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

From July 1, 1984 to June 30, 1985
Commonwealth of Virginia
Office of the Attorney General
Richmond
1985
THE 1984-1985 REPORT OF THE ATTORNEY GENERAL

was prepared by

BARBARA H. SCOTT

with editorial assistance by

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

July 1, 1985

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 offices, 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. In response to requests of State and local government officers and officials, the Attorney General also rendered more than 350 formal Opinions.

Significantly, attorneys in the Claims Section, the Medicaid Fraud Control Unit, the Human Resources Section, the Finance and War Veterans' Claims Section, and the Antitrust and Consumer Litigation Section, 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 $19 million for fiscal year 1984-1985.

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 1984-1985. 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,

William G. Broaddus
Attorney General
### PERSONNEL OF THE OFFICE

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<td>Marian W. Schutrumpf</td>
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<td>Bruce A. Neal</td>
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<tr>
<td>Mary W. Llewellyn</td>
<td>Henrico</td>
<td>Librarian</td>
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### 1984-1985 REPORT OF THE ATTORNEY GENERAL

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Janice E. Sullivan</td>
<td>Henrico</td>
<td>Director of Automation and Research Services</td>
</tr>
<tr>
<td>Barbara H. Scott</td>
<td>Henrico</td>
<td>Opinions and Annual Report Specialist</td>
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<tr>
<td>M. Patricia Boschen</td>
<td>Hanover</td>
<td>Information Processing Specialist</td>
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<tr>
<td>Jacqueline N. Clare</td>
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<td>Fiscal Assistant</td>
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<td>JacQ'ue Richardson</td>
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<tr>
<td>Kenneth W. Finney</td>
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<td>Clerk/Messenger</td>
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<tr>
<td>John J. Richardson</td>
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<td>Clerk/Messenger</td>
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### ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 1985

<table>
<thead>
<tr>
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<tr>
<td>Edmund Randolph</td>
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<tr>
<td>James Innes</td>
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<tr>
<td>Robert Brooke</td>
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<td>Philip Norborne Nicholas</td>
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<td>John Robertson</td>
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<td>Sidney S. Baxter</td>
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<tr>
<td>Willis P. Bocock</td>
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<tr>
<td>John Randolph Tucker</td>
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<tr>
<td>Thomas Russell Bowden</td>
<td>1865-1869</td>
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<tr>
<td>Charles Whittlesey (military appointee)</td>
<td>1869-1870</td>
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<tr>
<td>James C. Taylor</td>
<td>1870-1874</td>
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<tr>
<td>Raleigh T. Daniel</td>
<td>1874-1877</td>
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<tr>
<td>James G. Field</td>
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<tr>
<td>Frank S. Blair</td>
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<tr>
<td>Rufus A. Ayers</td>
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<tr>
<td>R. Taylor Scott</td>
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<tr>
<td>R. Carter Scott</td>
<td>1897-1898</td>
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<tr>
<td>A. J. Montague</td>
<td>1898-1902</td>
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<tr>
<td>William A. Anderson</td>
<td>1902-1910</td>
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<tr>
<td>Samuel W. Williams</td>
<td>1910-1914</td>
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<tr>
<td>John Garland Pollard</td>
<td>1914-1918</td>
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<tr>
<td>J. D. Hank, Jr.</td>
<td>1918-1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918-1923</td>
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</tbody>
</table>

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.

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Armistead v. Fowler. Juvenile and Domestic Relations District Court, City of Williamsburg/County of James City. Mandamus action seeking to compel clerk of lower court to accept for filing and to place on docket certain petitions affecting custody of petitioner child. Dismissed.

Armstrong v. Virginia Employment Commission. Circuit Court, County of Isle of Wight. Section 60.1-58(b) - misconduct. Appeal denied.


Barker v. Virginia Employment Commission. Circuit Court, City of Danville. Section 60.1-58(b) - misconduct. Appeal denied.

Board of Medicine v. Tan. Circuit Court, City of Williamsburg/County of James City. Appeal of issuance of ex parte injunction restraining Board from revoking Tan's license to practice medicine. Vacated.


Brown v. Lukhard. Circuit Court, City of Richmond. Whether Department of Social Services correctly implemented Aid to Dependent Children cutbacks to students on ADC between 18 and 21 years of age. Reversed and remanded.


Burnette v. Virginia Employment Commission. Circuit Court, County of Richmond. Section 60.1-58(b) - misconduct. Appeal denied.
Carbaugh v. Hartford Accident & Indemnity Co. Circuit Court, City of Richmond. Requests court to decide distribution of Michael's Packers and Stockyards Bond. Commonwealth dismissed as appellee.


Commonwealth v. Seafood Harvesters, Inc. Circuit Court, City of Hampton. Appeal from decision that § 28.1-128.01, which prohibits use of hydraulic dredges to take hard shell clams, cannot be applied to shellfish leases issued prior to effective date of statute. Reversed and vacated.

Crowder v. Virginia Employment Commission. Circuit Court, City of Roanoke. Section 60.1-58(b) - misconduct. Appeal denied.

Department of Taxation v. Wellmore Coal Corp. Circuit Court, County of Buchanan. Correction of erroneous tax assessment. Judgment modified, affirmed.

Easterling v. Commonwealth. Circuit Court, County of Pulaski. Petitioner claims conviction obtained through improper search and seizure. Dismissed.


Goodman v. Martin, Mallory & Cleek. Circuit Court, County of Hanover. Petitioner alleged defendant employees of Department of Highways and Transportation slandered him in connection with communications with State Police leading to indictment on criminal charges which were eventually dismissed. Appeal denied.

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


In re Abramson. Circuit Court, City of Chesapeake. Petition for writ of mandamus seeking removal of members of Chesapeake Zoning Board. Settled.

In re Altizer. Circuit Court, County of Nottoway. Prisoner claims denial of access to courts by judge's ruling that prisoners not residents of institutions wherein confined. Dismissed.


In re Little. Circuit Court, City of Chesapeake. Mandamus to set aside injunction against minister barring control of church and to allow hearing on plea in bar. Denied.

In re Marcontell. Circuit Court, County of Alleghany. Petition for writ of mandamus to compel circuit court judge to order attorney to release client's files. Denied.

In re Reynolds. General District Court, City of Richmond. Petition for writ of mandamus to require general district court judge to afford discovery rights. Denied.

In re Stafford. Circuit Court, County of Fairfax. Mandamus action to compel judges to lift stay of divorce action. Denied.


Jesse v. Virginia Employment Commission. Circuit Court, County of Tazewell. Section 60.1-58(b) - misconduct. Appeal denied.


Libertarian Party of Virginia v. State Board of Elections. Original jurisdiction. Writ of mandamus directing board to provide, on election ballot, space to write in party's name, names of national candidates, and names of presidential electors. Decision in favor of defendants.


Michaels v. Virginia Employment Commission. Circuit Court, County of Giles. Section 60.1-58(b) - misconduct. Denied/affirmed.


Mullinex v. Virginia Employment Commission. Circuit Court, City of Winchester. Section 60.1-58(b) - misconduct. Denied.

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


Perriellia v. Commonwealth. Circuit Court, County of Tazewell. Plaintiff claims jury received improper instructions. Affirmed.


Ramey v. Virginia Employment Commission. Circuit Court, County of Dickenson. Section 60.1-58(c) - failure to accept suitable work. Denied.


Scott v. Commonwealth. Circuit Court, City of Bristol. Whether jury had sufficient evidence to render verdict of guilty. Affirmed.

Shaffer v. Norris Industries. Circuit Court, County of Scott. Section 60.1-58(a) - voluntary quit. Denied.


Shope v. Commonwealth. Circuit Court, County of Henrico. Whether evidence sufficient to support trial court's findings that appellant habitual offender. Affirmed.


State Highway & Transportation Commissioner v. McDonald's Corp. Circuit Court, City of Richmond. Eminent domain matter. Whether commissioners followed instructions given. Denied.

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


Stockton v. Director of Department of Corrections. Circuit Court, County of Patrick. Petitioner claims denial of right to fair trial. Dismissed.


Tibbs v. Clerk, Circuit Court of Tazewell County. Circuit Court, County of Tazewell. Petition seeking writ of mandamus to compel clerk to accept for filing motion for judgment under Tort Claims Act. Dismissed.


Vance v. Tri-City Transport Co. Circuit Court, City of Bristol. Section 60.1-58(a) - voluntary quit. Denied.

Virginia Employment Commission v. Virginia Beach School Board. Circuit Court, City of Virginia Beach. Section 60.1-23 - unemployed person. Dismissed.


Williams v. Commonwealth. Circuit Court, County of Bedford. Appeal of involuntary manslaughter conviction based on objection to jury instruction regarding proximate cause. Affirmed.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

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


Buckley v. William & Mary. Circuit Court, City of Richmond. Plaintiff alleges failure of notification employment contract would not be renewed as required by Faculty Handbook.


Commonwealth v. Judge. Circuit Court, County of Acomack. Appeal of decision to grant Commonwealth bill to quiet title and to deny cross-bill.


Cumbee v. Myers. Circuit Court, County of Montgomery. Appeal from demurrer to mandamus action against circuit court clerk who refused to record deed notarized "subscribed and sworn to."


GTE SPRINT v. AT&T. State Corporation Commission. Appeal of order authorizing GTE to do business in Virginia and relaxing regulation of AT&T.


Hall v. Virginia Marine Resources Commission. Circuit Court, City of Virginia Beach. Appeal of decision upholding decision of Marine Resources Commission upholding decision of Virginia Beach Wetlands Board to deny wetlands permit application.

Harris v. Commonwealth. Circuit Court, City of Richmond. Appeal of suspension of driver's license for failure to pay fines.
Hladys v. Commonwealth. Circuit Court, City of Richmond. Review of administrative decision to terminate plaintiff as medicaid provider.


Hopkins v. Commonwealth. Circuit Court, County of Franklin. Petitioner claims improper evidence used in obtaining conviction.

In re Cassidy. Circuit Court, County of Fairfax. Appeal from refusal of judge to issue permit to carry concealed weapon.

In re Cummings. State Bar Disciplinary Board. Order of Disciplinary Board revoked defendant's license based upon revocation in District of Columbia.

In re Lounsbury. Circuit Court, County of Fairfax. Petitioner claims improper evidence used in obtaining conviction.

Kendrick v. Circuit Court of Buchanan County. Original jurisdiction. Petitioner claims improper evidence used in obtaining conviction.

Knopp Brothers v. Department of Taxation. Circuit Court, City of Staunton. Whether taxpayer's application for correction of erroneous assessment barred by statute of limitations.

Lewis ex rel. Department of Labor & Industry v. The Ryland Group, Inc. Circuit Court, County of Henrico. Payment of wage case filed on behalf of employee of defendant. Employee not paid commissions for property in which contract of sale entered before termination, but settlement date after employee's termination.


MCI v. AT&T. State Corporation Commission. Appeal of SCC order authorizing MCI to do business in Virginia and relaxing regulation of AT&T.

Massey v. Commonwealth. Circuit Court, County of Fairfax. Petitioner claims jury received improper instructions.


Medicaid Fraud Control Unit v. Doe (Blue Ridge Nursing Center, Inc.). Circuit Court, City of Richmond. Appeal from grant of motion to quash investigatory subpoena on grounds of attorney-client privilege.

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


Robinson v. Circuit Court of the City of Chesapeake. Circuit Court, City of Chesapeake. Petition for writ of mandamus ordering circuit court to appoint new guardian ad litem and for new hearing in divorce action.


Spitzer v. Commonwealth. Circuit Court, County of Warren. Petitioner claims insufficient evidence to support conviction.


State Highway & Transportation Commissioner v. Cardinal Realty Co. Circuit Court, County of Chesterfield. Whether condemnation commissioners should not have been allowed to serve for cause.

State Highway & Transportation Commissioner v. Dennison. Circuit Court, County of Scott. Condemnation case involving qualification of expert testimony on land value.

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.


Virginia Department of Labor & Industry v. Westmoreland Coal Co. Circuit Court, County of Wise. Appeal from declaratory judgment which interpreted State statute.


Westmoreland Coal Co. v. Department of Taxation. Circuit Court, City of Richmond. Application for correction of income tax assessment.


Wonderland Day Care Center, Inc. v. Department of Social Services. Circuit Court, City of Richmond. Contract and libel claims.
CASES IN THE SUPREME COURT OF THE UNITED STATES


Hargrave v. Landon. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals. Petitioner claims insufficient evidence to support conviction. Pending.


Ohio v. Kovacs. Sixth Circuit Court of Appeals. Amicus appearance in bankruptcy suit in which court affirmed certain demands for environmental cleanup as claims dischargeable by bankruptcy court. Affirmed.

Palmer v. Hudson. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals. Petitioner's request for personal property and/or reimbursement for loss of same denied. Dismissed.


The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
ADOPTION. IMPLEMENTATION OF INTERSTATE COMPACT FOR PLACEMENT OF CHILDREN REQUIRES COMPLIANCE WITH VIRGINIA'S PLACEMENT LAWS.

July 6, 1984

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

You have asked for my opinion on several questions dealing with the interstate placement of children into adoptive or foster homes.

You indicate that several individuals and agencies, both within and outside the Commonwealth, may provide some or all of certain placement-supportive services such as the completion of adoptive home studies, the supervision of adoptive or foster homes, the visitation of children in such homes, and/or the facilitation of placement of children whose custody they do not hold. You then asked whether any such person or agency is subject to licensure as a "child-placing agency."

Section 63.1-195 of the Code of Virginia defines a "child-placing agency" as follows:

"[A]ny person licensed to place children in foster homes or adoptive homes or a local board of public welfare or social services authorized to place children in foster homes or adoptive homes pursuant to §§ 63.1-56 and 63.1-204." (Emphasis added.)

Section 63.1-195 defines "placement" as:

"[A]ny activity by any person which provides assistance to a parent or guardian in locating and effecting the move of a child to a foster home or adoptive home; however, such term shall not include the counseling of any person with respect to the options available and the procedures that must be followed to place a child for adoption or to adopt a child." (Emphasis added.)

Based on these statutory definitions,¹ I am of the opinion that any individual or agency providing some or all of certain placement-supportive services such as the completion of adoptive home studies, the supervision of adoptive or foster homes, the visitation of children in such homes, and/or the facilitation of placement of children whose custody they do not hold would require licensure as a child-placing agency.

You next state that your Department is responsible for administering the Interstate Compact for the Placement of Children ("ICPC"), § 63.1-219.1 et seq. As part of that responsibility, your Department must assist in ensuring compliance with the requirements of the ICPC itself, as well as ensuring compliance with the requirements of related child placement laws such as §§ 63.1-220 and 63.1-220.1.² Your second question is whether it would be proper for you to approve the direct placement of a nonresident child in a foster home in Virginia pursuant to the ICPC, when it is apparent that a person not authorized to effect the placement of such a child pursuant to § 63.1-220.1 has provided assistance to the adoptive or biological parent in locating and effecting the adoptive placement and no licensed agency is involved.

The purpose of the ICPC is, in part, to ensure that a child requiring placement out of state will receive the maximum opportunity to be placed in a suitable environment, that the authorities in the state of placement will have the opportunity to ascertain the circumstances of the proposed placement, and that authorities of the state from which the placement is to be made will receive complete information to evaluate a potential placement. See 1982-1983 Report of the Attorney General at 265. In addition, Article III(a) of the ICPC specifically provides that, prior to the placement of a child for
adoption, the sending agency shall comply with, among other things, "the applicable laws of the receiving state governing the placement of children therein." I am, therefore, of the opinion that approval of the placement of a nonresident child in an adoptive home in Virginia pursuant to the ICPC can be made only when the placement is effected by those persons defined in § 63.1-220.1.

Your third question is whether it would be proper, under the ICPC and other relevant child placement statutes, for the Department to help effect the direct placement of a Virginia child in another state when it is apparent that a party not licensed as a child-placing agency has helped the biological and/or adoptive parent(s) in locating and effecting the adoptive placement and no licensed agency is involved.

As indicated above, a person involved in effecting the "placement" of a child, as defined in §§ 63.1-195 and 63.1-220, is a child-placing agency and must, therefore, meet appropriate licensure requirements. Failure of such person to comply with those requirements can result in a conviction of a misdemeanor (see § 63.1-215) or in the enjoining of such behavior (see § 63.1-214). Because such behavior could be found to be illegal, I am of the opinion that it would be inappropriate for you to help effect the placement of a Virginia child in another state, when it is apparent that a party not licensed as a child-placing agency has assisted the biological and/or adoptive parent(s) in locating and effecting the adoptive placement.

1"Child-placing agency" and "placement" are also defined in a like manner in § 63.1-220, which is part of Ch. 11 of Title 63.1. Chapter 11 provides for the procedures to be followed in adoption proceedings.

2Section 63.1-220 provides definitions that are relevant to the adoption process. Section 63.1-220.1 defines who may place a child for adoption and states as follows:

"A child may be placed for adoption by:
1. A licensed child-placing agency;
2. A local board of public welfare or social services;
3. The child's parent or legal guardian; and
4. Any agency outside the Commonwealth which is licensed or otherwise duly authorized to place children for adoption by virtue of the laws under which it operates."

AGING. BOARD OF SOCIAL SERVICES, NOT COUNTY BOARD OF SUPERVISORS, HAS AUTHORITY TO PROVIDE DIRECT SERVICES UNDER PROGRAM FOR AGING.

July 5, 1984

The Honorable David Wm. Shreve
County Attorney for Campbell County

You have asked whether the Campbell County Board of Supervisors has the authority to enter into a contract with the Central Virginia Commission on Aging, Inc., by which the county will provide services for aged county residents and the commission will reimburse the county for the cost of services as set out in the contract. Services to be provided are transportation, meal services, household cleaning services and other similar type care services. The county is also required to provide certain amounts of funds to match federal funds paid under the contract.

The Central Virginia Commission on Aging, Inc. is a legally incorporated public agency; it is the designated area agency on aging under § 2.1-373(a)(7) of the Code of
Virginia.

Section 2.1-373(b) provides:

"The governing body of any county, city or town may appropriate funds for support of area agencies on aging designated pursuant to subsection (a)(7) hereof."

The proposed contract with which you are concerned, however, requires not only an appropriation from the county, but also that the county provide direct services to aging residents who are determined to be eligible for services. There is no specific statutory authorization for the county to provide direct services. Under the Dillon Rule, counties have only those powers which are expressly conferred or necessarily implied. See Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); 1971-1972 Report of the Attorney General at 89 (holding that a county is not empowered to establish and operate a nursing home for the elderly).

I note, however, that a local board of social services is authorized by statute to provide certain social and protective services for aged and infirm persons. See §§ 63.1-55.01 and 63.1-55.1. The governing bodies of counties are specifically authorized to make grants and appropriate funds to local departments of social services for them to carry out service functions. See §§ 63.1-51 and 63.1-91. See also 1973-1974 Report of the Attorney General at 263. A permissible alternative to the proposed contract for the Board of Supervisors of Campbell County to provide services to the aged would be a contract for the Campbell County Board of Social Services to provide such services funded by a grant or appropriation made by the Campbell County Board of Supervisors.

It is my opinion, therefore, that while it is doubtful that the Campbell County Board of Supervisors has the authority to enter into the specific proposed contract, the county's board of social services does have authority to provide the necessary services and could legally enter into such a contract.

AGRICULTURAL AND FORESTAL DISTRICTS ACT (§ 15.1-1506 ET SEQ.). TERMINATION OF DISTRICTS AND WITHDRAWAL OF LANDOWNERS.

July 13, 1984

The Honorable Mitchell Van Yahres
Member, House of Delegates

You have presented four specific inquiries concerning the appropriate interpretation of the Agricultural and Forestal Districts Act, § 15.1-1506 et seq. of the Code of Virginia (the "Act"). I will repeat the question, followed by my response.

"(1) May the local governing body, at the time of passage of an ordinance creating an agricultural and forestal district, set a firm date at which the district will terminate, whether said date is at the time of the four to eight year review or not?"

This question is answered in the negative. Termination of districts under the Act is governed by § 15.1-1511(B), which states, in part:

"The local governing body shall review any district created under this section no less than four years but no more than eight years after the date of its creation and every four to eight years thereafter. In conducting such review, the local governing body shall...determine whether to terminate, modify or continue such district. If
the local governing body does not act, or if a modification of a district is rejected, the district shall continue as originally constituted."

The foregoing language does not contemplate the creation of a district for a fixed period of time. Rather, districts are to be created for an indefinite period with mandatory review between four and eight years after creation. If the local governing body takes no action upon its review, the district is to continue as originally created.

"(2) May the local governing body, at the time of passage of an ordinance creating an agricultural and forestal district, include in said ordinance a provision that a landowner may withdraw from the district at the time of the review of said district?"

The answer to this question is in the negative. Withdrawal from a district by a landowner is governed by § 15.1-1513(A). It provides for the filing of written notice of termination by a landowner at any time. After a hearing is held, the governing body may allow the landowner to terminate his association with the district "for good and reasonable cause shown...." Appeal de novo to the local circuit court is provided for a landowner whose request is denied.

If a provision of the type you have suggested were included in the original ordinance, the procedure set out in § 15.1-1513(A) would be defeated. Such inclusion would therefore be contrary to the intent of the statute.¹

"(3) May the local governing body, at the time of passage of an ordinance creating an agricultural and forestal district, include in said ordinance a provision that the district will terminate, or a provision that landowners may withdraw, upon the happening of a certain event? For example, at the time that the local county population reaches a certain amount, or at the time that the farming industry in the area shrinks to a certain amount of sales."

For the reasons set forth in my response to questions (1) and (2) above, I also answer this question in the negative. In the absence of statutory criteria overriding or providing exceptions to the procedures described above in answers (1) and (2), I see no legal basis upon which a local governing body may create them and thereby defeat the legislative intent of the Act.

"(4) May the agricultural and forestal district's advisory committee advise the local governing body and the local planning commission on the modification or termination of an agricultural and forestal district at the time of advice on the creation of said district, or only at such time as the four to eight year review takes place?"

The advisory committee is created pursuant to § 15.1-1510 upon receipt of the first application to create a district. Its role is to assist the local planning commission and the governing body in the establishment, modification or termination of districts under the Act. Under § 15.1-1511(B)(3), the advisory committee's duty is to comment to the planning commission on a proposed district and to provide its own recommendations with any suggested modifications. Both the planning commission and the advisory committee are given broad latitude to consider all relevant matters (§ 15.1-1511(C)(5)) in reporting ultimately to the governing body. It may therefore be appropriate for the advisory committee to comment on the duration of a proposed district at the time of its creation, as well as upon request at the time of the review provided in § 15.1-1511(E). The answer to this question is therefore in the affirmative.
Section 15.1-1513(D) provides that any heir at law or devisee of land within a district shall have an immediate right of withdrawal of his land upon inheritance or descent. This is the only statutory exception to the procedure of § 15.1-1513(A).

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**AGRICULTURE. SALE OF “SMITHFIELD BRAND HAM” DOES NOT VIOLATE §§ 3.1-867 THROUGH 3.1-871.**

June 26, 1985

The Honorable C. Jefferson Stafford
Member, House of Delegates

You ask whether a company's sale and marketing of hams as "Smithfield Brand Hams" would violate §§ 3.1-867 through 3.1-871 of the Code of Virginia if the hams had been processed, treated and cured outside the corporate limits of the town of Smithfield, Virginia.

Section 3.1-867 states as follows:

"Genuine Smithfield hams are hereby defined to be hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months; such six-month period to commence when the green pork cut is first introduced to dry salt, all such salting, processing, treating, smoking, curing and aging to be done within the corporate limits of the town of Smithfield, Virginia." (Emphasis added.)

Section 3.1-868 prohibits the labeling, stamping, packing, advertisement, sale or offer for sale of any ham as a "genuine Smithfield" ham unless it meets all of the criteria of § 3.1-867. Section 3.1-871 declares that a violation of § 3.1-868 is a misdemeanor punishable by a fine of not less than $25 nor more than $300.

You indicate that a company located in Richmond is processing hams as described in § 3.1-867. Inasmuch as such processing is not done in Smithfield, however, the products cannot be advertised as "genuine Smithfield" hams. The company wishes instead to label them "Smithfield Brand Hams."

