development in floodplain areas. Moreover, they do not in their terms arbitrarily discriminate among those properties which are subject to the regulations. Although the regulations presumably will have some restrictive effect on property development in the floodplain areas affected, I note that they neither flatly prohibit filling operations nor do they prohibit property development.\(^2\) They do require a determination of the city engineer that flood storage capability and existing storm water flow characteristics will be maintained.\(^3\) There being no clear conflict between the amendatory ordinances and any provision of either the United States Constitution or the Constitution of Virginia (1971), and giving the legislative actions of city council in enacting them the judicially required presumption of validity and reasonableness, I cannot conclude that either of the ordinances is invalid on its face. I express no opinion on their validity as they may be applied to and affect a specific piece of property, which necessarily must be decided on a case by case basis.

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1. The full text of § 1200, as published in the Code of the City of Virginia Beach, is as follows: "The purpose of this section is to establish and identify those areas to be known as the floodplain and which would be subject to special regulations. This set of proposed ordinances is intended to implement a policy of protecting the natural floodplains in the southern part of the city by requiring that any filling operations taking place maintain the same flood storage capability and storm water flow characteristics as those that naturally exist. The purpose of establishing such areas would be to protect life and property, to reduce public costs for flood control, rescue and relief efforts, and construction and maintenance of manmade drainage facilities, to preserve the highest possible level of water quality in the waterways of the area, and to support and conform to the National Flood Insurance Program."

2. Section 1202, a part of the same article of the zoning ordinance as §§ 1200 and 1203, lists, in subsection (a), six classes of permitted uses in the floodway areas of the floodplain, and provides in subsection (b) that land in the flood fringe areas of the floodplain "shall be subject to the use regulation of the appropriate zoning district as well as the special regulations relating to flood fringe as set forth in this article."

3. It has been observed that most recent challenges in other jurisdictions to similar environmental regulations of land on takings grounds have not been successful. See Owens, Land Acquisition and Coastal Resource Management: A Pragmatic Perspective, 24 Wm. & Mary L. Rev. 625, 633 (fn. 33) (1983) and cases cited. See, generally, R. Powell & P. Rohan, Powell on Real Property §§ 865.3 (1983); A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning §§ 7.01-7.03 (4th ed. 1984); P. Rohan, Zoning and Land Use Controls §§ 18.01-18.04 (1984).

4. The question may well be raised as to whether the discretion given to the city engineer in § 1203, to determine whether a proposed land filling will decrease the flood storage capacity or adversely affect stormwater conditions in the floodplain, constitutes an invalid delegation of legislative authority. It is said, for example, in Andrews v. Board of Supervisors, 200 Va. 637, 639, 107 S.E.2d 445 (1959), that when a local governing body delegates, or attempts to delegate, its zoning power, it must establish standards for the exercise of the authority delegated. "There must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards." This statement is subject to a qualification where it is difficult or impracticable to lay down a definite rule, and a delegation to an administrative officer of the power to exercise a discretion based upon a finding of facts is not an invalid delegation. See Maritime Union v. City of Norfolk, 202
It is presumed that public officials will discharge their duties in accordance with law, and if an appeal may be had from the arbitrary acts of an official, due process requirements are met. Ours Properties, supra, 198 Va. at 851. I note that, pursuant to § 15.1-496.1, an appeal to the board of zoning appeals may be taken by any person aggrieved by any decision of the zoning administrator "or from any order, requirement, decision or determination made by any other administrative officer" in the administration and enforcement of the zoning ordinance. Decisions of the board of zoning appeals may be reviewed and revised in circuit court, pursuant to § 15.1-497. Under the circumstances, I cannot conclude that the delegation of authority here is invalid on its face.

ZONING. NOTICE OF AMENDMENTS. TIME REQUIRED.

April 16, 1984

The Honorable James P. Downey
County Attorney for Fauquier County

This is in reply to your request for my opinion concerning the required public advertisement of proposed amendments to the Fauquier County zoning ordinance. Section 15.1-431 of the Code of Virginia provides that the local planning commission shall not recommend nor the governing body adopt any such amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in the county. The required notice "shall specify the time and place of hearing at which persons affected may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement shall appear in such newspaper." Section 15.1-431. (Emphasis added.)

You relate that the Fauquier Democrat is a newspaper of general circulation in the county which is used by the board of supervisors as the newspaper of record for county legal advertisements. The Fauquier Democrat appears weekly and bears a publication date of the Thursday of each week, but it is distributed by news carrier and appears in newsstands throughout the county each Wednesday. The newspaper reaches a majority of county residents on Wednesday, and the Thursday date coincides only with the date of receipt by some mail subscribers. You relate also that the board of supervisors meets monthly, on the third Tuesday of the month. You ask whether the notice requirement of § 15.1-431, quoted and emphasized above, is satisfied when the second advertisement of the hearing on a proposed amendment to the zoning ordinance appears in the newspaper on the Wednesday preceding a Tuesday regular meeting of the board at which the public hearing will be held.

Section 1-13.3, which governs the construction of the time of notice requirement in § 15.1-431, reads in pertinent part as follows:

"When a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding, but the day on which such notice is given, or such act is done, may be counted as part of the time...."

Applying this rule of construction to § 15.1-431 and to the facts presented, if the notice of a hearing on a proposed amendment to the zoning ordinance appears on second advertisement in the newspaper on a Wednesday, that Wednesday may be counted as the first of the required six days before the hearing is held and the following Monday would
be counted as the sixth. See, e.g., Kelly v. Trehy, 133 Va. 160, 112 S.E. 757 (1922); Anderson v. Union Bank, 117 Va. 1, 83 S.E. 1080 (1915); Jennings v. Pocahontas Collieries, 114 Va. 213, 76 S.E. 298 (1912); Swift & Co. v. Wood, 103 Va. 494, 49 S.E. 543 (1905); Turnbull v. Thompson, 88 Va. (27 Gratt.) 306 (1876). The fact that the newspaper bears a Thursday publication date would not affect this result if the newspaper actually reaches the public on Wednesday. Compare, e.g., Robert v. City of Norfolk, 188 Va. 413, 420, 49 S.E.2d 697 (1948) (to publish a magazine is "to bring before the public as for sale or distribution").

Accordingly, it is my opinion that the published notice requirement of § 15.1-431 is satisfied under the circumstances you describe.

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1See, also, Black's Law Dictionary 1109 (5th ed. 1979) (to publish is "[t]o make public; to circulate; to make known to people in general. To issue; to put into circulation.").
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**CONSTITUTION OF VIRGINIA**

(1971)

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