Assuming that neither the word "genuine," nor any substitute or synonym therefor, is used on the label, and further assuming the remainder of the label, including the design and the relevant advertising, is not used merely to circumvent the prohibition of § 3.1-868, it is my opinion that use of the proposed name, by itself, would not violate the above statutes.

It is well established that a penal statute must be strictly or narrowly construed against the Commonwealth. *See Berry v. City of Chesapeake*, 209 Va. 525, 526, 165 S.E.2d 291, 292 (1969); see also Reports of the Attorney General: 1980-1981 at 63; 1974-1975 at 147. Construing the applicable criminal statute narrowly and applying it to the facts as stated or assumed above, I must answer your inquiry in the negative.

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1 Without considering the right of the company or any other to use or register this term as a trademark, the supplemental material which you have furnished to this Office indicates the United States Department of Agriculture has approved its use as consistent with the latest glossary of the USDA's Labeling Policy Book 62 (April 1981).
Nothing herein is intended to determine whether the use of the proposed name might violate the Virginia Consumer Protection Act (§ 59.1-196 et seq.) and, in particular, subsection D of § 59.1-200, prohibiting misrepresentation of geographic origin.

ALCOHOLIC BEVERAGE CONTROL LAWS. POSSESSION BY INTERDICTED PERSON UNDER § 4-52(b). SUFFICIENCY OF EVIDENCE TO CONVICT UNDER § 4-52(b).

December 10, 1984

The Honorable Dennis L. Godfrey
Commonwealth's Attorney for Washington County

You inquire whether an individual, against whom an order of interdiction has been entered pursuant to § 4-51 of the Code of Virginia and who is subsequently arrested for being drunk in public, may be properly charged with possessing alcoholic beverages in violation of § 4-52(b). Additionally, you ask whether the conviction of an interdicted person for being drunk in public constitutes or establishes, in itself, the unlawful possession of alcoholic beverages in violation of § 4-52(b), in the absence of tangible evidence of alcoholic beverages, such as a bottle of whiskey.

Sections 4-51 and 4-52(a) authorize a court to enter an order of interdiction prohibiting the sale of alcoholic beverages to certain persons. After the entry of such order, the provisions of § 4-52(b) become operative. That section provides as follows:

"The possession of alcoholic beverages, except such alcoholic beverages as may have been, or may be, acquired in accordance with the provisions of §§ 4-48 and 4-50, or either of them, by any person who has been interdicted under the provisions of this chapter, shall be unlawful, and any interdicted person found in possession of alcoholic beverages in violation of the provisions of this section shall, notwithstanding any other provision of this chapter to the contrary, be guilty of a misdemeanor and punished as provided in § 4-92."

The first question requires an analysis of whether an offense under § 4-52(b) is essentially identical to the offense of being drunk in public. It is provided in § 19.2-294 that "[i]f the same act be a violation of two or more statutes...conviction under one of such statutes...shall be a bar to a prosecution or proceeding under the other or others." As noted in Hundley v. Commonwealth, 193 Va. 449, 451, 69 S.E.2d 336, 337 (1952):

"A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute...."

See also Estes v. Commonwealth, 212 Va. 23, 181 S.E.2d 622 (1971).

The elements of the offenses under §§ 18.2-388 and 4-52(b) are clearly different in several respects. I am, therefore, of the opinion that a person may be charged under both sections upon proper proof.

With regard to your second question, it is my opinion that the mere fact an interdicted person has been convicted of being drunk in public does not, in itself, constitute or give rise to any presumption that such person has been in possession of alcoholic beverages. Alcoholic beverages is a defined term. As used in § 4-52(b), it does not include beer having not more than three and two-tenths percent alcohol by weight. In your hypothetical case, it is possible that the individual convicted of being drunk in
public became intoxicated by consuming three point two beer or some other non-prohibited beverage.

Evidence that the interdicted person was drunk in public certainly creates a strong suspicion of possession of "alcoholic beverages," but "suspicion, even though strong, is insufficient to sustain a criminal conviction." Hall v. Commonwealth, 225 Va. 533, 537, 303 S.E.2d 903, 905 (1983); Stover v. Commonwealth, 222 Va. 618, 283 S.E.2d 194 (1981). As noted in Stover, id., "where the evidence is circumstantial, "all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence." 222 Va. at 623, 283 S.E.2d at 196. See also Sutherland v. Commonwealth, 171 Va. 485, 198 S.E. 452 (1938). I am, therefore, of the opinion that an interdicted person who is convicted of being drunk in public can also be convicted under § 4-52(b) only if there is sufficient evidence, in addition to the fact of being drunk in public, to establish the elements of the offense.

1See § 18.2-388.

ARREST. NOT FALSE IMPRISONMENT WHEN OFFICER ARRESTS ACCUSED IN GOOD FAITH RELIANCE UPON TELETYPE MESSAGE THAT WARRANT OUTSTANDING IN ANOTHER JURISDICTION.

August 29, 1984

The Honorable Ottie J. Moore
Sheriff for Caroline County

You have asked several questions relating to the arrest of an accused without a warrant under § 19.2-81 of the Code of Virginia. You state that the accused was arrested pursuant to a teletype message received from another jurisdiction which complied with the requirements of § 19.2-81. The accused was taken before a magistrate for a hearing to determine whether probable cause existed to issue a warrant for his arrest; the magistrate refused to issue such a warrant; and the accused was thereafter released pursuant to § 19.2-82.

Your first question is whether the officer’s actions in arresting the accused pursuant to the teletype message constituted false imprisonment of the accused. A person is not falsely imprisoned if he is taken into custody pursuant to a lawful arrest. See Yeatts v. Minton, 211 Va. 401, 177 S.E.2d 646 (1970). Section 19.2-81 authorizes the warrantless arrest of a person "duly charged with a crime in another jurisdiction" upon receipt of such a teletype message. See 1975-1976 Report of the Attorney General at 15; Crowder v. Commonwealth, 213 Va. 151, 191 S.E.2d 239 (1972). Accordingly, an officer is not liable for false imprisonment if he relies on a teletype message and takes an accused into custody in good faith and with a reasonable belief in the validity of the arrest. See DeChene v. Smallwood, 226 Va. 475, 311 S.E.2d 749 (1984).

Your second question is whether the arresting officer incurred any liability because he was unable to comply with § 19.2-75. Section 19.2-75 provides that "any process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person charged." Of course, if the magistrate has not issued any process, the officer will not have served any process and will not have incurred any obligation to leave a copy with the accused.

Your third question is whether the judicial officer failed to meet the mandatory
requirement that he endorse the warrant with the action taken thereon with respect to the accused. Section 19.2-76 mandates an officer to endorse a warrant with the action taken thereon when an accused is arrested "upon a warrant in a county or city other than that in which the charge is to be tried, or in a county or city contiguous thereto," and is taken before a judicial officer for the purpose of determining whether he should be admitted to bail. In such a case, the accused is arrested pursuant to a warrant and is taken before the judicial officer for purposes of bail. In the case you hypothesized, however, the accused was arrested without a warrant and was taken before the magistrate to determine whether probable cause existed for a warrant to issue. Because no warrant was issued, the officer had no obligation to endorse the warrant in accordance with § 19.2-76.

ASSETS AND DEBTS. DEBTS OF INSOLVENT ESTATE PAID RATABLY.

December 10, 1984

The Honorable John R. Cullen
Commonwealth's Attorney for Louisa County

You have inquired about the construction of § 64.1-157 of the Code of Virginia concerning the order in which debts are paid from an insolvent estate.

When the assets of a decedent are not sufficient for the satisfaction of all demands, § 64.1-157 ranks the classes of debts and sets a limit upon payment within certain classes. For example, after the payment of funeral expenses, not to exceed $500 and charges of administration, debts are to be paid:

"First. To debts due the United States;

Second. To claims of physicians, not exceeding seventy-five dollars, for services rendered during the last illness of the decedent; and accounts of druggists, not exceeding the same amount, for articles furnished during the same period; and claims of professional nurses or any other person rendering service as a nurse to the decedent at his request or the request of some member of his immediate family, not exceeding the same amount, for services rendered during the same period; and accounts of hospitals and sanitariums, not exceeding two hundred dollars, for articles furnished and services rendered during the same period...."

You specifically ask whether the limits set by § 64.1-157 are per claim or per class.

It is necessary to read § 64.1-158 with § 64.1-157. Section 64.1-158 deals with the same subject matter as § 64.1-157, and they are, therefore, to be considered in pari materia and may be construed together. See 2A N. Singer, Sutherland Statutory Construction § 51.0a (4th ed. 1984). Section 64.1-158 provides that "when the assets are not sufficient to pay all the creditors of any one class, the creditors of such class shall be paid ratably...." This clearly indicates that the limit is not a class limit because, if it were, § 64.1-158 would be surplusage.

I am, therefore, of the opinion that the limits set upon payments pursuant to § 64.1-157 are per claim and not per class.
COMMISSION ESTABLISHED UNDER § 5.1-36.

June 27, 1985

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

This is in reply to your request for my opinion concerning the power of a county board of supervisors to remove from office a person it has appointed as member of an airport commission established pursuant to Ch. 3 of Title 5.1 of the Code of Virginia, § 5.1-31 et seq. Your questions, quoted from your letter, are as follows:

"(1) May a Board of Supervisors summarily remove a member it has appointed to an airport commission which has been established pursuant to Section 5.1-35 et seq. of the Code of Virginia?

(2) If the Board of Supervisors is entitled to remove a member of the airport commission is any particular cause or justification required?

(3) If the Board of Supervisors is entitled to remove a member it has appointed to an airport commission, what type of notice or hearing is required?"

The provisions of Art. 1, Ch. 3 of Title 5.1 confer extensive authority upon local governing bodies to establish and operate airports. The acquisition and use of property in that regard are declared to be for a public, governmental purpose. See § 5.1-33. The county board of supervisors may operate an airport it has established or it may vest jurisdiction for such operation in any suitable officer, board or body of the county. See § 5.1-41. The county may exercise the powers, rights and authority given it in Art. 1 jointly with one or more other political subdivisions, "and the political subdivisions so acting jointly may enter into such agreements with each other as may be necessary or proper for the exercise and enjoyment of the joint powers hereby granted, and for joint action in carrying out the general purposes of this article." Section 5.1-35.

The commission about which you inquire was established by agreement as authorized in § 5.1-35, and in § 5.1-36, the latter of which reads as follows:

"The agreement provided for in § 5.1-35 may provide for the creation of a governing board, commission, authority or body empowered to have and exercise, on behalf of the several political subdivisions which are parties to such agreement, the powers, rights and authority conferred on such political subdivisions by this article. Such agreement shall specify the name of the board, commission, authority or body and its composition and prescribe its powers and duties which may include powers to establish, construct, manage, and operate an airport, acquire, hold and dispose of property but on behalf of the several subdivisions, including the exercise on their behalf of the power of eminent domain. If any such board, commission, authority or body is created, all proceedings in connection with the establishment, construction, management and operation of the airport, including application for and issuance of any license required therefor, shall be in its name. The intent of §§ 5.1-35 and 5.1-36 is that any such board, commission, authority or body established by two or more political subdivisions or through action of the General Assembly may have the same powers granted to a city, town and county but in no case will such powers be greater than those granted to a city, town or county."

In light of the above statutory scheme, I conclude that members of an airport commission may be considered to be public officers for purposes of your inquiry. See 1969-1970 Report of the Attorney General at 4; see generally 1982-1983 Report of the Attorney General at 397. Article 1.1, Ch. 6 of Title 24.1 provides for the removal of
public officers from office. Because nothing in the law specifies a term of office for an appointed airport commissioner, § 24.1-79.2 applies, which reads, in part, as follows:

"[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.)

Because members of the airport commission in question are appointed officers who do not serve for a term established by law, the power of a board of supervisors to summarily remove from office a person it has appointed to such an airport commission 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 the power to remove such officer, in the absence of constitutional or statutory restraint. See 1983-1984 Report of the Attorney General at 284. Because there is no constitutional or statutory restraint of which I am aware on the board of supervisors' implied power to summarily remove its appointed airport commissioners, your first question is answered in the affirmative and your second question is answered in the negative.

With regard to your third question, there is nothing in § 5.1-36, or in any other provision of law of which I am aware, which prescribes any notice or a hearing before a board of supervisors may remove one of its appointed airport commissioners. Accordingly, I conclude that, while some form of notice and hearing prior to removal may be advisable as a matter of public policy, Virginia law does not require it. Compare 1983-1984 Report of the Attorney General at 323. This is consistent with the board's implied power of summary removal, discussed above.

BINGO AND RAFFLES. HIRING OF BOOKKEEPER BY QUALIFIED ORGANIZATION TO ASSURE PROCEEDS USED PROPERLY; FINANCIAL REPORTS FILED MAY NOT BE PROHIBITED BY § 18.2-340.9(E).

August 17, 1984

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked whether a charitable organization holding a permit to operate bingo games may employ a bookkeeper or CPA to assure that bingo profits are properly accounted for and all statutorily required reports are correctly filed.

In a prior Opinion found in the 1977-1978 Report of the Attorney General at 239, this Office was asked whether an individual, who was not a bona fide member of an organization, could "maintain, handle, bookkeep, bank, and disburse" funds collected during each night of bingo conducted by that organization. At that time, former § 18.2-335 of the Code of Virginia provided, in part, that an organization permitted to conduct bingo games could "delegate the authority or duty of organizing, managing or conducting bingo games or raffles only to a natural person or persons who are bona fide members of such...organization." That Opinion concluded that bookkeeping by a nonmember, under the facts outlined, would be a violation of the statute.

In 1979, the General Assembly revised the laws concerning bingo games and raffles. Section 18.2-340.9(E) now provides, in pertinent part:
"No person, except a bona fide member of any such organization who shall have been a member of such organization for at least ninety days prior to such participation, shall participate in the management, operation or conduct of any bingo game or raffle. No person shall receive any remuneration for participating in the management, operation or conduct of any such game or raffle." (Emphasis added.)

In addition, the Supreme Court of Virginia has recently interpreted the word "manage," as found in another provision within the gambling laws, to be synonymous with "conduct" and to mean to control and direct. In the same opinion, the Court stated "conduct connotes leadership and control. It contemplated the person in charge." See Turner v. Commonwealth, 226 Va. 456, 460, 309 S.E.2d 337 (1983). See also 1980-1981 Report of the Attorney General at 180.

In the situation posited by you, there is no suggestion that the bookkeeper or CPA does anything more than balance books and assure the proper filing of reports, and there is certainly no indication that he participates in the daily management of the operation. Thus, where a bookkeeper or CPA merely comes in on a periodic basis to prepare the organization's books, to correctly fill out the financial reports, and does not participate in the daily counting and depositing of funds or the daily filling out of forms, it is my opinion that such activity should not be considered participation in the "management, operation or conduct" of any bingo game. Such a peripheral and limited role cannot be said to be either controlling or directing the bingo operation or constituting any real operating function in the actual conduct of the game. Accordingly, I am of the opinion that payment of a bookkeeper or CPA under these circumstances could be considered a "reasonable and proper" expense under § 18.2-340.9(A).

1See Ch. 420, Acts of Assembly of 1979. For present provisions as to bingo games and raffles, see § 18.2-334.2 and §§ 18.2-340.1 through 18.2-340.14.

2Section 18.2-340.6 requires that an organization, which has been granted a permit to conduct bingo games, maintain complete records of all receipts and disbursements and file an annual or quarterly financial report under oath with the local governing body.

BOARD OF TRANSPORTATION SAFETY. CONTINUED TO EXIST THROUGH MERGER OF DEPARTMENT OF TRANSPORTATION SAFETY WITH DIVISION OF MOTOR VEHICLES. LIMITATION ON MEMBERS' TERMS CONTINUED.

May 21, 1985

The Honorable Laurie Naismith
Secretary of the Commonwealth

You have questioned the applicability of the limitation on the terms of members of the Board of Transportation Safety (the "Board"), which was previously in the Department of Transportation Safety ("DTS") but will be in the Division of Motor Vehicles ("DMV") effective July 1, 1985.

DTS was created in 1978, pursuant to § 33.1-393 of the Code of Virginia, as a successor to the Division of Highway Safety. See Ch. 820, Acts of Assembly of 1978. The Board was established pursuant to § 33.1-397 to advise DTS' Director, the Secretary of Transportation and the Governor on transportation safety matters. Section 33.1-399 provided for the appointment and compensation of Board members and limited members to two full successive terms.
In 1984, the General Assembly repealed §§ 33.1-392 through 33.1-399 and simultaneously enacted §§ 46.1-40.2 through 46.1-40.6. See Ch. 778, Acts of Assembly of 1984. The provisions of § 46.1-40.2 et seq. are essentially identical to the former provisions of § 33.1-392 et seq. The major difference between prior law and present law is the elimination of DTS as an independent agency by merging it with DMV.

The specific provision you question is § 46.1-40.6 which reads, in pertinent part: 
"Appointment and confirmation of Board members under this section shall occur only as the terms of the current members of the Board expire under prior law." (Emphasis added.) You specifically ask whether a member who has served two full successive terms as of July 1, 1985, would be eligible for reappointment.

The primary object of any statutory interpretation is to give effect to the legislative intent. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). Manifestly, the legislature intended that the Board is to continue as a governmental entity throughout the legislature's actions. The legislative intent for the continuity of the Board can be seen in the following areas. First, there is a nearly complete identity between the policies and functions of the Board under both acts. Secondly, the use of the language "current members of the Board" in § 46.1-40.6 indicates the General Assembly considered the Board under prior and present law to be one body. Finally, a 1984 legislative study states that DTS' merger with DMV was a step toward efficiency and the elimination of fragmentation of the State's highway safety function. The study indicates no intent to extinguish the prior Board and create a new entity.  

The above view on continuity of the Board is consistent with the rules of statutory construction as applied by the Supreme Court of Virginia. The Court, in an early case, stated:

"But the prevailing view is that where a statute is repealed, and all or some of its provisions are at the same time re-enacted, the re-enactment neutralizes the repeal, and the provisions of the repealed act which are thus re-enacted continue in force without interruption so that all rights and liabilities that have accrued thereunder are preserved and may be enforced."

Moore v. Commonwealth, 155 Va. 1, 10, 155 S.E. 635, 638 (1930).

It is, therefore, my opinion that the limitation in repealed § 33.1-399 that Board members serve no more than two full successive terms, and reenacted in § 46.1-40.6, is applicable to Board members appointed under prior law and who continue to serve under the new law. Therefore, a member who has served two full successive terms as of July 1, 1985, would not be eligible for reappointment.

1 Compare §§ 33.1-392 and 46.1-40.2.
2 Compare §§ 33.1-397 and 46.1-40.5.

BOARD OF TRANSPORTATION SAFETY. MEMBERS. ELIGIBLE FOR REAPPOINTMENT IF ONE OF TWO CONSECUTIVE TERMS SERVED INCOMPLETE.
June 17, 1985

The Honorable Laurie Naismith
Secretary of the Commonwealth

You ask whether two current members of the Board of Transportation Safety (the "Board") are eligible for reappointment. The two members were originally appointed to the Board in September 1978, each to serve a four-year term ending June 30, 1982. In July 1981, following a departmental reorganization, both men were reappointed to serve four-year terms ending June 30, 1985. As a result, both men have been appointed twice but have only served on the Board for a total of seven years each, rather than eight years.

Section 46.1-40.6 of the Code of Virginia, dealing with the composition of the Board, reads, in pertinent part: "Members shall serve for terms of four years, and no member shall serve for more than two full consecutive terms." (Emphasis added.) Your inquiry, therefore, requires determination of whether each of the current Board members in question has served "two full consecutive terms."

It is a general rule of statutory construction that words in a statute should be given their usual, commonly understood meaning. See 1982-1983 Report of the Attorney General at 707. The first term served by each of the two members was for three years: September 1978 through July 1981. The first term, therefore, was not a full four-year term. Accordingly, it is my opinion that each of the two members is eligible for reappointment to the Board for another full four-year term. This conclusion is consistent with a prior Opinion of this Office which held that a regional library board member was eligible to serve two full terms following the expiration of a partial term for which he was appointed to fill a vacancy. See 1983-1984 Report of the Attorney General at 225.

BOARDS OF SUPERVISORS. AUTHORITY TO EMPLOY EXTRA PERSONNEL TO SELL COUNTY DECALS.

August 22, 1984

The Honorable L. Guy Plaster
Treasurer for Russell County

You have asked whether a board of supervisors has the authority to employ extra personnel for the purpose of selling county vehicle license decals in locations outside the county courthouse. The specific situation is presented in your letter as follows:

"This year, the Board of Supervisors employed extra personnel to sell these decals in different locations outside the Court House. To do this, they had to purchase a special bond to cover these people. I then issued the decals through the County Administrator's Office to these persons, and they reported back to that office with funds coming to the Treasurer's Office from them."

Section 46.1-65(a) of the Code of Virginia authorizes the imposition of vehicle licensing fees by a county, "in such manner, on such basis...as the proper authorities of such counties...may determine." Chapter 20 of Title 58 provides that the county treasurer is the fiscal officer of the county. Among his duties, he must collect taxes and other amounts payable into the county treasury. See § 58-958. It has been consistently held that a constitutional officer cannot be controlled in the performance of his duties unless there exists specific statutory authority for such control. See Reports of the Attorney General: 1982-1983 at 128; 1975-1976 at 51. The control by the governing
Russell County has adopted the county board form of government as authorized by § 15.1-697. Under this form of government, the board of county supervisors is required to provide for the "performance of all the governmental functions of the county in such manner as the board shall deem proper...." See § 15.1-701(d). Additionally, § 15.1-706(d) discusses certain constitutional officers, including the treasurer, and provides that such officers "shall be accountable to the board of county supervisors in all matters affecting the county and shall perform such duties, not inconsistent with his office, as the board of county supervisors shall direct." (Emphasis added.)

In consideration of the foregoing provisions of law, the treasurer is responsible for receiving payments on behalf of the county, but is also required to cooperate with the board of county supervisors so that they may perform their governmental functions. By providing for the sale of county decals in areas other than the courthouse, the board of county supervisors is thereby making the process of obtaining the decals more accessible and, thus, more convenient to the county residents. As long as there are safeguards provided for the purpose of accountability, I am of the opinion that the board of county supervisors may employ additional personnel to sell county vehicle license decals outside the county courthouse.


BOARDS OF SUPERVISORS. COMMONWEALTH'S ATTORNEYS. COMPREHENSIVE CONFLICT OF INTERESTS ACT.

July 25, 1984

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

This is in reply to your request for my opinion concerning county office space assigned to you in your capacity as Commonwealth's attorney, pursuant to §§ 15.1-257 and 15.1-258 of the Code of Virginia. Section 15.1-257 provides, in pertinent part, as follows:

"The governing body of every county and city shall provide a courthouse with suitable space and facilities to accommodate the various courts of record and officials thereof serving the county or city...and, upon request therefor, suitable space and facilities for the attorney for the Commonwealth to discharge the duties of his office." (Emphasis added.)

Similarly, § 15.1-258 provides as follows:

"The governing body of each county and city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, attorney for the Commonwealth, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city." (Emphasis added.)

You relate that you are a part-time Commonwealth's attorney, and that the county provides you an office in the county administration building from which you discharge your public duties as Commonwealth's attorney and also conduct your part-
time private law practice. You ask my opinion as follows:

1. Whether the county board of supervisors may prohibit you from conducting your part-time private law practice from the public office space provided you as Commonwealth's attorney;

2. Assuming the answer to question number one to be in the affirmative, or assuming that you voluntarily agree to such a prohibition by the board, whether the board may be required to provide you a rental allowance to secure office space in a building not owned by the county;

3. What the meaning of the term "suitable space" is, as used in § 15.1-257, and who may make that determination; and

4. Whether any county rental payments made to secure private office space for you could be paid or applied to an office you personally own.

Sections 15.1-257 and 15.1-258 impose a mandatory duty upon the local governing body to furnish office space to the Commonwealth's attorney for the discharge of his public duties of office. See Reports of the Attorney General: 1980-1981 at 378; 1971-1972 at 110. The board of supervisors has no control over how the Commonwealth's attorney uses the office space made available to him pursuant to the above Code sections, once it is allocated. Compare Reports of the Attorney General: 1964-1965 at 15 (pursuant to § 15.1-258, board of supervisors has no control over use of space assigned to commissioner of accounts and he may conduct private law practice therein); 1959-1960 at 54 (part-time Commonwealth's attorney has sole discretion to determine the hours he will spend in space assigned by board of supervisors, to discharge his public duties). See generally 1978-1979 Report of the Attorney General at 56 and 289 (elected constitutional officers are not subject to the control and jurisdiction of the local governing body in the operation of their respective offices).

By virtue of § 15.1-50.1, Commonwealth's attorneys in counties having a population of less than 35,000 may engage in the private practice of law. I am not advised of the number of such attorneys who conduct their private practice from the office space provided by the counties for the discharge of their duties as attorneys for the Commonwealth. The local governing bodies are manifestly aware of such practice and could take action to seek legislative change if they be so inclined. Until such time as the General Assembly alters or prohibits the private practice of law or the conducting of private business in the public offices assigned to public officials, I am of the opinion that the view expressed in the Opinion found in the 1964-1965 Report of the Attorney General, supra, is a proper construction of §§ 15.1-257 and 15.1-258. Accordingly, in my opinion your first inquiry should be answered in the negative.

With regard to your second inquiry, prior Opinions of this Office held that, while it is mandatory upon the local governing body to provide office space for the Commonwealth's attorney, allocation of such space is largely in the governing body's discretion, and the Commonwealth's attorney has little control over the exact location of his office. In the exercise of that discretion the governing body may provide a rental allowance to secure an office suitable to your needs as Commonwealth's attorney outside of county-owned buildings; however, I know of no authority which states that it may be required to do so. See, e.g., Reports of the Attorney General: 1980-1981, supra; 1987-1988 at 30; 1966-1967 at 42; 1959-1960 at 78; 1949-1950 at 21. Thus, although the governing body may not prohibit your private practice, it is not required to provide a rental allowance. Accordingly, your second inquiry is answered in the negative.

Turning to your third inquiry, I note that the statute does not define "suitable space," nor am I aware of any legal definition of that term which is precise enough to
answer every question. The statute similarly does not specify who shall determine what is "suitable." In addressing an analogous situation, a prior Opinion of this Office expressed the view that a statutory requirement for providing "suitable quarters" for a trial justice "contemplates that a trial justice shall be provided with a reasonably adequate place or places in which to transact his official duties." (Emphasis added.) 1954-1955 Report of the Attorney General at 242. Black's Law Dictionary 1286 (5th ed. 1979) defines "suitable" as "[f]it and appropriate for the end in view." As a practical matter, in view of the discretion given a local governing body in assigning office space to public officials, and that accorded a Commonwealth's attorney to determine and control the operations of his office, compromise between the two points of view as to what is "suitable," should they differ, will be necessary. If disagreement persists, the only remedy would appear to be to place the matter before a court for determination. Compare Reports of the Attorney General: 1964-1965, supra; 1959-1960 at 90.

Finally, with regard to your fourth inquiry, I refer you again to the Opinion contained in 1980-1981 Report of the Attorney General at 378, which holds that it is permissible, under the Virginia Conflict of Interests Act,2 for a Commonwealth's attorney who owns an office building to lease space to the county, even though the county in turn allocates part of the space to the Commonwealth's attorney's office under §§ 15.1-257 and 15.1-258, provided that the Commonwealth's attorney does not participate in his official capacity in the transaction, and this fact is made a matter of public record.3 Provided the transaction you contemplate meets the requirements discussed in that Opinion, your inquiry is answered in the affirmative.

1As you point out, because Accomack County's population does not exceed 35,000, you are not required to devote full time to your public duties and you may engage in the private practice of law. See § 15.1-50.1.
2The Act, § 2.1-347 et seq., was repealed by Ch. 410, Acts of Assembly of 1983. See now the Comprehensive Conflict of Interests Act, § 2.1-599 et seq.
3The transaction was deemed to fit the exemption contained in § 2.1-349(b)(1), which is repealed. See supra note 2. The exemption is carried over into the new Act in § 2.1-608(1).

BOARDS OF SUPERVISORS. EXPENSES. SCHOOLS AND SCHOOL BOARDS. LUMP-SUM REIMBURSEMENTS NOT AUTHORIZED FOR EXPENSES INCURRED IN CONNECTION WITH COUNTY BUSINESS.

July 11, 1984

The Honorable Charles K. Trible
Auditor of Public Accounts

This is in reply to your letter concerning the manner of payment of expenses incurred by members of county boards of supervisors, school boards and employees of county governments and school boards.

You ask, first, whether a Virginia county may reimburse members of its local governing body for expenses incurred in connection with county business on a lump-sum basis, absent a special provision of law containing an exception to the general statutes. By "lump sum," I presume that you refer to a payment made on a periodic basis, monthly for example, without the necessity of an itemized listing of the expenses and without regard to whether the expenses were actually incurred.

The statutory provisions governing salaries and expenses of office of public officers are contained in Ch. 1, Title 14.1 of the Code of Virginia. Section 14.1-46.01 gives authority to a county board of supervisors to fix the compensation of each of its members and allows a board member to accept, in lieu of an annual salary, "reimbursement for actual expenses incurred in maintaining an office and secretarial assistance." (Emphasis added.) The amount of expenses paid is deducted from the supervisor's salary and may not exceed the amount of salary. Clearly, such expenses must be actually incurred prior to payment and, therefore, should be itemized.

Sections 14.1-5, 14.1-5.2, 14.1-7, 14.1-8 and 14.1-9 provide authority for reimbursement of travel related expenses to persons traveling on county business. It is apparent from the express terms of these statutes that such reimbursements are to be for actual expenses incurred. The General Assembly has not provided express authority for reimbursements of expenses to any person on a lump-sum basis, nor may any such authority reasonably be implied by the statutory language used.

No prior Opinion of this Office of which I am aware has construed any of the above statutes or any other provision of law to allow lump-sum reimbursements of expenses to members of county boards of supervisors. An Opinion contained in 1954-1955 Report of the Attorney General at 209 deals specifically with the question whether the predecessors of §§ 14.1-5 and 14.1-7 allowed lump-sum travel allowances for division superintendents of schools. The Opinion held in the negative and stated that the very terms of the statutes require reimbursements to superintendents to be on an actual expense basis only. Although Code sections subsequently have been amended repeatedly and recodified, the applicable language has not been changed in any way which would alter the holding of that Opinion. Thus, the conclusion of the 1954 Opinion remains valid. Because the statutes on which that Opinion was based apply equally to members of county boards of supervisors, as well as to division superintendents of schools, I must conclude that the General Assembly has not authorized counties to reimburse for expenses on a lump-sum basis. Accordingly, your first question is answered in the negative.

You next ask in what respect Virginia law governing expenses incurred by members of county school boards differs from that applicable to members of boards of supervisors. Section 22.1-32 authorizes a county school board to pay each of its members an annual salary within the maximum limit set out for the county in the statute, and in subsection (D) thereof, provides that "[a]ny school board may in its discretion pay each of its members mileage for use of a private vehicle in attending meetings of the school board and in conducting other official business of the school board." There is no material difference between the language of this section and that of the Code sections applicable to members of boards of supervisors with regard to the question of lump-sum expense reimbursements versus reimbursements for actual expenses only.

A prior Opinion of this Office holds that §§ 14.1-5 and 14.1-7 apply to employees of public school boards in determining the proper rate of mileage reimbursements for use of private transportation on official school business. See 1979-1980 Report of the Attorney General at 299. This holding is consistent with the holding of the 1954 Opinion, supra, construing the predecessor statutes to apply to division school superintendents and limiting reimbursements to actual expenses incurred. Travel expense reimbursements to members of a county school board are governed by the same statutes which govern such reimbursements to other county officials and employees and are limited to actual
expenses plus mileage at a fixed rate for the use of private transportation. The only variation is provided in the last sentence of § 14.1-5, which appears to allow a private transportation mileage reimbursement rate for school board members and employees different from the State rate specified in the current Appropriation Act of the Commonwealth. This, however, does not change my conclusion that the General Assembly has not given express or implied statutory authority for a school board to reimburse its members for travel or any other expenses incurred in connection with school board business on a lump-sum basis, and such expense reimbursements as are authorized should be made for actual expenses only.

You ask, in your third and fourth questions, whether either county employees or employees of a county school board may receive lump-sum payments from the county treasury for expenses not otherwise specifically reimbursed. In my opinion, the principles enunciated and conclusions reached in the answers to your first two questions concerning members of school boards and county supervisors apply as well to county and school board employees on the issue of lump-sum reimbursements for travel expenses.¹

In summary, the General Assembly has established an extensive set of provisions governing expense reimbursement for county officers and employees. Those provisions have been consistently interpreted for thirty years to limit expense reimbursements to those expenses actually incurred.² The General Assembly's mandated format and the historical interpretation of that format are inconsistent with a lump-sum approach to reimbursements, and accordingly, I must conclude that authority for the latter approach does not exist for county officials and employees.

¹The only variation to the limit of actual expenses is the allowance for mileage at a fixed rate per mile traveled in private transportation. See § 14.1-5.

²There is a narrow statutory provision permitting persons traveling on county business in counties operating under forms of government specified in Chs. 13 and 14 of Title 15.1 to be "reimbursed" on "a basis and in a manner" that the governing body provides, but that exception is limited to persons whose expenses are reimbursed both by the county and the State. See § 14.1-8. Moreover, rendering that provision in context suggests that the reimbursement is limited by the authorization of § 14.1-5, and the intent is to permit the governing body to reimburse at a lower rate.


⁴The General Assembly is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments may be taken as legislative approval of that interpretation. Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603 (1983); Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346 (1983).

⁵A county board of supervisors or a county school board would not be prevented from providing in its employee pay plan adopted pursuant to §§ 15.1-7.1 and 22.1-296, respectively, for appropriate salary increments for positions whose job requirements routinely require incurring of travel related expenses in the course of county business.

⁶Of course, the mileage rate is an exception as indicated above.

BOARDS OF SUPERVISORS. MEMBER MAY SERVE ON LOCAL COMMUNITY ACTION BOARD.
The Constitution of Virginia (1971) states in Art. VII, § 6:

"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." (Emphasis added.)

This constitutional mandate provides that the only way in which a member of a governing body (i.e., a member of a board of supervisors) may serve as a member of a board appointed by the governing body is if such is permitted by general law. See Opinion to the Honorable Charles D. Barrell, dated July 17, 1984.

For purposes of your inquiry, the applicable general law is § 2.1-591. This section provides, in pertinent part:

"[A] community action board...[shall consist] of no less than fifteen members who shall be selected as follows:

1. One-third of the members of the board shall be elected public officials or their designees, who shall be selected by the local governing body or bodies of the service area."

Section 2.1-591(A)(1) clearly authorizes the board or boards of supervisors in the service area to select at least one-third of the members from the pool of elected public officials available. I am, therefore, of the opinion that § 2.1-591(A)(1) permits a member of a board of supervisors to serve on a local community action board without violating Art. VII, § 6 of the Constitution.

Several prior Opinions of this Office expressed the view that § 15.1-50 prohibits a member of a board of supervisors from serving on various boards. Prior to 1980, § 15.1-50 provided that "[n]o person holding the office of...supervisor shall hold any other office, elective or appointive, at the same time...." For example, see Reports of the Attorney General: 1976-1977 at 217; 1970-1971 at 66. This section was amended in 1980, however, to read: "No person holding the office of...supervisor...shall hold any other office mentioned in Article VII of the Constitution at the same time...." See Ch. 695, Acts of Assembly of 1980. The 1980 amendment, limiting the statutory prohibition to "any other office mentioned in Article VII," renders all prior Opinions based upon the general limitation of "any other office, elective or appointive," invalid. Therefore, § 15.1-50 does not preclude a member of a board of supervisors from serving on a community action board. I am, therefore, of the opinion that a member of a board of supervisors may serve on a local community action board.
July 17, 1984

The Honorable Charles D. Barrell
County Attorney for Culpeper County

This is in response to your request for my opinion concerning two situations involving a member of the Culpeper County Board of Supervisors (the "Board"). Your first inquiry is whether a member of the Board may also serve on the local community services board (the "CSB"). You further inquire whether a member of the Board may accept employment with the Culpeper County Department of Social Services.

You indicate that based upon Art. VII, § 6 of the Constitution of Virginia (1971) and § 37.1-195 of the Code of Virginia, it is your opinion that a member of the Board may also serve on the local CSB.

Article VII, § 6 states, in pertinent part:

"No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law." (Emphasis added.)

By virtue of this provision of the Constitution, the only way in which a member of a governing body may serve as a member of a board appointed by the governing body is if such is permitted by general law. The applicable Code section concerning the appointment of members to local community services boards is § 37.1-195. This section provides that the board of supervisors of each county elects and appoints members of a CSB. Section 37.1-195 provides, in part:

"No such board shall be composed of a majority of elected officials as members, nor shall any county or city be represented on such board by more than one elected official."

Section 37.1-195 clearly gives the Board the authority to appoint its own members to the CSB within certain limitations; the limitation being only one elected official from the county may serve. For the foregoing reasons, I concur in your opinion that § 37.1-195 is the general law which permits a member of the Board to serve on the local CSB without violating Art. VII, § 6 of the Constitution.¹

Whether service on the CSB constitutes a conflict of interests is a question which must be addressed by your local Commonwealth's attorney. Section 2.1-632(B) of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634, requires the Commonwealth's attorney of the locality involved to respond to such inquiries. The Attorney General is authorized to review an adverse opinion rendered by the Commonwealth's attorney and, therefore, does not render opinions on local conflict of interests inquiries except in appeals.

Your second inquiry is similarly a conflict of interests matter. This question should be addressed by the interested member to your local Commonwealth's attorney pursuant to § 2.1-632(B).

¹A prior Opinion of this Office indicates that a member of the board of supervisors is prohibited, pursuant to § 15.1-50, from serving on a local CSB as set out in § 37.1-195. See 1970-1971 Report of the Attorney General at 68. Since that Opinion was issued,
however, § 15.1-50 has been amended to apply only to holding "any other office mentioned in Article VII of the Constitution...." Because the CSB is not mentioned in Art. VII, § 15.1-50 no longer prohibits such dual officeholding.

BOARDS OF SUPERVISORS. POWERS. THOSE CONFERRED ONLY EXPRESSLY OR BY NECESSARY IMPLICATION.

April 23, 1985

The Honorable Harry J. Parrish
Member, House of Delegates

You have asked two questions which I answer seriatim.

"1. What is the authority of an individual member of the Board of County Supervisors?"

The political and corporate powers of a county are generally vested in the board of supervisors. See §§ 15.1-589, 15.1-623, 15.1-674, 15.1-701, 15.1-729 of the Code of Virginia. Section 15.1-540 provides that "[a]ll questions submitted to the board for decision shall be determined by a majority of the supervisors voting on any such question...." This Office has interpreted this section as requiring that the legislative functions of a board of supervisors be performed collectively. Opinion to the Honorable Frank Medico, Member, House of Delegates, dated September 6, 1984.

Furthermore, the powers of boards of supervisors are fixed by statute and those powers are only such as are conferred expressly or by necessary implication. Board of Supervisors v. Corbett, 206 Va. 167, 142 S.E.2d 504 (1965). An individual supervisor is a public officer whose duties are fixed by law. Old v. Commonwealth, 148 Va. 299, 138 S.E. 485 (1927).

I am unaware of any provision that confers any official powers on an individual supervisor. In the absence of such a provision or board authorization to act, a member has no individual powers. See, e.g., 1972-1973 Report of the Attorney General at 29.

"2. Can a supervisor use his stationery with the official county seal affixed thereto for personal correspondence?"

Your question is prompted by what you describe as the action of a board member making "demands by writing letters, which give the indication of being board actions by using the official stationery without the board having taken any official action."

This Office has recently addressed this question in an Opinion to the Honorable Claude W. Anderson, Member, House of Delegates, dated April 4, 1985. As stated in that Opinion, whether use of town stationery constitutes "misuse of office" so as to justify removal from office is ultimately a question for the court, pursuant to § 24.1-79.1 et seq. In this regard, § 24.1-79.5 permits removal of public officers upon a finding of "misuse of office when such...misuse of office has a material adverse effect upon the conduct of such office."

In my opinion, whether the action described in your letter is misuse of office so as to justify removal is also a question for the court, pursuant to § 24.1-79.1 et seq.
The Honorable R. Edward Houck  
Member, Senate of Virginia

You have requested my opinion on two questions arising from the proposal for rezoning and the issuance of industrial revenue bonds on behalf of Luck Stone Corporation.

One inquiry relates to an alleged conflict of interests on the part of the chairman of the Powhatan Planning Commission who voted for the rezoning application. By virtue of § 2.1-632 of the Code of Virginia, questions relating to possible violations of the Comprehensive Conflict of Interests Act on the part of officers and employees serving at the local level of government must first be submitted to the Commonwealth's attorney. In the event the Commonwealth's attorney should determine that a violation exists, the officer or employee involved can appeal that decision to the Attorney General. In the event the Commonwealth's attorney concludes that no violation is presented by the factual situation, that determination constitutes a bar to prosecution. See § 2.1-627.

Under the circumstances, I must abstain rendering an opinion on this question until such time as the situation has been presented to the Commonwealth's attorney as contemplated in § 2.1-632.

The second question relates to the validity of action taken by the Board of Supervisors of Powhatan County at its meeting on November 19, 1984, on a motion to approve the request for issuance of industrial revenue bonds for Luck Stone Corporation.

Section 15.1-540 provides the general statutory method for determining questions submitted to a board of supervisors for decision. That section reads, in part:

"All questions submitted to the board for decision shall be determined by a majority of the supervisors voting on any such question either by voice vote or by roll call or by any other method of voting which shall identify the matter to be voted upon, and shall record the individual votes of the members; but in any case in which there shall be a tie vote of the board upon any question when all the members are not present, the question shall be passed by till the next meeting when it shall again be voted upon even though all members are not present...."

In the facts posited in this case, the minutes reflect that a meeting was held on October 15, 1984, with all members present. A vote on a motion to deny the issuance of industrial revenue bonds resulted in a tie vote of 2-2, with one abstention. Hence, the motion to deny failed for lack of majority required by § 15.1-540. See 1983-1984 Report of the Attorney General at 271. The County Attorney advised the board that the issue could be brought up at anytime.

The minutes also reflect that the matter of the issuance of industrial revenue bonds for Luck Stone Corporation again appeared on the agenda for the board meeting on November 19, 1984. Unlike the adoption of an ordinance, there is no statutory requirement for prior notice or advertising of any proposed motion by the board of supervisors. In absence of some local ordinance or rules adopted by the board, there is no prohibition against a defeated motion on a resolution being again considered by the board at a subsequent meeting of the board. See 1961-1962 Report of the Attorney General at 12. This is not a case of a member changing his vote after having it recorded. See 1970-1971 Report of the Attorney General at 27. Neither was this a case of voting at an
adjourned meeting when a member did not previously vote. Compare 1963-1964 Report of the Attorney General at 25. Neither was the action on November 19, 1984 taken on a motion to reconsider, which would have required the motion be made by a member who voted with the majority when the question was first determined. See 1960-1961 Report of the Attorney General at 24.

The action taken by the board at the November 19, 1984 meeting (the second meeting) appeared on the agenda as any other item of business. The minutes reflect that a motion was made "for denial of this issuance of Industrial Revenue Bonds for Luck Stone Corporation." The motion was defeated. A member then moved to approve the request for issuance of the bonds. The motion was carried by a 3-2 vote.

Under the circumstances in this case, I am of the opinion that action of the board on November 19, 1984, pertaining to the industrial revenue bond issue, was legally permissible.

11 presume, for purposes of this Opinion, that there is no statute or county ordinance which requires approval of such bond projects by ordinance, as opposed to resolution. Consequently, I confine my opinion to the questions asked. See 1983-1984 Report of the Attorney General at 75 for a discussion on the legal distinction between ordinances and resolutions.

The minutes reflect that the position of tie breaker was abolished in Powhatan County by action taken on January 9, 1984.

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BOARDS OF SUPERVISORS. URBAN COUNTY EXECUTIVE FORM OF GOVERNMENT. VACANCY FILLED IN SPECIAL ELECTION UNDER GENERAL LAW CALLED BY SENIOR CIRCUIT JUDGE PURSUANT TO § 15.1-729.

July 9, 1984

The Honorable David T. Stitt
County Attorney for Fairfax County

This is in reply to your letter concerning a prospective vacancy on the Fairfax County Board of Supervisors. You relate that all of the present members of the board were elected in November 1983, for four-year terms of office which began in January of this year, and that the next regular election for the board will be held in November 1987. One of the present members plans to move from Fairfax County and, therefore, will resign from office. You request my opinion on the following question:

"What statutory provisions are applicable in selecting a replacement for a district supervisor who resigns from the Fairfax County Board of Supervisors, and what procedures are specified by those applicable statutes?"

As will be developed more fully hereinafter, I am of the opinion that the general provisions of Title 24.1 of the Code of Virginia controlling special elections govern. Under those provisions, a special election to fill a vacancy on the board may be held only in November at the time specified for a general election. Moreover, there are no provisions applicable to Fairfax County which permit an interim appointment to fill a vacancy pending a special election.

Fairfax County has adopted the urban county executive form of government as set out in §§ 15.1-722 through 15.1-740 and 15.1-754 through 15.1-791. Section 15.1-729
provides, in pertinent part, as follows with regard to the filling of vacancies on the board of supervisors:

"In the event that the number of districts in any such county shall be increased by redistricting or otherwise subsequent to a general election for supervisors under such form of government, and such supervisors shall have taken office, then, in such event, the urban county board of supervisors shall adopt a resolution requesting a judge of the circuit court of such county to call a special election for an additional supervisor or supervisors in accordance with the increase in the number of districts, such additional supervisor or supervisors to be elected from the county at large and such election shall be held within forty-five days from the date of such request. The qualifications of candidates and the election shall be as at general law applying to special elections. Any supervisor or supervisors thereby elected shall hold office until the first day of January following the next regular election provided by general law for the election of members of the board of supervisors, and at the next regular election all supervisors of any such county shall be elected from districts as provided by law.

In the event a vacancy occurs on the urban county board of supervisors, the senior judge of the circuit court of such county shall call a special election, in the district, if the vacancy be of a district supervisor, or in the county at large if the vacancy be of the chairman, to which election all of the foregoing paragraph shall be applicable, mutatis mutandis; provided, however, that if any such vacancy occur within one hundred and twenty days prior to the date of a regular election for the board of supervisors, such vacancy shall be filled by appointment by the remaining members of such board within seven days of the occurrence of such vacancy, which appointment shall be for the duration of the term of office of the person whose absence from such board occasioned such vacancy." (Emphasis added.)

In accordance with the emphasized language in the second paragraph quoted above, upon the occurrence of a vacancy, the senior judge of the circuit is required to call a special election to fill it, to which election all of the foregoing paragraph shall be applicable, mutatis mutandis." "Mutatis mutandis" means "with the necessary changes." Dinwiddie County v. Annexation Judges, 208 Va. 410, 414, 158 S.E.2d 117 (1967). Because the foregoing paragraph of § 15.1-729 does not come into play until the special election is called by the senior judge, in my opinion application of the mutatis mutandis principle requires the result that only the last two sentences of that paragraph, emphasized in the first paragraph quoted above, are applicable in this instance. Thus, the election called by the senior judge to fill the vacancy, and the qualifications of candidates therein, "shall be as at general law applying to special elections." It is therefore necessary to examine general law.

In this case, the general law sections applicable to special elections to fill a vacancy in the office of county supervisor are §§ 24.1-1(5)(c), 24.1-163 and 24.1-164. Taking them in reverse order, § 24.1-164 provides that special elections to fill vacancies in office "shall be superintended and held, notice thereof given, returns made and certified, votes canvassed, results ascertained and made known, and certificates of election given, by the same officers, under the same penalties, and subject to the same regulations as prescribed for general elections, except so far as may be otherwise provided...."

The applicable portions of § 24.1-163 provide as follows:

"Whenever a special election is ordered to fill a vacancy...it shall be the duty of the officer ordering such election to issue his writ of election at the time the vacancy
occurs...directed to the secretary of the electoral board of the county, city or town in which the election is to be held, designating therein the office to be filled and the time and place of holding the same; upon receipt of which such officer shall proceed to cause public notice to be given of such election in the same manner as is required in the preceding paragraph. No special elections shall be ordered to be held within the sixty days prior to a general or primary election.

A copy of any order calling a special election to fill a vacancy shall be sent to the State Board of Elections."

Finally, § 24.1-1(5)(c), defining "[s]pecial election," governs the timing of the special election in the following words: "An election to fill a vacancy in any county, city or town office...regularly elected in a November general election shall be held on a regular November general election day...."

Note that §§ 24.1-163 and 24.1-1(5)(c), when read together as they must, require the conclusion that if a board member resigns within sixty days prior to a November general election, the special election to fill the vacancy may not be held until the next following November. In such a situation, this would result in a vacancy of over one year in duration. The apparent conflict with the provisions of § 15.1-729, which appear to contemplate a more expeditious filling of the vacancy, is resolved by the clear mandate of § 15.1-729 that the provisions of general law (in this case §§ 24.1-163 and 24.1-1(5)(c)) control.

Turning to the second part of your inquiry as to procedures, the conduct of elections is governed by provisions contained in Ch. 7 of Title 24.1, which are too numerous to recount here and which should be consulted directly for guidance. You refer specifically to the availability of a primary election for party nominations of candidates for election to fill the prospective vacancy. Provisions governing primary elections are contained in Art. 5 of Ch. 7. Section 24.1-171 states that Art. 5 shall not apply to the nominations of candidates to fill vacancies "unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries." Section 24.1-174 provides that "[p]rimaries for the nomination of candidates for offices to be voted on at the general election in November shall be held on the second Tuesday in June next preceding such election" which, in this case, is June 12, 1984. Declarations of candidacy in a primary election must be filed no later than the sixtieth day before the primary, pursuant to § 24.1-184, except that, pursuant to § 24.1-194, in the event a vacancy occurs less than sixty days before the date fixed by § 24.1-174 for the holding of a primary, but more than 30 days before that date, a party may permit declarations to be filed up to fifteen days prior to the primary date. Thus, the answer to whether a primary may be held will necessarily depend upon when the vacancy occurs. See Reports of the Attorney General: 1979-1980 at 160; 1970-1971 at 181.

You refer also to the requirements of law with regard to the deadline for filing notices of candidacy and completing the nomination process. I direct you to § 24.1-166, as amended by Ch. 480, Acts of Assembly of 1984, effective July 1, 1984, which contains provisions applicable to these concerns, and which states, inter alia, that the notice of candidacy by nonparty candidates shall be filed and nominations by political parties, other than by primary, shall be made and completed at least seventy-four days before a special election held at the same time as a November general election.

In summary, with respect to your principal question, the applicable provisions of the urban county executive form of government pertaining to filling a vacancy on the board of supervisors incorporate, by reference, the provisions of Title 24.1 pertaining to special elections. Those provisions require that the special election be held on a regular November general election day. If the vacancy occurs within sixty days of the November date, then the special election is held on the next following November. Under the
circumstances in which Fairfax County finds itself, the Code does not provide for an interim appointment, and to avoid such an interruption of representation, the board may wish to request the next session of the General Assembly to adopt legislation permitting interim appointments. Finally, whether a primary may be held will depend upon when the vacancy occurs.

1Note, that §§ 24.1-76 and 24.1-76.1 provide for the filling of vacancies on county governing bodies, but each applies only when "no other provision is made for filling the same." Because § 15.1-729 does provide for the filling of a vacancy on an urban county board of supervisors, neither of these two sections applies. See, e.g., Reports of the Attorney General: 1983-1984 at 102; 1979-1980 at 70.

2Note, that the procedure for filling the vacancy as discussed in the text would not apply if a vacancy should occur within one hundred and twenty days prior to the date of a regular election of the board, which in this instance next will be in November of 1987.

3The necessary conclusion that a vacancy may exist for over one year raises an interesting question of compliance with § 6 of Art. I of the Constitution of Virginia which provides, in part, "that all men...have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected...." I am unable to conclude, however, that such a situation would necessarily require a holding that §§ 24.1-163 and 24.1-1(5)(c), as so applied, would violate this important aspect of the Virginia Bill of Rights. See Duncan v. Town of Blacksburg, 364 F.Supp. 643 (W.D. Va. 1973), and Avens v. Wright, 320 F.Supp. 677 (W.D. Va. 1970).

The Board of Supervisors, however, may wish, to request the General Assembly to amend the pertinent portions of the Code to permit an interim filling of the vacancy pending the special election. See, for example, the last paragraph of § 15.1-623.

BOARDS OF SUPERVISORS. VACANCIES. FUNCTIONS OF OFFICE DURING VACANCY.

September 6, 1984

The Honorable Frank Medico
Member, House of Delegates

This is in response to your request for advice on the proper method for continuing the functions of office of a resigned member of the Fairfax County Board of Supervisors during the interim pending the November 6, 1984 special election to fill the vacancy.

In a memorandum from the county executive to the administrative assistant of the office of the district supervisor, the county executive set forth certain guidelines "in an effort to ensure continuity of service...." Among them were continuation of existing staffing, budgeting and operational levels. With respect to board items, the memorandum noted that another supervisor "has agreed to handle all necessary Board Items."

You ask the following questions:

"1. Does the County Executive have legal authority to designate a supervisor from another magisterial district to oversee and in effect, represent Mount Vernon District when that person was not elected by the Mount Vernon District voters?"
2. What is the legal responsibility of the Board Chairman for overseeing and representing the Mount Vernon District affairs until a Mount Vernon Supervisor is elected by the voters to fill the vacancy? The Board Chairman is elected by all county voters.

3. If the existing law is silent about this situation, what Code changes are necessary to insure that voters of a district are legally represented during the period when a supervisor's seat is vacant?

With regard to questions 1 and 2, the statutory responsibilities and authority of an urban county executive and the chairman of an urban county board of supervisors are set out, respectively, in §§ 15.1-738 and 15.1-729 of the Code of Virginia. It is to be noted that § 15.1-738 imposes upon the county executive the responsibility, subject to the board of supervisors, for "the proper administration of all the affairs of the county which the urban county board of supervisors has authority to control." Thus, it is clear that the county executive should take responsibility to manage the administrative affairs and staff assigned to a district office while the supervisor's office from that district is vacant, subject, of course, to the direction of the remainder of the board. Moreover, nothing in the law prohibits the county executive's efforts to coordinate the legislative needs of the district's constituents with another supervisor who has volunteered to attend to those items, and, subject to the board's guidance, this seems a desirable approach given the existing vacancy on the board. Thus, while the Code sections do not vest in the county executive or the board chairman the authority to succeed to the responsibilities of the vacant office or to designate someone else to do so, they may properly take certain steps to provide for continuity of services.

The principal functions of the governing body of a political subdivision are legislative in character, and those functions must be performed, collectively, by the officials elected for that purpose. There is no provision in the law governing the urban county executive form of government for interim representation on the board during a vacancy prior to the special election to fill the vacancy. See Opinion to the Honorable David T. Stitt, County Attorney for the County of Fairfax, dated July 9, 1984. In answer to your third question, in order to provide for continuation of district representation in the event of a vacancy, it will be necessary for the General Assembly to amend the applicable law for filling a vacancy on such board, in particular, to provide expressly for an interim appointment to the vacancy pending a special election to fill the vacancy for the unexpired term of office. Such is the case with boards of supervisors in other forms of county government.

1 Fairfax County operates under the urban county executive form of government, provision for which is made in §§ 15.1-722 through 15.1-740 and 15.1-754 through 15.1-791.

2 The legislative responsibilities of a board of supervisors are broad and include many items which are often perfunctory and noncontroversial. It is within the board's discretion whether it will consider items affecting only that district during the vacancy on the board. Nothing precludes the board, however, from requesting one of its members to review the items coming before it if the board concludes that this is an appropriate method to ensure continuity of service.
This is in reply to your request for my opinion concerning the legislative and representative functions of the remaining members of the Board of Supervisors of Fairfax County during the period when a vacancy exists on the Board due to the resignation of a member. Fairfax County operates under the Urban County Executive form of government, with a board of supervisors consisting of a member elected from each of the electoral districts in the county, plus a chairman elected at large. See § 15.1-729 of the Code of Virginia. One of the members elected from a district has resigned, and the resulting vacancy is to be filled in a special election scheduled for November 6, 1984. You express concern over the possible illegality of board actions affecting the unrepresented district during the interim period while the vacancy exists. You ask the following questions:

"1. Do the remaining board of supervisor members have legal authority to develop and present any and all legislative proposals for constituents of the district where a supervisor vacancy exists?

2. Does a supervisor of another magisterial district have the legal authority to develop and present any and all legislative proposals for constituents of the district where a supervisor vacancy exists?

3. Can the at-large member legally represent the constituents on any and all matters because he is elected by all voters of the county including the district where the supervisor vacancy exists?"

Section 15.1-729 provides, in pertinent part, as follows:

"The powers of the county as a body politic and corporate shall be vested in an urban county board of supervisors, to consist of one member from each district of such county to be known as the board of supervisors....In addition to the above members of the board of supervisors, there shall be elected a county chairman...by the qualified voters thereof....The chairman shall vote only in case of a tie but shall have all other rights, privileges, and duties of other members of the board and such other, not in conflict with this article, as the board may prescribe....A quorum shall consist of a majority of the board of supervisors and the chairman shall be included and counted." (Emphasis added.)

Section 15.1-730, relating to the general powers of the board of supervisors, reads as follows:

"The urban county board of supervisors shall be the policy determining body of the county and shall be vested with all rights and powers conferred on boards of supervisors by general law, not inconsistent with the form of county organization and government herein provided.

The urban county board of supervisors shall be the governing body of the urban county and of each of the districts established under article 6 (§ 15.1-787 et seq.) of this chapter for the provision of certain services to residents of such districts." (Emphasis added.)

Section 15.1-787 requires the division of the county into districts, five to eleven in number, with each district so constituted as to give, as nearly as practicable, representation in proportion to the population in the district. Section 15.1-787 further
provides as follows:

"These districts shall serve as (a) the electoral divisions for elections of members of the urban county board of supervisors, (b) sanitary districts under the provisions of article 7 (§ 15.1-791), and (c) shall have such other functions as are specified herein.

Each district shall have at least one of its residents who is a qualified voter of the district appointed to the local planning commission of the county and to the county school board. Each member of the county school board shall be appointed for terms and serve in accordance with all the provisions of § 15.1-770 of the Code of Virginia."

Section 15.1-727 provides as follows with respect to the applicability of general law to the board of supervisors of a county adopting an urban county form of government under Ch. 15 of Title 15.1:

"Except where inconsistent with this chapter, all provisions of law relating to boards of supervisors or governing bodies of counties shall refer to the urban county board of supervisors, to the extent that the term 'urban county board of supervisors' shall be synonymous with and equivalent to the board of supervisors referred to in general law insofar as the powers, duties and functions of such board are used in general law and all provisions of law relating to supervisors or members of the board of supervisors or governing bodies of counties shall refer to the members of the urban county board of supervisors to the end that the term 'supervisors' shall be synonymous with and equivalent to the members of the urban county board of supervisors." (Emphasis added.)

A provision of general law made thus applicable to the Board of Supervisors of Fairfax County is § 15.1-540, which provides, inter alia, that "[a]ll questions submitted to the board for decision shall be determined by a majority of the supervisors voting on any such question...." (Emphasis added.)

Returning to your inquiry, I first reiterate the statement contained in my Opinion to you on this subject dated September 6, 1984, that "[t]he principal functions of the governing body of a political subdivision are legislative in character, and those functions must be performed, collectively, by the officials elected for that purpose." (Emphasis added.) The statutory provisions set out above clearly vest all legislative authority of the county in the supervisors as a group, with the only limitation being that placed upon one member, the chairman, of having a vote only in the case of a tie. There is no procedural limitation upon the subject matter of questions which any board member may wish to introduce for legislative action, nor is there any such limitation on the board's authority to act upon any question which is placed before it. The statutes indicate that the board members are to act as a group on all legislative proposals presented, regardless of whether such legislation may affect only one district or the entire county, and regardless of the absence of a board member, provided a quorum is present. While § 15.1-787 requires district representation on the elected board, it does not in terms limit the power of the board to act on legislation which impacts a particular district in the event of failure of the district's representation by virtue of a vacancy, nor, in my opinion, may such a limitation be implied. Had the General Assembly intended such a result it could have said as much, but it did not.

Taking all of the above into consideration, in my opinion your first two questions must be answered in the affirmative. With regard to your third question, as I pointed out in my earlier Opinion to you, the board chairman (at-large member) does not have the authority under the statutes to succeed to the responsibilities of the vacant district supervisor's office. There is no provision in this instance for interim representation on
the board during a district vacancy pending the special election to fill the vacancy. On the other hand, there is nothing which prohibits the chairman, or any other board member, from volunteering to confer with residents of the unrepresented district and speaking on their behalf at board meetings in which items affecting their interests are discussed and acted upon by the board.

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1See §§ 15.1-722 through 15.1-740 and 15.1-754 through 15.1-791.

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BONDS. INTEREST. FORFEITURE OF BONDS IN CRIMINAL PROCEEDINGS. ONCE REDUCED TO JUDGMENT, TREATED LIKE ANY OTHER MONEY JUDGMENT IN FAVOR OF COMMONWEALTH.

November 28, 1984

The Honorable Dorothy A. Faulconer
Clerk, Circuit Court for Culpeper County

You have requested my opinion whether interest accrues on the judgment of a forfeited property bond in the same manner that interest accrues on any other criminal judgment for fines and costs. I have previously rendered an Opinion that interest may be allowed on costs reduced to judgment. See 1981-1982 Report of the Attorney General at 62. In that Opinion, I stated that where, by operation of statute, costs are merged into and constitute a money judgment, postjudgment interest may accrue.

Such statutory authority for accrual of interest on a forfeited bond is found in § 19.2-143 of the Code of Virginia, which states, in pertinent part, that upon a finding of forfeiture and default in payment, the judge "shall promptly transmit to the clerk of the circuit court of his county or city wherein deeds are recorded an abstract of such judgment as he may render thereon, which shall be forthwith docketed by the clerk of such court." (Emphasis added.) This language clearly establishes that forfeiture of a bond can be reduced to judgment. The Supreme Court of Virginia has said that "[t]he conditional obligation of the recognizance became an unconditional money judgment in favor of the State when final judgment was entered..." Jordan v. Commonwealth, 135 Va. 560, 570, 115 S.E. 569 (1923). Additionally, § 19.2-147 refers to the party against whom a bond forfeiture has been reduced to judgment as "the judgment debtor."

Accordingly, I am of the opinion that interest accrues on a forfeited bond from date of entry of the final judgment order in the particular case. As such judgment is for money, interest would accrue pursuant to the provisions of § 6.1-330.10.

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CITIES. CONTRACTS, CHARTERS, ORDINANCES.

August 3, 1984

The Honorable Robert W. Ackerman
Member, House of Delegates

This is in reply to your letter concerning an interpretation of §§ 15.1-840 and 15.1-926 of the Code of Virginia, § 23 of the Charter of the City of Fredericksburg, and § 2-60 of the Fredericksburg City Code, as they relate to the suspension and removal, and terms of employment, of the city manager. Your first question is:
"1. Does Section 23 of the City Charter regarding the suspension and removal of a City Manager override Section 15.1-926 of the Code of Virginia by virtue of Section 15.1-840 of the Code of Virginia?"

Section 15.1-840 is contained in Ch. 18 of Title 15.1. The provisions of that chapter apply to a particular city or town only when specifically made applicable by act of the General Assembly. See §§ 15.1-837 and 15.1-838; 1978-1979 Report of the Attorney General at 33. The selected provisions of Ch. 18, which have been made applicable to Fredericksburg through its charter, do not include § 15.1-840. Accordingly, that section has no effect upon the answer to your inquiry.

Similarly, § 15.1-926 is contained in Art. 4, Ch. 19 of Title 15.1 and applies only to cities which have duly adopted the optional form of government provided in Art. 4, pursuant to the procedures for change of form of municipal government set out in Ch. 20. See Reports of the Attorney General: 1982-1983 at 628 (n.2); 1978-1979 at 33; 1976-1977 at 161. I am not advised that Fredericksburg has adopted an optional form of government as provided in Art. 4 of Ch. 19. Assuming that Fredericksburg has not adopted the optional form, § 15.1-926 also has no effect upon the answer to your inquiry. Thus, in answer to your first question, § 23 of the Fredericksburg City Charter is controlling as regards the appointment, suspension and removal of the city manager.

Section 23 reads as follows:

"The council shall appoint a city manager, who shall be the chief administrative officer of the city. The manager shall be chosen by the council solely on the basis of his executive and administrative qualifications and need not, when appointed, be a resident of the city or State. The appointment of the city manager shall be for such term as may be fixed by the council. Before the city manager may be removed, he shall, if he so demands, be given a written statement of the reasons alleged for his removal and the right to be heard publicly thereon at a meeting of the council prior to the final vote on the question of his removal, but pending and during such hearing the council may suspend him from office. The action of the council in suspending or removing the manager shall be final, it being the intention of this charter to vest all authority and fix all responsibility for such suspension or removal in the council. In case of the absence or disability of the manager, the council may designate some qualified person to perform the duties of the office during such absence or disability."

Your second and third questions are based on an assumption that §§ 15.1-840 and 15.1-926 may apply. In light of the answer to your first question, it is unnecessary to consider your second and third inquiries.

Questions 4 and 5 relate to § 2-60E of the Fredericksburg City Code and the effect of subsequent amendment or repeal thereof. Whether the code provision modifies the charter provision, or constitutes an irrevocable part of the contract of employment, may be determined only after a disclosure of all contract documents and the complete understanding of the parties at the time of entering into the contract. I do not have before me all the evidence necessary to reach a definitive answer to those questions.

By long-standing policy, this Office does not express an opinion on the interpretation of local ordinances. See Reports of the Attorney General: 1977-1978 at 31 and 484; 1976-1977 at 17 (Attorney General does not interpret local ordinances or city codes). Accordingly, I am in no position to express an opinion on the applicability of the city code and the effect of any changes city council contemplates making in § 2-60E. I am not advised as to what such changes may be, nor the scope of § 2-60E in its present wording, nor the understanding of the parties as to the applicability of the city code to
the contract in question when it was made, many of which necessarily are matters for
local determination.

\[1\]The charter was enacted in Ch. 481, Acts of Assembly of 1942, and was amended, in
relevant part, in Ch. 45, Acts of Assembly of 1966 and in Ch. 664, Acts of Assembly of
1968.

CITIES. REGULATIONS. EXTERIOR LIGHTING REQUIREMENTS IN MULTI-FAMILY
APARTMENT COMPLEXES. REGULATION BY CITIES.

October 19, 1984

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

You have asked two questions: (1) whether the City of Alexandria has the
authority, as part of its zoning or site plan approval powers, to establish minimum
exterior lighting standards for new multi-family rental apartment complexes; and
(2) whether the city has the authority, under its zoning and land use, police or other
powers, to establish and enforce minimum exterior lighting standards for existing multi-
family rental apartment complexes. You indicate that your primary concern is that
portion of such complexes made up of recreation areas, grounds and parking areas. I
will answer your questions in the order in which they were asked.

Although you specifically limit your first question to the city's zoning and land use
powers, it is necessary that I first determine whether the requirements contained in the
Uniform Statewide Building Code preempt the city from requiring lights in recreation
areas, grounds, and parking areas. I find no provisions in the BOCA Basic Building
Code/1981 which pertain to exterior lighting generally or to lighting of recreational
areas or grounds. With respect to parking areas, subsection 622.6 of the BOCA Basic
Building Code/1981, which is a portion of S 622, pertaining generally to parking lots,
provides that "electric light wiring shall be provided to furnish adequate illumination of
driveways and lanes as required by the administrative authorities for street lighting but
such illumination shall not be less than 0.25 lumen per square foot (2.69 lumens/m²) of
parking area." This section clearly appears to contemplate some minimum lighting in
parking areas to such an extent as may be determined by the local officials.\[5\] Thus, it
does not appear from the terms of the Building Code that it precludes the exercise of
local authority in this area.

The conclusion that the Building Code does not preempt local authorities from
utilizing zoning power in this area is supported by an administrative interpretation from
O. Gene Dishner, Director of the Department of Housing and Community Development,
to the Honorable Bernard S. Cohen, dated September 28, 1983. Finally, the provisions of
the State Code make it apparent that the Building Code is not intended to supersede
zoning ordinances or land use controls, provided they do not affect the manner of
construction of a building or the materials to be used therein. See §§ 36-97(7) and 36-98
of the Code of Virginia.

Accordingly, I turn to the city's zoning authority and the pertinent provisions of
§ 15.1-489 which set forth the purposes of a zoning ordinance. Among the purposes of a
zoning ordinance is the need to provide for "convenience of access, and safety from...
other dangers...." In addition, a locality may "protect against one or more of the
following...danger and congestion in travel and transportation, or loss of life, health, or
property from fire, flood, panic or other dangers...." See § 15.1-489. As the Supreme Court of Virginia recently indicated in reviewing this section and provisions similar to it, the General Assembly has vested the legislative branch of local governments with wide discretion in the enactment and amendment of zoning ordinances. See City of Manassas v. Rosson, 224 Va. 12, 294 S.E.2d 799 (1982).

The failure of the State Code zoning provisions to mention specifically a particular subject which a local government wishes to regulate is not necessarily fatal to the local government's regulatory action. For example, in Peck v. Kennedy, Zoning Adm'r, 210 Va. 60, 168 S.E.2d 117 (1969), the Supreme Court of Virginia upheld a zoning ordinance which had the effect of prohibiting advertising by means of outdoor moving signs or devices such as pennants, although there is no specific mention of such a regulation in the Code. The Court noted that the local governing body had the benefit of a study on the effect of moving signs and pennants on safe driving, and the Court further indicated that this was a proper consideration under the county's zoning authority. Accordingly, the Court upheld the ordinance.

With respect to requiring lighting in new parking lots, it appears that there is a basis upon which city council may conclude that such a requirement would serve the public safety and enhance access during the evening hours when pedestrians might be in danger if they are moving through an unlighted parking lot. Nevertheless, while this would certainly appear to be a legitimate legislative goal, a locality's police power may not be utilized to regulate property interests unless the means employed are reasonably suited to the achievement of that goal. See City of Manassas v. Rosson, 224 Va. at 19-20. If the locality's zoning action is challenged in court by a prima facie case of unreasonableness, the locality must be able to meet the challenge with sufficient evidence of reasonableness to render the question fairly debatable. Fairfax County v. Southland Corp., 224 Va. 514, 523, 297 S.E.2d 718 (1982). Thus, while I believe that the city has the power in its zoning ordinance to address such a need as lighting in new parking lots, it is incumbent on the city to ensure that any requirements which it imposes are reasonably related, as a general proposition, to the problem which it seeks to cure.

The question of lighting in recreation areas and grounds adjoining apartment complexes generally is a much more difficult one. While it seems reasonable that a locality has the authority to address the need for the lighting of a sidewalk between the parking lot and an apartment building, or similar areas, I am of the opinion that it is doubtful that a locality would have the authority to impose upon an apartment owner requirements to light recreational facilities or other grounds generally. Such a requirement does not clearly fall within the authority vested in localities by the General Assembly, and any argument that such a power may be fairly implied from the existing statutes seems unnecessarily strained.

Turning to your second question concerning the authority to impose lighting requirements upon existing facilities, I am doubtful that such authority exists. The General Assembly has clearly protected vested rights and has provided for the continuation of nonconforming uses. See § 15.1-492. In light of this provision and because retroactive application of zoning ordinances is not favored generally, see Roach v. Board of Zoning Appeals, 175 Md. 1, 199 A. 812 (1938), I must conclude that the city does not have authority under its zoning ordinance to impose new minimum exterior lighting requirements on existing parking lots or other areas of existing apartment complexes which have gained the status of nonconforming uses.

1The BOCA Basic Building Code/1981 was adopted as a component volume of the Uniform Statewide Building Code by the Board of Housing and Community Development, effective July 16, 1982.
Because there is no definition of "parking lot" in the Building Code, it is not clear whether this provision applies only to independent, commercial parking lots, or to those which are a part of an apartment complex as well. If it pertains only to independent parking lots, it obviously would not preempt local authority regarding apartment parking lots. If it pertains to apartment parking lots, then, as indicated above, it apparently contemplates some degree of lighting in such lots and gives the authority to local administrators to determine how much.

CITIES AND TOWNS. REAL PROPERTY. VOTE OF THREE-FOURTHS OF COUNCILMEN OF FAIRFAX CITY REQUIRED TO SELL CITY PROPERTY; MAYOR NOT MEMBER OF COUNCIL PURSUANT TO CITY CHARTER.

July 13, 1984

The Honorable John W. Russell
Member, Senate of Virginia

This is in reply to your request for my opinion concerning the number of votes required for the Fairfax City Council to sell municipal property. You ask, specifically, whether the three-fourths requirement of Art. VII, § 9 of the Constitution of Virginia (1971) and § 15.1-307 of the Code of Virginia is based only on the six councilmen or on the six councilmen plus the mayor, in order to sell any of the city's public property.

Section 15.1-307 provides, in relevant part, as follows:

"The rights of no city or town in and to its...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 or to each branch thereof, when there are two, and under such other restrictions as may be imposed by law; and in case of the veto by the mayor of such an ordinance, it shall require a recorded affirmative vote of three fourths of all the members elected to the council or to each branch thereof, when there are two, had in the manner heretofore provided for in § 15.1-817 to pass the same over the veto." (Emphasis added.)

The answer to your inquiry turns on whether the mayor of Fairfax is a member of the city council. That, in turn, must be determined by reference to provisions of the city's charter touching on the matter, which are controlling. See Reports of the Attorney General: 1981-1982 at 397; 1980-1981 at 126; 1966-1967 at 316.

Section 3.1 of the Fairfax City Charter requires the periodic election of "six members of the Council and a Mayor...." Section 5.1 of the charter provides that "[t]he Council shall consist of six members elected as provided in Chapter 3." Section 5.2 provides that "[a]ll powers vested in the City shall be exercised by the Council except as otherwise provided in this charter," and goes on to list specific powers of council. The duties and powers of the mayor are set out separately in § 5.3; there is no indication in that section, or elsewhere in the charter, that the mayor is to be considered as a member of the council. Thus, although the mayor is invested with certain governmental and legislative powers and duties, including the duty to preside over council meetings, the power to vote in the case of a tie, and the power of veto, in my opinion the terms of the charter, nevertheless, require the conclusion that the mayor is not a member of the council. Compare 1980-1981 Report of the Attorney General, supra, at 128.

In answer to your inquiry, Art. VII, § 9 and § 15.1-307 require a three-fourths vote
of the six elected Fairfax councilmen to pass an ordinance authorizing the sale of any rights in the city's public property.

1Art. VII, § 9 states in like manner 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."

You note that the above-quoted constitutional provision uses the phrase "governing body" in place of the word "council," which was the word used in former § 125 of the Constitution of Virginia (1902), and which continues in use in § 15.1-307. This change in terminology in the 1971 constitutional provision does not affect the answer to the question presented here concerning the Fairfax City Council, and for these purposes "council" and "governing body" may be considered as interchangeable. Compare §§ 1-13.5, 15.1-6(3) and 15.1-7; compare also Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21 (1983).

The present charter was enacted in Ch. 319, Acts of Assembly of 1966, and has since been amended, in relevant part, by Ch. 12, Acts of Assembly of 1972 and Ch. 205, Acts of Assembly of 1984.

By way of contrast, see the former charter for the Town of Fairfax, enacted in Ch. 357, Acts of Assembly of 1954, which states in § 3(a) thereof that "[t]he government of the said town shall be vested in a town council, which shall be composed of a mayor and six councilmen...." (Emphasis added.)

CLERKS. ASSIGNMENT OF DEED OF TRUST MAY NOT BE RECORDED AS AUXILIARY DOCUMENT ATTACHED TO DEED OF TRUST.

October 17, 1984

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

You have asked for my opinion on three issues regarding certain recordation practices. First, you ask whether an assignment of a deed of trust is of such primary importance that it should be recorded separately or whether it is merely an auxiliary writing to be annexed to the deed of trust. Next, you ask whether a memorandum of a mechanic's lien, an affidavit and a notice of a mechanic's lien, filed pursuant to § 43-7 of the Code of Virginia, should be recorded as separate documents or whether the affidavit and notice are auxiliary to the memorandum and should be annexed to it for recording purposes. Finally, you ask whether a deed of trust with an addendum may be accepted for recordation where the grantor has signed both the deed of trust and the addendum but has acknowledged only the addendum.

The underlying issue involves the determination of what factors dictate whether a document is to be recorded individually or be annexed to another document. This issue was addressed in an Opinion found in the 1977-1978 Report of the Attorney General at 329. The facts there involved a real estate transaction where a power of attorney, an affidavit stating the power of attorney had not been revoked by death, and a contract of bargain and sale were to be recorded. The issue was whether the affidavit could be annexed to either the power of attorney or the contract of bargain and sale, or whether the three documents should be recorded separately. The Opinion focused on whether there was a specific statutory provision for recordation of each document, the formalities required to render the document valid, and the separate or joint nature of the
documents. The Opinion weighed these three elements to determine whether any of the documents in question could be considered a mere supportive paper of any other document. It was concluded that the legislature specifically provided for the recordation of each of the three documents. Both the power of attorney and the affidavit had the same authentication requirements, and the affidavit was no more a part of the deed of bargain and sale than the power of attorney. Based on these elements, the Opinion concluded it was reasonable to consider all three documents as separate instruments.

When the foregoing criteria are applied to a deed of trust and an assignment of the deed of trust, I must conclude that the assignment should be treated as a separate instrument. A suggested form of a deed of trust is set out in § 55-58, but no particular form is provided for an assignment. An assignment of a deed of trust obviously relies on and refers to the original deed of trust. It is, however, a different transaction and involves different grantors and grantees. The statutes specifically provide for recording a deed of trust. See §§ 17-60 and 55-58.1. An assignment of a deed of trust may be recorded pursuant to statutory authority by including the assignment within the phrase "all contracts in reference to real estate...." See § 17-60. Also, an assignment may be entered on the margin of the page where the deed of trust is recorded pursuant to § 55-66.1. Thus, the assignment document is of the same dignity as the deed of trust.1

In applying the 1977-1978 Opinion criteria to the mechanic's lien documents, the joint nature of the memorandum and affidavit clearly controls how they are to be recorded. Section 43-10 sets out the preferred form for the memorandum and affidavit. This form shows the two to be integral parts of one document. The affidavit refers to the memorandum and is a formal acknowledgment of the truth of the memorandum. On the basis of form, the affidavit is auxiliary to the memorandum and the two should be filed as one document. The notice, however, is a significantly different document which serves to advise the owner formally of the lien, while the memorandum serves to advise the public. The notice requires only the signature of the person asserting the lien, while the memorandum requires a notarized affidavit. Section 43-4 requires only that the memorandum and affidavit be recorded to perfect the lien. Section 43-7, dealing with perfection of a lien by a subcontractor, requires that the notice only be sent to the general contractor, not that it be recorded. Thus, based on all the 1977-1978 Opinion criteria, a notice, if recorded at all, would be an auxiliary document to a memorandum.

In response to your third question, § 17-59 provides, in pertinent part, that "[e]very writing authorized by law to be recorded...shall, when admitted to record, be recorded by...the clerk...." (Emphasis added.) Section 17-60 provides, in part: "All deeds, deeds of trust...which have been acknowledged as required by law...shall...be recorded in a book to be known as the deed book." (Emphasis added.) In the case posited by you, the deed of trust itself was not properly acknowledged; hence, it is not a recordable instrument, unless the instrument is proved as provided in § 55-106.

Section 55-106 reads as follows:

"Except when it is otherwise provided, the circuit court of any county, or the corporation court of any city, other than the city of Richmond, in which any writing is to be or may be recorded, and the Chancery Court of the city of Richmond, when any such writing is to be or may be recorded in such city, or the clerk of any such court, or his duly qualified deputy, in his office, shall admit to record any such writing as to any person whose name is signed thereto, except as provided in § 55-113 of the Code of Virginia, when it shall have been acknowledged by him, or proved by two witnesses as to him in such court, or before such clerk, or his duly qualified deputy, in his office, or the manner prescribed in §§ 55-113 to 55-115, 55-119 and 55-120, inclusive, and when such writing is signed by a person acting on behalf of another, or in any representative capacity, such acknowledgment before
such court or clerk, or his deputy, may be in accordance with the provisions of such sections."

You did not state whether the addendum to the deed of trust incorporated the deed of trust by reference. If it did not, the deed of trust cannot be recorded unless the signature is proved by two witnesses as provided in § 55-106. Where the addendum on its face incorporates the deed of trust by reference, however, the two instruments become an integrated document and the clerk is required to admit it to record if either is properly signed and acknowledged.

1It should be noted that a failure to record would result in a lack of notice to anyone other than the parties to the assignment.

CLERKS. BOARDS OF SUPERVISORS. MANDAMUS. COSTS. COUNTY GOVERNING BODY MUST FURNISH SUPPLIES AND EQUIPMENT TO CIRCUIT COURT CLERK PURSUANT TO § 15.1-19; MANDAMUS APPROPRIATE REMEDY; COURT DISCRETION TO AWARD COSTS IN MANDAMUS.

July 19, 1984

The Honorable Walton F. Mitchell, Jr.
Clerk, Circuit Court of Craig County

This is in reply to your request for my opinion concerning the requirement of § 15.1-19 of the Code of Virginia that county and city governing bodies furnish supplies and equipment for the use of clerks of courts of record. You ask whether § 15.1-19 entitles a clerk to relief in a situation where the budgeted sums for supplies and equipment have proven inadequate to operate the clerk's office in an efficient manner. You ask also what steps should be taken to obtain relief, if available, under the statute, and who would be responsible for any costs thereby incurred.

Section 15.1-19 reads as follows:

"The governing body of each county and city shall, at the expense of the county or city, provide suitable books and stationery in addition to supplies furnished by the State, for the use of clerks of all courts of record, together with appropriate cases and other furniture, for the safe and convenient keeping of all the books, documents and papers, in the custody of such officers and also official seals for such officers, when the same are required by law; and also such other office equipment and appliances, including typewriters and adding machines, as in their judgment may be reasonably necessary for the proper conduct of such offices."

A question substantially equivalent to that presented in the first part of your inquiry was considered in a prior Opinion of this Office, which held that, pursuant to § 15.1-19, a local governing body "may not refuse to pay for such supplies and/or equipment considered necessary by the clerk of the circuit court" for the proper functioning of the clerk's office. See 1974-1975 Report of the Attorney General at 66. The Opinion applied the ruling of Saville v. City of Richmond, 162 Va. 612, 174 S.E. 828 (1934), wherein the Court awarded mandamus to compel the city to provide record books to the Clerk of the Chancery Court of the City of Richmond, under the statutory predecessor to § 15.1-19. I am of the opinion that the ruling applies to your inquiry as well, and that accordingly, § 15.1-19 entitles a clerk to relief in a situation where the local governing body is not providing funds for supplies and equipment sufficient for the proper functioning of the...
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clerk's office. Whether the factual situation constitutes sufficient basis to conclude that your office cannot function properly is a question which the court must determine.

With regard to the second part of your inquiry, the appropriate remedy to seek under § 15.1-19 would be a writ of mandamus to compel the local governing body to fulfill the requirements of the statute. See Saville, supra. In such a proceeding, the court, in its discretion, may award costs to the prevailing party. See § 8.01-648; see also 1982-1983 Report of the Attorney General at 138.

CLERKS. DEPUTY CLERKS. NOT REQUIRED TO BE RESIDENT OF COMMONWEALTH.

July 24, 1984

The Honorable Edwina F. Mull
Clerk, Circuit Court for the City of Bristol

This is in response to your request for my opinion whether a deputy clerk for the circuit court may reside outside the Commonwealth of Virginia.

The Constitution of Virginia (1971) provides in Art. II, § 5:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

**

(b) the General Assembly may provide that residence in a local governmental unit is not required for election to designated elective offices in local governments, other than membership in the local governing body...."

As is apparent, the constitutional provision prescribes two basic requirements for holding elective office: one year's residence in Virginia and qualification to vote for the office. With respect to local elective offices, the General Assembly may relax the second requirement by providing that residing in the local government unit and, hence, eligibility to vote for the office is not mandatory. There is no provision for relaxing the first requirement for Virginia residence.

The statutory provision which implements the constitutional residency requirement is § 15.1-51. This section, as amended and reenacted by Ch. 711, Acts of Assembly of 1984, states, in pertinent part:

"Every county officer shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county....Every city and town officer except the town attorney shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment in such city or town unless otherwise specifically provided by charter.

B. Notwithstanding the foregoing provisions, and except as other provisions of law may require otherwise, nonelected officers of any county, city or town, and
nonelected deputies of constitutional officers, shall not be required to reside in the jurisdiction in which they are appointed."

A deputy clerk of a circuit court is a nonelected deputy of a constitutional officer; therefore, § 15.1-51(B) permits a deputy clerk to reside outside the local governmental unit in which he or she is appointed. Assuming a deputy must have the same qualifications to hold office as his principal, however, the first requirement of § 5 of Art. II of the Constitution, which is applicable to the clerk, is similarly applicable to the deputy. Accordingly, it is my opinion that a deputy clerk for a circuit court in Virginia may not reside outside the Commonwealth.

All prior Opinions rendered by this Office in which contrary conclusions were reached on both residency requirements in the Commonwealth and in the political subdivision, based upon § 15.1-51 prior to the 1984 amendments, or the Constitution of Virginia prior to the 1971 revision, are expressly overruled.

1 For purposes of this Opinion, deputies of constitutional officers will be considered officers due to their treatment as such by the General Assembly in § 15.1-51(B).

2 In the recent case of Bernal v. Fainter, 104 S.Ct. 2312 (1984), the Supreme Court of the United States declared unconstitutional a state law requirement of citizenship for notaries public. That decision does not disturb such a requirement in public offices closely related to the process of democratic self-government.


CLERKS. FEE FOR SUIT TO SELL LAND UNDER § 8.01-78. FEE PURSUANT TO § 14.1-113, NOT § 14.1-112(23).

August 10, 1984

The Honorable Samuel C. Winn
Clerk, Circuit Court of King and Queen County

You have asked whether the clerk's fee on a petition for the sale of land of a person under a disability pursuant to § 8.01-78 of the Code of Virginia is that provided in § 14.1-112(23) or in § 14.1-113.

Section 14.1-112(23) sets the fee for all court proceedings "for which no specific fee is provided by law...." Section 14.1-113 provides a specific fee for causes in chancery. The threshold issue is whether the cause is encompassed by § 14.1-113. See 1967-1968 Report of the Attorney General at 51.

A cause is encompassed by § 14.1-113 if two requirements are met. First, there must be the institution of a "suit." Second, the suit must be a "chancery" cause.

A petition filed under § 8.01-78 does institute a "suit." In Stone v. Caldwell, 99 Va. 492, 39 S.E. 121 (1901), the Supreme Court of Virginia held that an application to purchase property which is delinquent for the nonpayment of taxes is a "suit" because it involves the "issuance, service, and return of process...[and] judicial action on the part of the court." See 1971-1972 Report of the Attorney General at 387. These same functions are required for a cause brought under § 8.01-78; hence, such a cause is a "suit."

A suit for the sale of land of a person under a disability is governed by the
provisions of Art. 8, Ch. 3, Title 8.01. Section 8.01-68, a part of Art. 8, provides for relief in the circuit courts "in the exercise of their equity jurisdiction...." Consequently, suit instituted under § 8.01-78 is a chancery cause.

I am, therefore, of the opinion that the proper clerk's fee for a proceeding instituted under § 8.01-78 is that which is specified in § 14.1-113.

April 23, 1985

The Honorable Paul X Bolt
County Attorney for Grayson County

You have asked for my opinion regarding the fee to be charged by the clerk of a circuit court when a petition is filed pursuant to § 46.1-387.9:1 or § 46.1-387.9:2 of the Code of Virginia for the restoration of one's driving privilege by an individual who has been adjudged an habitual offender. Petitions filed pursuant to the above-mentioned sections, like petitions for writs of mandamus, prohibition, habeas corpus and quo warranto, are governed entirely by statute and are considered civil actions at law.1

Section 14.1-112 provides the fee schedule that the clerk of a circuit court is entitled to charge for services performed by virtue of his office. There is no statutory provision for a specific fee to be charged for filing a petition for the restoration of one's driving privilege. Section 14.1-112(23) authorizes a fee of ten dollars, however, "[f]or all services rendered by the clerk in any court proceeding for which no specific fee is provided by law...."

In light of the foregoing, it is my opinion that the clerk may charge a ten dollar fee for filing a petition for the restoration of one's driving privilege pursuant to § 46.1-387.9:1 or § 46.1-387.9:2.

January 11, 1985

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

You ask if a clerk of court is, by virtue of § 17-79 of the Code of Virginia, required to read an instrument in its entirety and determine the names in which it is to be indexed. Additionally, if my answer is in the affirmative, you ask what standards are prescribed to make a determination of the parties affected by the instrument.

Your inquiry is prompted by an earlier Opinion to you found in the 1982-1983
Report of the Attorney General at 403, in which I concluded that an instrument purporting to be an assignment of rights under a contract of sale of real estate should be indexed in the names of the assignees, as well as the assignor, even though the instrument was not signed and acknowledged by the assignees. The basis for that conclusion is § 17-79(1), which requires the indexing of the names of all parties appearing in an instrument which are shown to be affected by the instrument.

As stated in numerous prior Opinions, this Office has consistently held that a clerk is not responsible for determining if an instrument to be recorded is sufficient to meet the requirements of any particular provision of law. See, e.g., Reports of the Attorney General: 1983-1984 at 41; 1971-1972 at 65. Nevertheless, § 17-79(1) requires the clerk to index the names of all parties affected by an instrument to be recorded. Other subsections of § 17-79 specify the sufficiency of indexing in certain types of instruments. As indicated in my earlier Opinion to you, the language of § 17-79 cannot be taken literally, because there are instances in which it would be palpably absurd to index an instrument in the names of all persons mentioned therein which are in any sense affected by its terms. For that reason, I concluded that the index should be confined to those names which are clearly affected by the instrument.

Not all instruments which must be recorded are signed and acknowledged by all persons affected thereby. For example, persons whose names appear in an instrument for purposes of identification only may be, but are not necessarily, affected by the instrument. On the other hand, an instrument by which rights are transferred, assigned or conveyed to parties who are mentioned, although not signatories, clearly affects the interest of such parties.

In answer to your question, I am of the opinion that in order to comply with § 17-79, it is necessary for the clerk to read every instrument to determine if all the parties mentioned therein are affected by the instrument. There are no statutory standards prescribed for making that determination. I am, therefore, of the opinion that the clerk is required to use reasonable care to determine if all parties mentioned therein are in fact affected by the instrument.

CLERKS. RECORDATION. FEES FOR RECORDATION UNDER § 14.1-112(2).

December 26, 1984

The Honorable C. Richard Cranwell
Member, House of Delegates

You have requested my opinion on the maximum fees to be charged by the clerks of the circuit courts for recordation of instruments pursuant to § 14.1-112 of the Code of Virginia. In the fact situation which you described, the clerk charged thirteen dollars ($13.00) for the recording of a form deed of trust with one additional page. This fee was broken down by the clerk to include twelve dollars ($12.00) for recording the form deed of trust of less than three pages and one dollar ($1.00) for the extra page.

Section 14.1-112(2) provides that the clerk of a circuit court shall charge the following fees:

"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
In 1964, the General Assembly revised the Code by repealing Title 14 and enacting a new Title 14.1 governing costs, fees, salaries and allowances. Prior to that time, the clerk's fee for recording a writing in the proper book was three cents for every twenty words. See § 14-123(4) (1956 Repl. Vol.). The General Assembly then enacted § 14.1-112(2), which provided that a clerk shall charge a minimum of four dollars for recording a writing of up to three pages and one dollar for each page over three. No maximum was set. See Ch. 386, Acts of Assembly of 1964.

Section 14-123, which was repealed when Title 14.1 was adopted, in its prefatory sentence, stated that a "clerk of a circuit or other court of record may...charge the following fees...." (Emphasis added.) The permissive "may" was changed to the mandatory "shall" with the passage of Title 14.1. Moreover, the General Assembly in its 1964 revision added a final sentence to § 14.1-112 which stated: "The provisions of this section shall control the fees charged by clerks of courts of record for the services above described." (Emphasis added.) Most significantly, however, is the inclusion in subsection (2) of the word "minimum," which word is noticeably absent from other portions of § 14.1-112.

Based on the above, I am of the opinion that the intent of the General Assembly in passing § 14.1-112 was to limit in certain areas the discretion of a clerk in assessing fees. By use of the word "minimum," the General Assembly fixed a base fee applicable whenever the writing is more than one-half but less than three and one-half pages. See 1983-1984 Report of the Attorney General at 299. The provision of § 14.1-112(2) that permits a charge of one dollar per page for each page in excess of three and one-half pages vests a clerk with the power to charge a greater amount for longer documents.

While the General Assembly has thus made mandatory the charging of minimum fees, it has not placed a maximum on the fee charged under § 14.1-112(2) for recording. Desirable as uniformity may be, the General Assembly has not chosen to fix a uniform fee when applying § 14.1-112(2) other than as a minimum. I am, therefore, of the opinion that the clerk is limited only by the nine dollar minimum he must charge for recording and indexing an instrument having up to three and one-half pages.

CLERKS. RESIDENCE. ANNEXATION. CLERK OF CIRCUIT COURT COUNTY OR CITY OFFICER FOR PURPOSES OF §§ 15.1-51 AND 15.1-52; MAY CONTINUE IN OFFICE IF RESIDENCE ANNEXED TO CITY WHOLLY WITHIN COUNTY.

April 3, 1985

The Honorable John B. Davis
Clerk, Circuit Court of Augusta County

This is in reply to your request for my opinion whether a clerk of circuit court is considered to be a county or city officer for purposes of §§ 15.1-51 and 15.1-52 of the Code of Virginia. Your specific inquiry is whether the clerk for a county circuit court, whose residence is in an area to be annexed to a city wholly contained in the county, may continue as county court clerk after the annexation has taken place.

Section 15.1-51 provides, in pertinent part, as follows:

"Every county officer shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for
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which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county." (Emphasis added.)

Section 15.1-52 reads as follows:

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

In my opinion, a clerk of a county circuit court is a county officer for purposes of §§ 15.1-51 and 15.1-52. Cf. Reports of the Attorney General: 1972-1973 at 70; 1971-1972 at 66; 1962-1963 at 16; 1960-1961 at 36. However, the provision stated in the emphasized portions of those two statutes, quoted above, would apply to the facts you present. See Reports of the Attorney General: 1983-1984 at 73; 1974-1975 at 537.¹

Accordingly, your inquiry is answered in the affirmative.

¹I refer you also to § 15.1-1053, incorporating § 15.1-995, which provides that a county officer who resides in a territory annexed to a city may continue in office for so long as he is successively elected to the office held by him at the time of the transition.

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COLLEGES. EMINENT SCHOLARS PROGRAM. PRIVATE ENDOWMENT ELIGIBLE FOR STATE MATCHING FUNDS.

November 9, 1984

The Honorable Frank L. Hereford, Jr.
President, University of Virginia

You ask whether income from a proposed gift to a private tax-exempt foundation would be eligible for matching State funds under the Virginia Eminent Scholars Program.

You indicate that the foundation holds two separate funds: A "General Fund" and an "Eminent Scholars Fund." Assets of the General Fund may either be transferred to the Eminent Scholars Fund or be used for other charitable purposes, at the discretion of the foundation. Donors may also make gifts directly to the foundation's Eminent Scholars Fund. You further indicate that assets and earnings of the Eminent Scholars Fund may only be given to the University of Virginia for the exclusive purpose of attracting and retaining eminent scholars at the University, and may not be used for any other purpose or be returned to the General Fund.

Your specific question is whether income earned by the foundation Eminent Scholars Fund is eligible for matching funds from the State of Virginia as such income is applied to the salary of an eminent scholar at the University. For the reasons which follow, I answer your question in the affirmative.

Item 203 of the Appropriations Act (Ch. 755, Acts of Assembly of 1984) provides, in pertinent part, as follows:
"Eminent Scholars

Out of this appropriation sums are made available for attracting and retaining eminent scholars in institutions of higher education subject to the following conditions:

(1) These sums shall be apportioned, in accordance with plans approved by the Governor, to institutions of higher education, to equal the interest earned by endowment funds created for the purpose after June 30, 1966."

The purpose of the Eminent Scholars Program is to attract and retain eminent scholars in State institutions of higher education. To fulfill this purpose, there have been appropriated funds for apportionment among the institutions, to the extent available within the appropriation, "to equal the interest earned by endowment funds" created for this purpose. The legislation does not limit the endowment to one owned or controlled by the institution, so long as the endowment is created for the purpose of attracting and retaining such scholars.

This Office has also previously held that, in order for an endowment to qualify for matching funds, it is necessary for a donor to have created the endowment for the purpose of attracting and retaining eminent scholars. See 1977-1978 Report of the Attorney General at 26. This Office has further observed that eligibility for State matching funds is not limited to endowments owned or controlled by the University. See 1974-1975 Report of the Attorney General at 14. The central requirement is that the endowment be created exclusively for the purpose described above.

Accordingly, upon the facts you posit, I answer your inquiry in the affirmative.

COLLEGES AND UNIVERSITIES. COMPUTER SALES TO UNIVERSITY STAFF AND STUDENTS BY RELATED FOUNDATION.

June 18, 1985

The Honorable George F. Allen
Member, House of Delegates

You ask several questions regarding whether a State university can sell computers to its staff and students in competition with local retailers. Your question focuses upon the University of Virginia (the "University") and the University of Virginia Alumni Patents Foundation (the "Foundation"). I understand that the University is not itself engaged in such sales. I am informed that the Foundation actually sells the computers to such individuals after entering into contracts with the manufacturers. Consequently, the status of the Foundation must be analyzed in order to answer your questions with respect to the sales transactions.

The Articles of Incorporation of the Foundation show that it is a separate, nonprofit corporation chartered under the laws of the Commonwealth, and that it has tax-exempt status under § 501(c)(3) of the Internal Revenue Code. The Foundation is organized solely for charitable, scientific and educational purposes for the exclusive benefit of the University, and the articles permit the Foundation to engage in all lawful activities incidental to its stated purposes.

I answer your questions seriatim, as follows:

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"1. Can State universities and colleges sell computers and related equipment to staff, students and employees for personal use in competition with the local market and vendors?"

As noted above, the sales transactions under consideration are those of the Foundation, and I assume your question goes to that organization. Given that context, I know of no general statutory provision enacted by the General Assembly which would prohibit such sales. My research has revealed nothing in statutory or case law which would prohibit such sales by a nonprofit foundation organized to benefit a university.

"2. If the foregoing question is in the affirmative, then under what guidelines must such [foundations]...operate in making such sales?"

Because the Foundation is a nonprofit corporation, not a State institution, it need only comply with the laws that govern such corporations.

"3. Do competitive bidding and the Virginia Public Procurement Act apply in this matter?"

Because the procurement of the equipment involves a private foundation and not the Commonwealth of Virginia, I answer this question in the negative.

"4. Is it proper and legal for a separate business entity to take the name of the University of Virginia and operate a business for University related individuals only, in competition with other local vendors?"

I know of no prohibition against the Foundation's using the name of the University, provided the University has given its consent. I am advised that the University protects the use of its name, logos and mottoes through a strict licensing policy. I understand further that the Foundation uses the University's name with the consent of the University.

1 I understand that there are no cross-directors or officers serving the University and the Foundation, and the University has no power of control over the Foundation.

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

June 18, 1985

The Honorable George W. Grayson
Member, House of Delegates

You ask whether an individual, under the following set of facts, would be eligible for in-state tuition rates at Virginia's public institutions of higher education:

The individual was born and educated in Virginia and is a graduate of a Virginia university, has never been employed--other than in the military--outside of Virginia, has consistently paid Virginia taxes, is a registered Virginia voter, holds a Virginia driver's license, whose automobiles have been purchased and registered in Virginia, has declared Virginia on a State of Legal Residence Certificate (DD Form 2058); but who, until a short time before commencement of the academic year, was on active United States military assignment in a foreign country.
Eligibility for in-state tuition rates is governed by § 23-7.4 of the Code Virginia. In general, an independent student must establish that he or she has been domiciled in Virginia for a period of at least one year prior to the first official day of class within a term, semester or quarter of the student's program. See § 23-7.4(A) and (B).

"Domicile" is defined in § 23-7.4(A) to mean:

"[T]he present, fixed home of an individual to which he returns following temporary absences and at which he intends to stay indefinitely. No individual may have more than one domicile at a time. Domicile, once established, shall not be affected by mere transient or temporary physical presence in another jurisdiction."

Determination of one's domicile must be made on a case-by-case basis, with the burden on the student to establish factually such eligibility clearly and convincingly. See § 23-7.4(B), which also states as follows in that regard:

"In determining domiciliary intent, all of the following applicable factors shall be considered: continuous residence for at least one year prior to the date of alleged entitlement, state to which income taxes are filed or paid, driver's license, motor vehicle registration, voter registration, employment, property ownership, sources of financial support, location of checking or passbook savings accounts and any other social or economic relationships with the Commonwealth and other jurisdictions. Domiciliary status shall not ordinarily be conferred by the performance of acts which are auxiliary to fulfilling educational objectives or are required or routinely performed by temporary residents of the Commonwealth. Mere physical presence or residence primarily for educational purposes shall not confer domiciliary status.

Those factors presented in support of entitlement to in-state tuition shall have existed for the one-year period prior to the date of the alleged entitlement."

On the facts you present and assuming the absence of any other pertinent facts which would indicate that the individual has abandoned Virginia domicile, or that he has not continuously maintained such status in Virginia during the requisite one-year period, I am of the opinion that the individual you describe ordinarily would be eligible for in-state tuition rates. Nonetheless, the facts pertinent to the individual's residence outside the Commonwealth must be evaluated to determine whether a new domicile has been established during the one-year period.

I reiterate that the burden is on every student to clearly and convincingly establish his Virginia domicile. The responsibility is initially on the institution to evaluate the pertinent facts and determine eligibility. Virginia law requires that each institution provide the student denied eligibility with an administrative appeal. If the student, upon exhausting administrative review, continues to be dissatisfied with the institution's determination of ineligibility, Virginia law further provides for review in the State circuit courts. See § 23-7.4(H). This Office is not in a position to make binding determinations of eligibility for in-state tuition.

1 An independent student is one "whose parents have surrendered the right to his care, custody and earnings, have ceased to support him, and have not claimed him as a dependent on federal and State income tax returns for at least twelve months prior to the date of the alleged entitlement." Section 23-7.4(A).
The Honorable William H. Shaw, III
Commonwealth's Attorney for Gloucester County

This is in reply to your letter in which you request my opinion as follows:

"(a) whether or not the Board of Supervisors of a county can require the payment of rent as a condition of its providing office space to a part-time Commonwealth's Attorney for the discharge of his duties because the latter also engages in the private practice of law there; and

(b) whether or not a part-time Commonwealth's Attorney can require the governing body to reimburse him for facilities (furniture, equipment, etc.) he provides to the extent he uses them in discharging his public duties." 

With regard to your first inquiry, § 15.1-257 of the Code of Virginia provides, in pertinent part, as follows:

"The governing body of every county and city shall provide... upon request therefor, suitable space and facilities for the attorney for the Commonwealth to discharge the duties of his office. The costs thereof and of the land on which they may be and of keeping the same in good order, shall be chargeable to the county or city."

(Prior Opinions of this Office hold that this section, and § 15.1-258, impose a mandatory duty upon the local governing body to furnish office space to the Commonwealth's attorney for the discharge of his duties of office. See Reports of the Attorney General: 1980-1981 at 378; 1971-1972 at 110. The statutes make no distinction between those attorneys who serve full-time versus those who serve part-time. Once the space is allocated to the Commonwealth's attorney's office, the governing body thereafter cannot control how it is used. Compare Reports of the Attorney General: 1964-1965 at 15 (board of supervisors has no control over commissioner of accounts occupying space assigned to him under § 15.1-258 and he may conduct private practice of law therein); 1959-1960 at 54 (number of hours part-time Commonwealth's attorney spends in office assigned to him for the discharge of his public duties solely within his discretion). See generally 1978-1979 Report of the Attorney General at 56 and 289 (elected constitutional officers not subject to control and jurisdiction of local governing body in the operation of their respective offices).

No express authority is given a board of supervisors to demand the payment of rent for office space required to be made available to public officers pursuant to §§ 15.1-257 and 15.1-258. I think it implicit in the statute, however, that the governing body is required to furnish only the space and facilities necessary to accommodate the Commonwealth's attorney in the discharge of his official duties. Moreover, with the approval of circuit court, any vacant rooms in the courthouse remaining after space is assigned to those officers specified in § 15.1-258 may be rented, pursuant to § 15.1-259. Taking all of the above into consideration, it is my opinion that the board of supervisors may not require the payment of rent as a condition of its providing office space to a part-time Commonwealth's attorney for the discharge of his public duties. The governing body may demand rent for space devoted to the Commonwealth's attorney's private law practice, to the extent that such space is identifiable separately from the space assigned to him for his public duties, subject to the requirements of § 15.1-259.
With regard to your second inquiry, the expenses of office of a Commonwealth's attorney are set by the State Compensation Board and are paid, ultimately, entirely out of the State Treasury, pursuant to §§ 14.1-50, 14.1-51, 14.1-64 and 14.1-65. Section 14.1-65 provides, as follows, with regard to payment of such expenses:

"Whenever a county or city attorney for the Commonwealth...purchases office furniture, office equipment, office appliances...stationery, office supplies, postage, data processing services, printing, advertising, telephone or telegraph service, or repairs to office furniture and equipment in conformity with and within the limits of allowances duly made and contained in the then current budget of any such officer under the provisions of Articles 7 (§ 14.1-48 et seq.) and 8 (§ 14.1-53 et seq.) of this chapter, the invoices therefor, after examination as to their correctness, shall be paid by the county or city directly to the vendors, and the State shall monthly pay the county or city the State's proportionate part of the cost of such items on submission by such officer to the Compensation Board of duplicate invoices and such other information or evidence as the Compensation Board may deem necessary." (Emphasis added.)

Purchases made by the Commonwealth's attorney which are paid for by the county and reimbursed by the State are for items consumed or utilized in the Commonwealth's attorney's official functions. Section 14.1-65 does not contemplate a rental payment to the Commonwealth's attorney for property which he may wish to utilize in the office. In my opinion, both parties are equally bound by the above-quoted provisions, and the Commonwealth's attorney may not require anything of the county governing body in the way of payment of his office expenses other than that set out in § 14.1-65, which does not appear to contemplate reimbursement as you suggest.

1 As you point out, because Gloucester County's population does not exceed 35,000, you are not required to devote full time to your public duties, and you may engage in the private practice of law. See § 15.1-50.1.

2 Section 15.1-258 provides, in part, as follows: "The governing body of each county and city shall, if there are offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, attorney for the Commonwealth,..."
board of supervisors; however, the decision on whether to fund a particular highway project rests with the Department of Highways and Transportation.

I am unaware of any statutory obligation on the county attorney to become involved in a State highway condemnation proceeding. It is my opinion that a Commonwealth's attorney/county attorney is not prohibited by Virginia law from representing a client in condemnation proceedings, unless the county is a party or has a financial interest in the proceeding. In the facts presented by you, it does not appear that the county has an interest in the proceeding instituted by the State. You should be aware, however, of the possible appearance of impropriety which the situation could create.

Although there appears to be no question of a violation of § 2.1-607 of the Code of Virginia, I draw your attention to §§ 2.1-602 and 2.1-610, portions of the Comprehensive Conflict of Interests Act. Additionally, care should be exercised to avoid possible violation of the Code of Professional Responsibility whenever the interests of two clients may be in conflict. The Virginia State Bar should be consulted on this question.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. DISCLOSURE AND DISQUALIFICATION. MEMBER OF GOVERNING BODY EMPLOYED AS SCHOOL TEACHER. SECTION 2.1-610 REQUIRES DISQUALIFICATION IN TRANSACTION INVOLVING SCHOOL BOARD APPOINTMENTS.

February 22, 1985

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You have requested my opinion whether a member of a county board of supervisors, who is also a regularly employed teacher in the county school system, may participate in the selection and appointment of members of the county school board. This situation is governed by § 2.1-610(A) of the Code of Virginia, a part of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act").

The primary thrust of § 2.1-610(A) provides that an officer or employee of an agency of government is required to disqualify himself from participating in any transaction on behalf of the agency when "(i) he has a personal interest in the transaction and (ii) the transaction has specific application to his personal interest."2

Your inquiry brings into focus, for the first time since the enactment of § 2.1-610 in 1983, the applicability of that section and repealed § 2.1-352, the forerunner to § 2.1-610, to a member of the governing body who is also a school teacher.

It has been the consistent position of this Office in applying § 2.1-352 that a distinction exists in matters involving members of governing bodies who are employed as teachers generally, as opposed to persons employed at a higher level or in a position where school board decisions affect only a few employees. See Reports of the Attorney General: 1982-1983 at 684, 699, 704; 1978-1979 at 304; 1977-1978 at 480; 1970-1971 at 436; 1969-1970 at 310.

In addition, § 2.1-610(A), in giving an example of a transaction having specific application,3 appears to recognize that a person who is a member of a large class may have an interest affected by a transaction without falling within the prohibition of the section. As the Code section states, "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."

If it were not for the recent decision of the Supreme Court of Virginia in the case of *West v. Jones*, 228 Va. 409, 323 S.E.2d 96 (1984), I would accept the prior Opinions of this Office and the language of § 2.1-610(A) as being dispositive of your question. The *West* opinion, however, appears to construe the Code language differently and, as a decision of the Supreme Court of Virginia, must be regarded as controlling.

The *West* decision considered the applicability of § 2.1-610 to a member of city council participating in the selection and appointment of members of the city school board while employed as a school principal. The Court held that the principal had a personal interest in the appointment to the school board which may benefit or suffer from his participation in the transaction, and that the appointment was a matter which had a specific application to his interest.

Having determined that a personal interest existed in the transaction and that the transaction had specific application to the principal's personal interest, the Court stated: "As we construe the language of the new provision, a public servant whose interest is 'involved' in a transaction may participate in that transaction only when his interest is one limited to that which he shares in common with other members of the public at large." 228 Va. at 417, 323 S.E.2d at 101. This reading of the statutory distinction between a transaction of specific application and one which affects the general public is clear, even though it seems to transform the phrase "affects the public generally" into a larger concept.

Despite the fact that in *West* the Court was considering a transaction involving a "principal" as opposed to a "teacher," I am constrained to conclude that the Court would likely have reached the same result if the member of council had been a teacher.

While it is likely undisputed that school boards generally in Virginia employ principals and teachers utilizing a fixed pay scale and do not individually negotiate salaries with principals and teachers, the parties in *West* had stipulated that the board had the power to change policies and, if it saw fit, could give individual raises. The Court used that fact to support its conclusion that the principal had a personal interest in the transaction which could benefit or suffer from his participation in the transaction.

I am not advised whether the School Board of Rockbridge County negotiates salaries individually with school teachers, as opposed to using the fixed scale approach, or if it has exercised the power to change the policies relating to salaries of teachers and grant individual raises, as was stipulated was legally permissible in *West*. It is clear, however, that any local school board possesses that authority by virtue of the Constitution of Virginia and general law. Article VIII, § 7 of the Constitution of Virginia (1971) vests the supervision of schools of each division in the local school board. Sections 22.1-295 and 22.1-296 empower the board to employ and place teachers, as well as to provide for their payment. I must, therefore, assume that each board could negotiate individual salaries with teachers if it is so inclined.

In view of the construction of § 2.1-610 by the Court in *West*, the distinction heretofore drawn by this Office between principals and teachers, involving those who are also members of the governing body, is of doubtful validity in transactions involving appointment of school board members. Accordingly, because of the *West* opinion, I must conclude that a court, following the reasoning of that opinion, would hold that a member of a county board of supervisors, who is also a regularly employed teacher in the county...
school system, may not participate in the selection or appointment of members of the county school board.

Section 2.1-610 reads, in pertinent part, as follows: "[E]ach officer of local governmental agencies, including members of the governing bodies of counties, cities and towns, and local advisory agencies, and each employee of local governmental agencies and local advisory 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 a transaction of specific application and his disqualification shall be noted in the records of the agency. As used in this section, '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. For example, an amendment to a zoning map affecting fewer than ten parcels of land is a transaction having specific application to a person who has a personal interest in one of the parcels and is not a general transaction."

"Personal interest in a transaction" is a defined term in § 2.1-600, and insofar as here relevant, means a personal and financial benefit or liability accruing to an officer or employee in any matter considered by his agency.

Section 2.1-610(A) provides, in relevant part: "For example, an amendment to a zoning map affecting fewer than ten parcels of land is a transaction having specific application to a person who has a personal interest in one of the parcels and is not a general transaction."

By implication, a zoning amendment affecting a substantially larger number of parcels would be of general application.

COMPREHENSIVE CONFLICT OF INTERESTS ACT. GENERAL ASSEMBLY. MEMBER OF LAW FIRM MAY FURNISH LEGAL SERVICES TO STATE COLLEGE OR UNIVERSITY UNDER CERTAIN CONDITIONS.

February 18, 1985

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

You ask whether it is permissible for a law firm, in which a member of the General Assembly is a partner, to perform legal services on an hourly fee basis for a State college or university. Your question focuses solely upon the Comprehensive Conflict of Interests Act and not upon other statutes pertaining to obtaining legal services, such as § 2.1-122 of the Code of Virginia.

Section 2.1-604, a portion of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act"), reads, in part, as follows:

"(B) No member of the General Assembly shall have a personal interest in a contract with any governmental agency of the executive or judicial branches of state government, other than in a contract of regular employment, unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as defined in § 11-37 of the Code of Virginia."

Insofar as here relevant, a "personal interest," which is prohibited in the foregoing
section, means a personal and financial benefit accruing to the member of the General Assembly by reason of his interest in the law firm. Assuming that the partner has an interest in the partnership exceeding three percent of the total equity, or annual income in excess of $10,000, including dividends and interest income, the partner would have a "personal interest" in the entity.

The probative question is whether the member's interest in the partnership gives him a "personal interest in a contract" with a governmental agency in the executive branch of State government. A "personal interest in a contract" is also defined in § 2.1-600, and 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." Thus, the member would have an interest in any contract between his firm and any governmental agency.

Any contract entered into by the law firm, in which the member is a partner, with an agency of the executive branch of State government is permissible if such contract is awarded as a result of competitive sealed bidding or competitive negotiations, as defined in § 11-37 (the Virginia Public Procurement Act). Conversely, if the contract is entered into for legal services by the educational institution without competitive sealed bidding or competitive negotiations, the member of the General Assembly would have an interest in a contract which is prohibited by § 2.1-604(B).

I have examined the various exceptions in the Act to determine if any are applicable to the situation posited by you. Section 2.1-608 provides several exceptions to the prohibitions in § 2.1-604, but only one appears to be applicable to the contract here in question. Subsection (A)(6) of § 2.1-608 exempts "[c]ontracts for the purchase of goods or services when the contract does not exceed $500." Hence, any contract between the law firm and the college or university, not exceeding $500, in the aggregate, will not be affected by the provisions of § 2.1-604, even though competitive sealed bidding or competitive negotiation is not utilized in the procurement.

The fact that the service here involved is to be furnished on an hourly fee basis does not remove the contract from the ambit of § 2.1-604. The determinative factor is whether the contract between the firm and the governmental agency contemplates services which will exceed $500. While the $500 threshold amount applies to each contract individually, each hour's work is not a separate contract. Bearing in mind the legislative admonition in § 2.1-599 that the Act is to be "liberally construed to accomplish its purpose and any exception or exemption to its applicability shall be narrowly construed," I am of the opinion that the hourly fee basis for payment must be viewed only as the method of paying for the service to be performed by the law firm. If the work to be performed will likely exceed $500 in hourly fees, the contract falls outside the exception to the prohibition in § 2.1-604 and cannot be undertaken by the member's firm in the absence of competitive sealed bidding or competitive negotiations.

To summarize, assuming the member has a "personal interest" in the law firm, as that term is defined in § 2.1-600, I am of the opinion that: (1) the member would have a personal interest in a contract between his law firm and any State college or university; (2) the contract is prohibited by § 2.1-604(A), unless (a) the contract is awarded as a result of competitive sealed bidding or competitive negotiations, or (b) the contract for services does not exceed $500, even though entered into without competitive sealed bidding or competitive negotiations; and (3) an hourly fee basis for paying for legal services does not remove the prohibition if the total cost exceeds the $500 exception in § 2.1-608(A)(6).
"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. 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, firm, 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." Section 2.1-600.

CONSOLIDATED LABORATORY SERVICES. MAY CHARGE FEES FOR LABORATORY TESTING ONLY UNDER CERTAIN CIRCUMSTANCES.

August 1, 1984

The Honorable George W. Grayson
Member, House of Delegates

You ask whether the owner of a twenty-five lot mobile home park must pay to the Division of Consolidated Laboratory Services of the Department of General Services (the "Department") service fees for drinking water testing.

The Department 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 1983-1984 Report of the Attorney General at 161.

Item 68 of § 1-29 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." (Emphasis added.) Inasmuch as no general fund appropriations are applicable to drinking water testing for local governments and commercial water companies, the Department is authorized to charge fees for services provided to these entities.

Because the term "commercial water companies" is not defined in the Appropriations Act or in any other provision of the Code, it must be given its ordinary meaning. The term commercial water company connotes an entity in the business of supplying water as a service and for profit. It does not, in my opinion, encompass an owner of a mobile home park even though that owner supplies water incidental to lot rental. Such a water system is a waterworks as defined in § 32.1-167 of the Code and subject to regulation by the State Board of Health. Had the General Assembly intended for the general fund appropriations not to be applicable to testing drinking water samples from such a source, it would have used the term "waterworks."

Because the Department may charge service fees only where no general appropriation has been made and only testing services for local governments and commercial water companies were excluded from the general fund appropriation, it is my opinion that the Department is not authorized to charge for analysis of drinking water samples for a mobile home park owner. I do note, however, that there is no Code provision which would require the Department to conduct the testing itself; such testing may be done by private laboratories. See § 2.1-429(4).
Section 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:

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


The term "water company" is used, but not defined in §§ 56-261 and 56-261.1.

CONSTITUTION. ARTICLE II, § 5. RESIDENCY REQUIREMENTS FOR LOCAL GOVERNING BODY.

September 5, 1984

The Honorable G. C. Jennings
Member, House of Delegates

You have noted the provisions of § 15.1-51 of the Code of Virginia which permit a district officer to reside in any incorporated town located within his district. In light of this provision, you have asked "where a town includes parts of two or more districts, may a district officer reside in any part of the town or must he reside in that part of the town included in the district for which he was elected?" You advise that the district officer in question is a member of a county board of supervisors.

Article II, § 5 of the Constitution of Virginia (1971) provides:

"The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

**

(b) the General Assembly may provide that residence in a local governmental unit is not required for election to designated elective offices in local governments, other than membership in the local governing body...." (Emphasis added.)

The two requirements enunciated by the foregoing provisions are (1) one year's residence in Virginia and (2) qualification to vote for the office sought. With respect to elective offices in local government, the General Assembly may not relax the second requirement by removing the residency requirement for membership on the governing body. Consequently, I am of the opinion that a member of the county board of supervisors residing in a town partly included in two or more magisterial districts must reside in that portion of the town which is situated in his magisterial district.

If the district officer is nonelected and no provision of law would require otherwise, § 15.1-51(3) would apply and the officer would be permitted to reside outside the local governmental unit. See 1984-1985 Report of the Attorney General at 40.
CONSTITUTION. DUE PROCESS. WELFARE FRAUD. MIRANDA WARNINGS NOT NECESSARY FOR FRAUD INVESTIGATIONS BY LOCAL SOCIAL SERVICE EMPLOYEES.

September 27, 1984

The Honorable Joseph R. Caprio
Commonwealth's Attorney for King William County

You have asked whether the warnings required pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), are applicable in alleged welfare fraud cases which are investigated by a county department of social services through its director and employees pursuant to § 63.1-124 of the Code of Virginia.

In Miranda the Supreme Court of the United States set forth rules of police procedure applicable to "custodial interrogation." The Court further defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

In Beckwith v. United States, 425 U.S. 341 (1976), the Court held that statements made by a taxpayer to internal revenue agents during the course of a noncustodial interview in a criminal tax investigation were admissible against him in the ensuing criminal tax fraud prosecution even though he was not given warnings required by Miranda. The Court reasoned that although the focus of the investigation may have been on the taxpayer when he was interviewed, it was not the equivalent of questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. 425 U.S. at 347. In Oregon v. Mathiason, 429 U.S. 492 (1977), the Court further held that Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody," and "[i]t was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited." 429 U.S. at 495. (Emphasis in original.)

Although § 63.1-124 places the burden on the superintendent to enforce the provisions thereof, there is nothing in the statutes which confers upon the superintendent the power to arrest or detain an individual suspected of welfare fraud. Fraud investigation interviews by social service employees are noncustodial; hence, Miranda warnings are not required by the Constitution of the United States. See 15,844 Welfare Recipients v. King, 474 F.Supp. 1374 (1979). I am, therefore, of the opinion that the director of a local department of social services or his or her employees may question a person whom they suspect of fraud without giving the Miranda warnings.

1Section 63.1-124 reads, in part: "Whoever obtains, or attempts to obtain, or aids or abets any person in obtaining, by means of a willful false statement or representation, or by impersonation, or other fraudulent device, assistance or benefits from other programs designated under rules and regulations of the State Board of Social Services or State Board of Health to which he is not entitled shall be deemed guilty of larceny, and upon conviction, shall be punished accordingly. Willful failure to notify the Department of change in conditions which could result in a reduction or termination of assistance or benefits received hereunder shall constitute a violation of this section. It shall be the duty of the local superintendent or the Commissioner of Health to enforce the provisions of this section and he shall cause a warrant or summons to be issued for each violation of
The Honorable Laurie Naismith  
Secretary of the Commonwealth  

You have asked whether the decision of the Supreme Court of the United States in Bernal v. Fainter, 104 S.Ct. 2312 (1984), affects § 47.1-4(ii) of the Code of Virginia.

Section 47.1-4 reads as follows:

"Each person appointed and commissioned as a notary shall be (i) at least eighteen years of age; (ii) a citizen of the United States and a registered voter in the state of his residence; and (iii) able to read and write the English language. No person who has ever been convicted of a felony...shall qualify to be appointed....A nonresident of Virginia may be appointed only if he is regularly employed in this Commonwealth and if such appointment will be necessary or useful to him in such employment."

In the case of Bernal v. Fainter, supra, the Supreme Court declared unconstitutional Texas Civil Statute Ann. Art. 5949(2) (Vernon), which requires that a notary public be a citizen of the United States and the State of Texas. The Court held that the citizenship requirement violates the Fourteenth Amendment to the United States Constitution, in that it discriminates on the basis of alienage. The Court applied the "strict-scrutiny" test, which means that in order to withstand an attack, a state statute which discriminates on the basis of nationality must advance a compelling state interest by the least restrictive means available.

In prior cases, the Court has held that an exception to the strict-scrutiny standard is the "political function" rule that applies to laws which exclude aliens from positions which are closely related to the process of democratic self-government. See Cabell v. Chavez-Salido, 454 U.S. 432 (1982). To qualify as a political function exception, the position must have policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. The Court found the political function exception inapplicable to the Texas statute. The Court held that while there is a critical need for the notary's duties to be carried out correctly and with integrity, the position of notary is essentially clerical and ministerial, as opposed to a position which has policymaking responsibility or broad discretion.

Virginia notaries, like those of Texas, are empowered to take acknowledgments, administer oaths, certify copies of documents, and perform other similar functions. See § 47.1-12. I am unaware of any material distinction between the Texas and Virginia statutes by which the Virginia statute could be brought within the narrow exception to the strict-scrutiny test.

Similarly, the requirement that a Virginia commissioned notary be a registered voter in the state of his residence is also inherently suspect and subject to strict scrutiny because, indirectly, it too imposes a requirement of citizenship. I am unaware of any theory by which such a requirement could be justified as a political function which is
closely related to the process of democratic self-government and thereby withstand the strict-scrutiny test.

In view of the foregoing, I am of the opinion that the portion of the Virginia statute concerning citizenship, like the Texas statute, cannot withstand a court challenge. Accordingly, because of the clear holding of the Supreme Court of the United States, I am constrained to conclude that the provisions of § 47.1-4, which require applicants for a commission as notary to be a citizen of the United States and a registered voter in the state of his residence, are no longer enforceable. I also conclude that the Texas decision does not affect the remaining portions of § 47.1-4 and the requirement regarding references. Accordingly, those provisions should still be enforced.

1An applicant for appointment as a notary must submit certain references in order to be considered. See § 47.1-5.

CONSTITUTION. SCHOOLS. LOCAL SCHOOL BOARD HAS BROAD SUPERVISORY POWERS GRANTED BY CONSTITUTION OF VIRGINIA.

November 23, 1984

The Honorable J. Granger Macfarlane
Member, Senate of Virginia

You ask whether a local school board may establish a short-term disability benefit plan for its employees. In return for voluntary contribution of a predetermined number of sick days, participating employees disabled for more than twenty working days may opt to receive normal sick leave, if available, or special benefits under the proposed plan. The special benefit would provide 67% of regular pay from the 21st through the 120th working day of the disability. After using the special benefit, employees may requalify, but only through contribution of two sick days for each day the special benefit was paid.

The supervisory authority of local school boards is set forth at Art. VIII, § 7 of the Constitution of Virginia (1971). The scope of supervisory powers granted therein is not defined. Although broadly written, the general supervisory authority is not plenary. See, e.g., Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977), in which the Supreme Court of Virginia observed, "[t]he general power of school boards to supervise does not necessarily include the right to deal with the labor relations of employees in any manner...unfettered by legislative restriction." 217 Va. at 576, 232 S.E.2d at 41. The Arlington County decision reaffirmed the longstanding legal principle that, like all local governing bodies, "[s]chool boards...constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other..." (citing Kellam v. School Board, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960)).

Moreover, Art. VIII, § 4 places the overall supervision of Virginia's system of public schools in the Board of Education. The Board of Education has the primary responsibility and authority for effectuating educational policy to promulgate regulations. See Art. VIII, § 5(e); § 22.1-16 of the Code. Accordingly, the exercise of supervisory powers by a school board must be compatible with Board of Education policies or duly promulgated regulations. See Opinion to the Honorable George R. St. John, dated July 10, 1984.
The Board of Education has promulgated and, from time to time, amended a regulation entitled "State Sick Leave Plan for Teachers." Bylaws and Regulations of the Board of Education, p. 91 (Rev. 1980). In an inquiry similar to yours, this Office construed that regulation as it appeared in 1975. See 1975-1976 Report of the Attorney General at 311. At that time § X of the regulation provided that "State sick leave funds cannot be used for employment of substitutes for teachers unless such regular teacher is actually sick and cannot report for work...." (Emphasis added.) Based upon the Board regulation, this Office opined that the Portsmouth School Board could not establish a "sick leave bank" through which a voluntary donation of sick days would be available for other school personnel with exhausted leave benefits.

The disability plan you outline is similar to the Portsmouth plan. However, its permissibility must be reviewed with respect to the current 1980 revision of the Board of Education regulation which deleted the crucial § X referenced above. The 1980 regulation retains a provision that leave must be based upon personal illness (§ III), but now does not require that the teacher, against whom the sick leave is charged, be the person who is unable to report to work. Section VI provides that "[l]ocal school boards may adopt supplementary rules and regulations, not in conflict with these regulations...."

I am of the opinion that a local school board may adopt a voluntary, short-term disability plan based upon pooled sick leave, supplementing the Board of Education's sick leave regulations, and not in conflict therewith. Because there would be no conflict with existing regulations, the power to adopt the plan would be within the local school board's authority under Art. VIII, § 7 of the Constitution. I do advise that any plan expressly be limited to available, appropriated funds.

CONSTITUTIONAL LAW. COLLEGE MAY REFUSE TO DISPLAY PAINTING WITHOUT VIOLATING FIRST AMENDMENT IF REASONS LEGITIMATE AND NOT BECAUSE OF MESSAGE COMMUNICATED.

August 8, 1984

The Honorable Charles J. Colgan
Member, Senate of Virginia

You ask whether the refusal of Mary Washington College to permit the exhibit of an artwork containing the visible remains of a five month old human fetus in a saline solution constituted censorship. I understand that the work in question was presented by an artist for showing at an art exhibit sponsored by the college on its premises. Your correspondence indicates that the artwork was purposefully designed, and submitted to the art exhibit, in order to convey the artist's pro-life message on the controversial issue of abortion.

Manifestly, your inquiry raises the issue of whether the college violated the "free speech" rights of the artist. For the reasons which follow, I am unable to conclude definitively that the college violated the First Amendment to the United States Constitution.
As a general principle, expression regarding the subject of abortion clearly implicates First Amendment guarantees of free speech. Bigelow v. Virginia, 421 U.S. 809 (1975). It is firmly recognized, however, that not all expressive activity, even on controversial matters of clear public interest such as abortion, is absolutely protected by the Constitution. The constitutional analysis requires a careful consideration of all relevant factors including an examination of the governmental interest or purpose at stake, the manner in which the expression is conducted, and the special characteristics of the environment within which the expressive activity would occur. Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Heffron v. Int'l Soc. for Krishna Conc., 452 U.S. 640 (1981).

As a threshold consideration, I am unable to determine from the information provided whether the art exhibit was designed or operated as a "public forum." A public forum has been recognized by the United States Supreme Court as a place where government property has been dedicated or is traditionally open to the public for assembly and discussion of controversial issues. In such places, the college's authority to suppress a particular message is limited. United States v. Grace, 103 S.Ct. 1702 (1983). Once access is granted to the public for general advocacy purposes, whether on social, political, religious or ideological subjects, government may not selectively discriminate on the basis of the speaker's position without compelling justification. Carey v. Brown, 447 U.S. 455 (1980). Conversely, until a First Amendment forum is established, the college may uniformly deny all advocacy activity on its property. Perry Ed. Ass'n. v. Perry Local Ed. Ass'n., 103 S.Ct. 248 (1983).

Accordingly, merely because the art exhibit in this case was conducted on public property, or the artist permitted to use the property for a specific purpose, does not by itself convert the art exhibit into a public forum for advocacy of beliefs. Until a First Amendment forum has been created by the college, the college may properly deny all advocacy activity thereon so long as such restriction is uniformly and consistently applied. The college, no less than a private owner of property, has the right to preserve the property under its control, and to permit only such use or uses compatible with the authorized activity provided; of course, the control is not premised upon the ideology or beliefs of the speaker. Perry, supra, at 955. See also Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (no public forum found for purposes of political speech on public transit vehicles, although commercial advertisements and public service announcements permitted).

It may well be that the college's action was not predicated on the artist's "pro-life" message, but upon legitimate factors, such as the quality of the art and medium utilized, independent of the position advocated. I recognize that such factors as artistic suitability and quality are inherently subjective or judgmental in nature; however, the Constitution does not preclude judgment on such factors. Board of Education v. Pico, 457 U.S. 853 (1982) (government may remove books from public school libraries on factors independent of ideology, such as, educational suitability and appropriateness to the purposes).

The news article you provided suggests that the college refused to allow the display of the given artwork on its premises out of concern for the legality of the artist's use of the fetus. The Virginia General Assembly has enacted comprehensive legislation governing the use and distribution of dead bodies and organs. See § 32.1-288, § 32.1-291 et seq. In general, these statutes require that bodies be properly interred, or, under controlled circumstances, set aside for scientific training and research by designated institutions. The legislation itself does not expressly refer to a human fetus as a dead body, nor has the Supreme Court of Virginia shed any light on that issue with respect to these enactments. Nonetheless, while the legislative intention may be debated, the college's concern for the legality of the use of a fetus as an art medium is not only
1 Much of the details of this matter was provided in a newspaper report attached to your general inquiry. It would be imprudent to adjudicate a constitutional violation on the basis of hearsay reports.
2 The inquiry does not indicate clearly the nature and purpose of the exhibit; the guidelines or standards determining which art would be exhibited; whether the showing was a profit venture and whether participation was limited in any manner. Because of the absence of all pertinent facts, the constitutional analysis is necessarily limited.

I suspect that a speech on abortion by the artist, or anyone else, at the exhibit would have been beyond the intended and authorized purpose of the art show.

4 In Pico, the Court stated: "Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended (emphasis by court) by their removal decision to deny respondents access to ideas with which petitioners disagreed and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Pico, supra, at 171. (Emphasis added.)

5 It goes without saying that government may regulate the distribution of dead bodies, as well as human fetuses. The overriding public interest in controlling decomposition, avoiding disease and moral outrage over the use thereof, is sufficiently compelling to withstand First Amendment challenge.

**CONSTITUTIONAL LAW. COLLEGES AND UNIVERSITIES. HOUSE BILL 482, REQUIRING SELECTIVE SERVICE REGISTRATION AS CONDITION FOR ELIGIBILITY TO ATTEND STATE-SUPPORTED INSTITUTIONS OR TO APPLY FOR STATE TUITION AID, NEITHER BILL OF ATTAINDER NOR VIOLATIVE OF SELF-INCRIPTION OR LIBERTY INTEREST PROTECTION.**

August 6, 1984

The Honorable Stanley C. Walker  
Member, Senate of Virginia

You have asked generally whether House Bill 482, introduced at the 1984 Session of the General Assembly, is constitutional. The bill provides that those persons federally required to register with the Selective Service System must do so or be ineligible to attend any State-supported institution of higher education in Virginia and to receive State tuition assistance grants. You specifically inquired whether the bill (1) impermissibly constitutes a bill of attainder, (2) violates a nonregistrant's Fifth Amendment right against compelled self-incrimination, or (3) works an unlawful infringement of a nonregistrant's liberty interest, without substantive and procedural due process safeguards.

When the bill was introduced, it provoked considerable debate over its constitutionality. Part of the debate focused upon a lawsuit styled Selective Service System v. Minnesota Public Interest Research Group, which challenged a federal law which denied federal financial assistance to students enrolled in postsecondary education programs if the students failed to comply with the registration requirements of the Military Selective Service Act. Indeed, the United States District Court which ruled on that case concluded that the federal statute constituted an unconstitutional bill of attainder and, therefore, issued a nationwide injunction against its enforcement. In light
of that ruling, it was appropriate for the legislature to consider the constitutional questions raised about the proposal.

As your inquiry noted, the Selective Service case was appealed to the Supreme Court of the United States. Because of the obvious similarity of the issues in the federal case to the issues raised by H.B. 482, I deferred opining on the constitutionality of H.B. 482 because of the possibilities that the Supreme Court would issue a definitive decision which could conclusively resolve the difficult legal issues at hand.

The Supreme Court has now decided the Selective Service case, 52 U.S.L.W. 5140 (July 5, 1984), and it is appropriate that I respond to your inquiry. Based upon the Supreme Court's opinion, I must conclude that H.B. 482 is constitutional.

The Supreme Court's recent ruling in Selective Service upholds the constitutionality of the federal legislation which, as stated above, provides that any person who is required to register and fails to do so shall be ineligible for any form of federal financial assistance provided under Title IV of the Higher Education Act of 1965. 20 U.S.C. § 1070 et seq. The federal law further requires applicants for such assistance to file a statement with their institution of higher education attesting to their compliance with the draft registration law and implementing regulations. The pertinent regulations governing compliance with Title IV require a certification of compliance but do not require any applicant, including one who has failed to register, to state the date of compliance. 34 C.F.R. § 668.27(b)(1).

The Supreme Court's analysis of the statutory and regulatory effect disclosed no violation of the constitutional bar to bills of attainder or compelled self-incrimination under the Fifth Amendment. Additionally, the Court briefly raised and dismissed the issue of whether the federal law violated the equal protection clause. The applicability of these holdings to House Bill 482 is discussed below.

**Bill of Attainder**

A bill of attainder is generally understood as a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group without a judicial trial. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In Selective Service, the Court reasoned that the federal statute was not an impermissible attainder, because (1) its purpose was to encourage draft registration rather than to punish, (2) there was no singling out of a narrow group or individual, and (3) there was no irreversible determination of guilt because a nonregistrant who sought aid could comply and regain eligibility even after notification of his denial. It is my view that the Supreme Court's rationale is equally applicable to House Bill 482. Accordingly, I am of the view that House Bill 482 does not constitute an impermissible bill of attainder. I do note that House Bill 482, as drafted, does not provide for late compliance with the draft registration law. The defensibility of the bill would be strengthened by adding language removing ineligibility once registration has occurred, notwithstanding failure to register within the time limits required by federal law.

**Fifth Amendment**

The Supreme Court held that the federal statute does not violate the Fifth Amendment for two reasons. The Court observed that a person who has not registered is under no compulsion to register for aid. The Court stated, "since a non-registrant is bound to know that his application for federal aid would be denied, he is in no sense under any 'compulsion' to seek that aid." Selective Service at 5144. Also, under federal law, a student seeking federal aid is not required to disclose the date of his compliance. Likewise, nonregistered Virginians are under no legal compulsion to seek admission to State-supported institutions or to apply for financial aid. In addition, like the federal
requirement, House Bill 482 would not require that the date of registration compliance be disclosed. Finally, the bill does not require the students to file any statement of compliance. Accordingly, I am of the opinion that the bill does not violate the Fifth Amendment bar to compelled self-incrimination.

Due Process

Your third inquiry concerned whether the bill might infringe upon a liberty interest in attending a State college or receiving aid. Of course, the Fifth and Fourteenth Amendments provide that a valid liberty interest may not be denied without due process of law. I am of the view that the bill does not infringe upon any such liberty interest in violation of due process. I am unaware of any United States Supreme Court decision recognizing a fundamentally guaranteed right to attend an institution of higher education. In the landmark decision, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37 (1973), the Court held: "We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive." Moreover, because the bill itself does not discriminate unlawfully against any protected class, the legislative purpose will be judicially sustained so long as there is a rational basis therefor. The rationale for the legislation is self-evident: promoting registration, a matter in which both the federal government and the Commonwealth have an interest.

Preemption

There remains one additional constitutional consideration not examined by the Supreme Court in Selective Service, to wit: the doctrine of preemption. Because Selective Service addressed a federal statute, the Court did not have occasion to consider when a state enactment may further, or interfere with, the standards established by Congress. In Brown v. Hotel and Restaurant Employees, et al., 52 U.S.L.W. 5042 (July 2, 1984), the Supreme Court reaffirmed the basic principle that preemption occurs when (1) Congress expressly mandates preemption of state law, (2) Congress has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject, or (3) when state law conflicts with federal law.

It is my view that House Bill 482 is not preempted by existing federal legislation. The proposed state law may exist side by side in an area where Congress has chosen to act. The congressional action does not compel a finding that Congress has opted to totally occupy a field. "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." NYS Dept. of Social Services v. Dublino, 413 U.S. 405, 421 (1973). "It will not be presumed that a federal statute was intended to supersed the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." Schwartz v. Texas, 344 U.S. 199, 202 (1952). "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

All of these principles counseling against preemption are even more persuasive where the state statute is harmonious with the federal statute, and in an area where the state has traditionally maintained a strong, deeply-rooted interest. San Diego Unions v. Garmon, 359 U.S. 236 (1959), Florida Avocado Growers, supra; DeCANAS v. BICA, 424 U.S. 331 (1978). And this is so even where Congress has developed a pervasive and complex system of regulation. Id.
In this particular situation, one cannot make a persuasive argument that Congress intended to occupy the entire field of regulation leaving no room for state participation. Congress did not indicate any attempt to regulate admission to state universities in these cases and certainly states traditionally control the admissions criteria to their respective institutions of higher education.

As the law of preemption discloses, the judiciary will not preempt state laws enacted in traditional areas of local regulation, such as admission criteria to institutions of higher education, absent a clear expression of congressional intent displacing state regulation. Because such intent does not exist in the federal law, and because the bill may exist harmoniously with the federal law, I conclude that House Bill 482 is not preempted.

Accordingly, for the foregoing reasons, I am of the view that House Bill 482 is constitutionally defensible. Nonetheless, I would encourage amendatory language as noted previously.

1The bill was carried over to the 1985 Session of the General Assembly by the Senate Committee on Education and Health which you chair.
2The language of House Bill 482, as it presently exists, is set forth below in its entirety. The relevant language is emphasized: "§ 23-9.2:3. Power of governing body of educational institution to establish rules and regulations; offenses occurring on property of institution.--(a) In addition to the powers now enjoyed by it, the board of visitors or other governing body of every educational institution shall have the power:

(1) To establish rules and regulations for the acceptance of students except that individuals who have not complied with the federal requirement to register for the selective service shall not be eligible to attend any state-supported institution of higher education: however, nothing contained herein shall require any state-supported institution of higher learning to determine the registration status of any individual, until such time that the noncompliance of an individual attending the institution is brought to the attention of the institution; to establish rules and regulations for the conduct of students while attending such institution; and to establish rules and regulations for the dismissal of students who fail or refuse to abide by such rules and regulations.

(2) To establish rules and regulations for the employment of professors, teachers, instructors and all other employees and provide for their dismissal for failure to abide by such rules and regulations.

(3) To provide parking and traffic rules and regulations on property owned by such institution.

(b) Upon receipt of an appropriate resolution of the board of visitors or other governing body of an educational institution, the governing body of a political subdivision which is contiguous to the institution shall enforce state statutes and local ordinances with respect to offenses occurring on the property of the institution.

§ 23-38.12. Program of tuition assistance established.--There is hereby established, from funds provided by law, a program of tuition assistance in the form of grants, as hereinafter provided, to or on behalf of bona fide residents of Virginia who attend private, accredited and nonprofit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate, graduate, or professional education and not to provide religious training or theological education. Individuals who have not complied with the federal requirement to register for the selective service shall not be eligible to receive these grants. The State Council of Higher Education shall not be required to determine the registration status of any individual, until such time that the noncompliance of an individual seeking a grant is brought to the Council's attention. Unless otherwise indicated, as used in this chapter "accredited" means any institution approved to confer degrees pursuant to § 23-265 of the Code of Virginia."
Article VI, § 2 of the Constitution of the United States provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land...."

CONSTITUTIONAL LAW. FREE SPEECH. STATUTORY PROHIBITION (§ 54-184) AGAINST USE OF TRADE NAME IN PRACTICE OF DENTISTRY.

April 16, 1985

The Honorable Joseph B. Benedetti
Member, House of Delegates

You have asked several questions concerning the interpretation of § 54-184 of the Code of Virginia as it pertains to the practice of dentistry under a firm, trade or assumed name.¹

You first ask whether § 54-184, to the extent that it prohibits a licensed dentist or dental professional corporation from utilizing a trade name or assumed name, violates the First Amendment guarantees of free speech.

In 1979, the Supreme Court of the United States upheld the constitutionality of a state-imposed prohibition on the use of trade names in the case of Friedman v. Rogers, 440 U.S. 1 (1979). There, the Court found a Texas law prohibiting optometrists from using trade names to be a valid exercise of the state's police power, notwithstanding earlier Court decisions which held that the First Amendment protects truthful "commercial speech." See Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976). The Court, after discussing the specific history of the abuse of trade names by Texas optometrists, concluded that, although the specific trade name in question had not been shown to be deceptive or misleading, its use could nonetheless be prohibited, inasmuch as it was "an example of the use of a trade name to facilitate the large-scale commercialization which enhances the opportunity for misleading practices." Friedman, supra, 440 U.S. at 15.

Three years later, the Court in In Re R.M.J., 455 U.S. 191 (1982), reaffirmed the "commercial speech doctrine" which it had developed in a series of cases over the preceding five years relating to state regulation of professions and the imposition of discipline. The Court summarized generally that the First Amendment protects truthful commercial speech, except where the advertising is inherently misleading or has been proven in practice to be misleading. Id. at 203. The Court also noted that states retain the authority to regulate communication (advertising) that is not misleading, so long as the state can assert a substantial interest and demonstrate that the interference is in proportion to the interest served. Id. at 203, citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

In Central Hudson, the Court developed a four-part analysis to be applied in commercial speech cases. That analysis includes:

(1) a determination of whether the expression is protected by the First Amendment;

(2) whether the asserted governmental interest is substantial.

If the preceding two questions are answered affirmatively, then one must determine:
whether the regulation directly advances the governmental interest asserted; and

whether it is not more extensive than is necessary to serve that interest.

The Court cautioned, however, that this test, while applicable to the advertisement of professional services, is to be applied with the understanding that the special characteristics of professional services afford opportunities to mislead and confuse, which are not present when standardized products or services are offered to the public. In Re R.M.J., supra note 15, at 203.

The reliance upon use of the four-part analysis, suggested by the Court in In Re R.M.J. and in Central Hudson, appears specifically applicable to the use of trade names in the practice of dentistry. As the Court in Friedman stated:

"A trade name is...a significantly different form of commercial speech from that considered in Va. Pharmacy and Bates....Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public."

Friedman, 440 U.S. at 12.

Following the Court's decision in In Re R.M.J., there have been two federal court decisions which address the constitutionality of state statutes which prohibit the use of a trade name by a dentist. The first, Baker v. Registered Dentists of Oklahoma, 543 F.Supp. 117 (W.D. Okla. 1982), upheld the constitutionality of the state statute which prohibited the use of trade names by dentists on the basis of its potential for abuse. The second case, Gutstein v. McDermott, 554 F.Supp. 966 (M.D. Pa. 1983), involved a constitutional challenge to a statute prohibiting the use of trade names by dentists. The court, in the context of determining whether it should abstain from exercising jurisdiction upon the constitutional issue, rejected the state's argument that trade name prohibitions unequivocally withstand constitutional challenges. The court concluded that the broad prohibition authorized by Friedman v. Rogers "was not intended to sweep so broadly," id. at 973, and stated its belief that the Supreme Court's decision in Friedman was based on the considerable history of deception and abuse in Texas.

Statutes enacted by the General Assembly are presumed to be valid and constitutional. On the basis of the foregoing analysis and in the absence of any specific facts in your letter upon which to evaluate the potential overbreadth of § 54-184, I must, therefore, conclude that the aforesaid statute is, on its face, constitutional.

You next ask whether the statute prohibits a dentist or professional corporation from utilizing his own or its own true name in conjunction, or in association, with a trade or assumed name and, if so, whether such is constitutional. The language of this statute is clear and does not permit a trade name to be used in conjunction with the dentist's true name. As indicated in response to your first question, in the absence of specific facts to evaluate the potential overbreadth of § 54-184, I must also conclude that the aforesaid statute is, on its face, constitutional.

You then ask, assuming that § 54-184 is constitutional, whether a dentist or dental corporation may practice in a building designated by the landlord with a commercially familiar name. Given the facts you have described, there would be no attempt to
practice, offer, or undertake to practice or hold oneself out as practicing, under a trade name as prohibited in § 54-184. Accordingly, such a practice, in my opinion, would not violate the statute.

The last question is whether the practice of dentistry in a building designated by the landlord with a commercially familiar name violates § 54-184 if the dentist merely identifies his or its practice in advertising in printed material as being located at that building (i.e., John Doe, D.D.S., located at the Dental Arts Building, North A Street, Richmond, Virginia). The information, so long as it conveys only the specific geographic location of the dentist's practice, such as the street or mailing address, would not appear to violate § 54-184, so long as it is not used in a false, misleading or deceptive manner. I am of the opinion that the facts as presented would not violate § 54-184.

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1Section 54-184 provides: "No person shall practice or continue to practice dentistry, or offer or undertake to practice, or hold himself out or continue to hold himself out as practicing dentistry, under any firm name or trade name or under any other name than his own true name; provided, that nothing herein contained shall prohibit the practice of dentistry by a partnership under a firm name containing nothing but the name of every member of such partnership. Nothing herein contained shall prohibit a licensed dentist from practicing dentistry as the employee of a licensed dentist, practicing under his own name or under a firm name, containing only the names of each member of such firm, or as the employee of a professional association organized and existing under the Professional Association Act...or...the Professional Corporation Act...provided, however, that the name of any such professional association or professional corporation shall contain the true name or last name of each associate or shareholder member and any other words designating its legal status as may be required by law, but no other words other than the initials D.D.S. or D.M.D. following the true name or last name of each associate or shareholder member so qualified."

I note that practitioners of many professions in Virginia are not prohibited from utilizing trade names. A history of the problems, if any, in Virginia, associated with the use of trade names in professions, may be determinative of the ultimate outcome of this question, and that history has not yet been compiled. As the court suggested in the Baker case cited above, however, it may not be necessary for a state to actually experience or "relive" the problem before it utilizes its police power to protect its citizens against the potential problem.

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CONSTITUTIONAL OFFICERS, BUDGETS. BOARD OF SUPERVISORS NEED NOT GIVE FORMAL NOTICE OF PUBLIC HEARING ON BUDGETS TO CONSTITUTIONAL OFFICERS AS LONG AS REQUIREMENT OF GENERAL NOTICE MET.

May 30, 1985

The Honorable Harry O. Tinsley
Sheriff for Madison County

You have asked whether a county board of supervisors must give formal notice to constitutional officers of the public budget hearing on their respective budgets or whether a reference to the meeting in a newspaper article will suffice.

The financing of constitutional offices is the subject of a comprehensive scheme set out in Title 14.1 of the Code of Virginia. This title includes provisions relating to the determination of salaries, expenses, manner of payment, and to the proportional amounts to be borne by the Commonwealth and by the localities.1 Sections 14.1-51 and 14.1-52
provide for notice to constitutional officers (excluding the clerk of court) and local
governing bodies of meetings of the State Compensation Board and appeals from
decisions of the Compensation Board. Once the Compensation Board has determined the
appropriate level of funding for a constitutional office, a local governing body may not
approve a budget for the operation of that office which appropriates for salaries,
expenses and other allowances less than the statutorily mandated proportion of the
amount approved by the Compensation Board. Reports of the Attorney General:

A local governing body has discretion, however, in providing a supplement to the
compensation of a constitutional officer or his deputies. Section 14.1-11.4 reads:

"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."

Various types of notice of the board of supervisors' actions or meetings are required
under Title 15.1. Sections 15.1-162 and 15.1-162.1 require publication of general notice
of any public hearings on the approval of the county budget or amendments thereto. If
the board of supervisors is to act by ordinance, § 15.1-504 requires that general notice be
published. I am unaware of any provision of Title 15.1, however, which requires the
board of supervisors give individual, formal notice to constitutional officers of the public
hearing on their respective budgets.

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1, requires
that information as to the time and place of each meeting of a local governmental body
be furnished to any citizen who has requested such information. See § 2.1-343. If you, or
any other constitutional officer, requests notice of the board of supervisors' meeting,
then the board of supervisors is required to furnish such notice.

In answer to your inquiry, it is my opinion that while the legislature has acted to
require general notice of certain types of public hearings, it has not acted to require
specific notice to constitutional officers before acting on budget matters which affect
them.

You also asked whether a conflict of interests exists under the Comprehensive
Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Act"), when an off-duty
deputy sheriff polices a ball game or other sporting event for which he is compensated by
the management of the park or other private party, rather than through the sheriff's
department.

Section 2.1-632 provides for the rendering of advisory opinions by the
Commonwealth's attorney regarding situations which may give rise to a violation of the
Act. In the event the opinion of the Commonwealth's attorney should conclude that a
violation would occur, the individual involved is free to appeal that decision for a review
by this Office. Accordingly, I suggest you direct this inquiry to the Commonwealth's
attorney for an advisory opinion pursuant to § 2.1-632.

1See Ch. 1, Title 14.1, "Salaries and Expenses of Office."
The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville

This is in reply to your letter concerning travel regulations established by the City of Martinsville. In response to an earlier inquiry from you on the same subject, I opined that you may not be required to comply with local travel regulations which interfere with the performance of your duties or restrict your maximum travel allowance below the budgeted expenses and allowances for your office as fixed by the State Compensation Board.

You now state that your travel allowance is paid entirely by the city and is not approved by the Compensation Board. Upon inquiry, I have learned that you do not include a travel allowance in your expense requests to the Compensation Board and that, instead, the city provides you with travel funds outside your Board-approved budget. You ask whether, under these circumstances, you must comply with city travel regulations or whether the responsibility to regulate your office travel expenditures rests entirely with you after city council approves your travel budget.

As I stated in my earlier Opinion to you, the State Compensation Board's decision in fixing expense allowances for a constitutional officer, unless overturned on appeal, is binding upon the locality and may not be altered in the local budgetary process or otherwise by local regulation. This principle clearly may not be extended to include expense allowances provided entirely at the local level which have not been subjected to review and approval of the Compensation Board. Moreover, § 14.1-7 of the Code of Virginia provides that any person traveling on county, city or town business "wherein no part of the cost is borne by the State may be reimbursed by such county, city, or town on a basis not in excess of that provided for persons reimbursed by the State when traveling on State business." The statute, by its terms, leaves to the local governing body discretion to fix and regulate local travel allowances, so long as the State rate of reimbursement is not exceeded. Accordingly, under the circumstances you describe, it is my opinion that you may be required to comply with the city's travel regulations.  

1Note that local government budgets are developed for "informative and fiscal planning purposes only," and the mere inclusion of an item therein, or approval of the budget by city council, does not constitute authorization for an expenditure or divest council of its authority to adopt policies regulating expenditures. See §§ 15.1-160 and 15.1-162; compare 1983-1984 Report of the Attorney General at 143.
It is the responsibility of the State Compensation Board (the "Board") to fix the salaries, expenses and other allowances of constitutional officers, including the commissioner of the revenue. See § 14.1-51 et seq. of the Code of Virginia. The sums so fixed comprise the budget for the operation of a constitutional office, funds for which are provided proportionately from State and local sources. See § 14.1-64. Sections 14.1-51 and 14.1-52 provide means for a locality to object to the allowances proposed by the Board and to appeal the Board's decision in fixing an expense allowance. The Board's decision, unless overturned, is binding upon the locality and may not be altered in the local budgetary process or otherwise by local regulation. See 1978-1979 Report of the Attorney General at 56. In my opinion you may not be required to comply with local travel regulations which interfere with the functions of your official duties or restrict your maximum travel allowance below your budgeted expenses and allowances as fixed by the Board.1

You ask also what remedy you may have in a situation where you are asked to comply with local regulations which conflict with your budgeted allowances. I refer you to § 14.1-63, which provides, in part, as follows:

"In the event a county or city shall fail to make timely payment of the salaries, expenses or other allowances fixed in accordance with the provisions of law applicable thereto, the Board shall withhold all reimbursements for the office or offices affected thereby until such salaries, expenses or other allowances have been paid, unless such county or city has appealed pursuant to § 14.1-51 or § 14.1-52."

Thus, you may wish to discuss the matter with city officials, and, if necessary and appropriate, with the Board. See also Opinion in 1978-1979 Report of the Attorney General, supra, at 58 (mandamus will lie to ensure compliance by a local governing body with the requirements of the compensation statutes).

1Constitutional officers are not completely excluded from the regulatory process of the locality. See Reports of the Attorney General: 1982-1983 at 131; 1981-1982 at 96, in which this Office expressed the view that the governing body may impose regulations but not interfere with the conduct of the office.

CONSTITUTIONAL OFFICERS. COUNTIES AND CITIES. SALARY SUPPLEMENTS.

September 21, 1984

The Honorable O. S. Foster
Sheriff for Roanoke County

This is in reply to your request for my opinion concerning salary supplements and fringe benefits presently provided to the employees of constitutional officers in Roanoke County. You relate that for several years the county board of supervisors has supplemented the salaries of such employees. The county board has required the constitutional officers to agree to abide by county rules and regulations as a condition of continuation of the supplements and fringe benefits. You ask whether "a local governing body has a right to usurp the authority of the constitutional officeholder by threatening to withdraw salary supplements and fringe benefits."
Prior Opinions of this Office consistently have held that constitutional officers have exclusive control over the personnel policies of their offices and are not subject to the jurisdiction of local governing bodies. See 1982-1983 Report of the Attorney General at 462 and Opinions therein cited. At the same time, however, it also has been consistently recognized that the decision whether to supplement the compensation of a constitutional officer or that of his employees with local funds rests in the discretion of the local governing body under the applicable statutes. See, e.g., Reports of the Attorney General: 1978-1979 at 237; 1977-1978 at 76. With particular regard to the thrust of your inquiry, it has been held that a constitutional officer has no property interest in compensation supplements made available in the discretion of the local governing body from local funds, and that the governing body may summarily reduce or eliminate such payments whenever it wishes, in the absence of a contractual obligation to continue them for a definite period of time. See Reports of the Attorney General: 1982-1983 at 78; 1974-1975 at 340. Accordingly, it is my opinion that a local governing body may withdraw salary supplements and fringe benefits made available from local funds to constitutional officers and their employees, consistent with the terms of any existing contractual arrangements among the parties.

1See § 14.1-11.4, which reads as follows: "Notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the sergeant, sheriff, treasurer, commissioner of the revenue, clerk of the circuit court, director of finance, or attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy or employee established in this title, in such amounts as it may deem expedient. Such additional compensation shall be wholly payable from the funds of any such county or city." (Emphasis added.)

2Compare 1984-1985 Report of the Attorney General at 69 (commissioner of revenue must comply with city's travel regulations when his travel allowance is paid entirely by the city and is not approved by the State Compensation Board).

CONSTITUTIONAL OFFICERS. EMPLOYEES. WORKING HOURS SET BY PRINCIPAL. CONSTITUTIONAL OFFICERS' TIME SHEETS MAY NOT BE REQUIRED BY COUNTY ADMINISTRATOR.

April 5, 1985

The Honorable Mary N. Brown
Commissioner of the Revenue for Wythe County

You have asked (1) whether a constitutional officer may be required to submit time sheets to the county administrator prior to the release of paychecks for the officer's employees, and (2) whether a county administrator may require the constitutional officer to operate his office within the same hours as those of the county employees. With respect to the latter question, you note that the county employees operate under a 40-hour workweek. The employees' lunch period is not computed in the calculation of these hours. Your office also operates under a 40-hour workweek; however, an hour for lunch per day is included in the calculation of such workweek.

This Office has long held that, in the absence of a controlling statute, a constitutional officer maintains exclusive authority over personnel matters involving vacation, office hours, sick leave and holidays for his employees. See 1982-1983 Report of the Attorney General at 107. More specifically, this Office has ruled that a county board of supervisors may not require submission of daily time sheets. See 1975-1976
Report of the Attorney General at 49. That Opinion further holds that, absent statutory authority, the employment terms of employees of constitutional officers are not subject to the control of a local governing body. See also 1974-1975 Report of the Attorney General at 538 (holding that it is the direct responsibility of the constitutional officer to establish and maintain the working hours of his office). Of course, the constitutional officer has the option to agree to be bound by the personnel practices of the local governing body.

I am unaware of any statute which would enable the county administrator to impose the requirements in issue, and I conclude, therefore, that both of your questions must be answered in the negative.

CONSTITUTIONAL OFFICERS. FREE TO DISCHARGE PRESCRIBED DUTIES AND EXERCISE POWERS IN MANNER DEEMED APPROPRIATE.

May 17, 1985

The Honorable Harry O. Tinsley
Sheriff for Madison County

You have asked whether a county sheriff has the authority to allow a deputy and members of his family to ride in a county owned vehicle. I assume, for the purposes of this Opinion, that you refer to a county owned vehicle assigned to or available to the sheriff's department as is authorized by § 14.1-77 of the Code of Virginia. See 1973-1974 Report of the Attorney General at 322.

Although limited to those powers and duties prescribed by statute, a sheriff is free to discharge his prescribed powers and duties in the manner in which he deems appropriate. Examples of discretionary areas of a sheriff's authority include personnel policies and cooperative agreements with federal agencies. Prior Opinions of this Office have consistently concluded that a sheriff has discretionary authority to set policies regulating automobile use within his office. Accordingly, it is my opinion that a sheriff has broad discretion in setting the policy which governs the use of vehicles by the sheriff's department. This discretion extends to policies regarding the use of county owned vehicles. Like other public officers, a sheriff does not, however, have the authority to allow the use of publicly owned property solely for private purposes. See Opinions to the Honorable Harry J. Parrish, Member, House of Delegates, dated April 23, 1985, and to the Honorable Claude W. Anderson, Member, House of Delegates, dated April 4, 1985.

Unless the officer or employee is utilizing his privately owned vehicle for public service as authorized in some cases (see § 14.1-77), motor vehicles assigned to public officers and employees are to be used for a public purpose. This does not preclude the occasional or incidental use of such vehicles for private purposes. The extent to which such private use may be permitted depends upon the policy of the agency having control and responsibility of such vehicles. Such policy should take into account the nature of the official duties of the persons to whom the vehicles are assigned and whether the personal use of such vehicles would interfere with the exercise of such officials' duties. Thus, marked differences may be indicated in the restraints imposed on a planning department inspector whose duties are generally regarded as nonhazardous and can be usually performed during routine work hours, as opposed to members of the police or emergency departments whose duties, by their very nature, are dangerous and who may be continuously on call, or on those officials whose duties, while not hazardous, are still subject to call at all hours.
In view of the foregoing, I am of the opinion that while there is no statutory prohibition against a deputy sheriff permitting members of his family to ride in a county owned vehicle, the reasonableness of a policy permitting such use on a frequent basis is extremely doubtful and should be considered very carefully by the sheriff.

You next ask whether the county could be held liable for damage or injuries if an accident occurred. The county is protected against tort liability by the doctrine of sovereign immunity. Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984); Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957). Furthermore, a prior Opinion concluded that, in the absence of a statute or constitutional provision making a county liable for the acts of a sheriff, no such liability exists. 1974-1975 Report of the Attorney General at 403. It is, therefore, my opinion that the county could not be held liable for damage or injury if an accident occurred.9

1Reports of the Attorney General: 1983-1984 at 323 (sheriff has exclusive statutory discretion to appoint, reappoint or remove deputies); 1982-1983 at 462 (sheriff has exclusive control over personnel policies).

21978-1979 Report of the Attorney General at 238 (sheriff may enter into agreement with agency of federal government for funds to provide increased services on land of concurrent jurisdiction).

3Reports of the Attorney General: 1982-1983 at 131 (county may not bar reimbursement for use of private vehicles by constitutional officer if the use of such vehicles is necessary for the constitutional officer to conduct the affairs of his office in an efficient and timely manner); 1976-1977 at 250 (sheriff has exclusive authority to assign duties to deputies, and deputies may properly use sheriff's department car and claim mileage in performance of such duties); 1973-1974 at 39 (sheriff has sole powers involving day-to-day direction and control of performance of his duties and the use of county cars to perform such duties), 322 (sheriff may authorize the use of private vehicles by deputy for performance of duties and provide for the reimbursement for same).

4Both Opinions related to the use of public property for private purposes by members of local governing bodies.

5In the case of State agencies, the policy is determined by the Governor pursuant to § 2.1-47.

6I express no opinion as to the potential liability of the sheriff or the deputy in the event of a claim arising from the personal use of the motor vehicle.

CONSTITUTIONAL OFFICERS. SHERIFFS AND DEPUTIES. APPLICABILITY OF LOCAL HOSPITALIZATION INSURANCE PROGRAM.

October 19, 1984

The Honorable Earl D. Sasser
Sheriff for Greensville County

You have asked several questions pertaining to the applicability of § 15.1-7.3 of the Code of Virginia to your deputies and other employees. You advise that the local governing body provides hospitalization insurance for the employees of the Department of Social Services, but has taken the position that deputy sheriffs are not entitled to such insurance.

Section 15.1-7.3 authorizes the governing body of every county, city or town to provide for its officers and employees group life, accident, and health insurance
programs. Insofar as here pertinent, the section reads as follows:

"In the event a county or city elects to provide one or more of such programs for its officers and employees, it shall provide such programs to the constitutional officers and their employees on the same basis as provided to other officers and employees, unless the constitutional officers and employees are covered under a state program, and the cost of such local program shall be borne entirely by the locality or shared with the employee." (Emphasis added.)

The foregoing quoted provision is clear and unequivocal. If the locality elects to provide one or more of such programs for its officers and employees, the constitutional officers and their employees, not covered by a State program, must be afforded the same coverage. Clearly, a sheriff is a constitutional officer and must be covered under the county's program if he and his employees are not covered by a comparable State program. Even though there are distinctions often made between deputies and other employees of constitutional officers for particular purposes, those distinctions are unnecessary for the purpose of answering your inquiry. The purpose of the above-quoted provision of S 15.1-7.3 is to extend the same insurance benefits to constitutional officers and their employees as are extended to the local government officers and employees. Therefore, I am of the opinion that if the local governing body provides hospitalization insurance for its officers and employees, the same benefits must be extended to the sheriff, his deputies and other employees.

You did not indicate whether the insurance program applies to officers and employees of departments other than Social Services. In the case of insurance coverage, it is necessary to show that the local governing body has provided a program for its officers and employees before the equal coverage provision in S 15.1-7.3 applies. I do not believe that providing coverage only for employees of the Social Services Department evidences a program has been provided for the county's officers and employees.

CONSUMER CREDIT. CREDIT REPAIR CLINICS. SALE OF SERVICE TO AID CONSUMER CHALLENGES TO CREDIT FILES UNDER FAIR CREDIT REPORTING ACT.

February 12, 1985

The Honorable Walter A. Stosch
Member, House of Delegates

You have requested my opinion on a matter pertaining to the growing concern related to the evaluation of "credit repair clinics."

According to information furnished with your inquiry from a retail merchants' association, credit repair clinics appeal "to the consumer who has been denied credit because of a poor credit record. They hold out the promise, either implicitly or specifically, that they can help the consumer obtain a clean credit record."

The statement continues by describing the "primary technique" which, according to the statement, is "to overwhelm the established [credit] system...." The statement concludes that while this objective is a "patent distortion of the spirit and intent of the Fair Credit Reporting Act...apparently it is not illegal."

With this information, you inquire whether the operation of such clinics is legal in Virginia. More specifically, you ask whether such clinics may charge a debtor a fee for assisting in effecting the debtor's rights under the federal Fair Credit Reporting Act.
1984-1985 REPORT OF THE ATTORNEY GENERAL


Under the Fair Credit Reporting Act, consumers have a right to challenge information in their credit files if they believe it to be inaccurate. There is nothing in that section which would prohibit a consumer from purchasing services to assist him/her to pursue this right. The federal Act does not prohibit the conduct of the business of a "credit repair clinic." Nor am I aware of any State law adopted by the General Assembly which would prohibit the operation of such a business. Section 6.1-363.1 of the Code of Virginia provides for regulation of certain debt counseling agencies but, by its clear terms, applies only to nonprofit organizations. Although the debt counseling agencies regulated by § 6.1-363.1 are prohibited from charging a fee to any debtor whom they counsel, the section does not apply to organizations, such as credit repair clinics, operated for a profit. Apparently, the businesses of which you inquire do not represent themselves to be nonprofit debt counsellors and, therefore, are not subject to the requirements of § 6.1-363.1.

I must, therefore, necessarily conclude that the business of a credit repair clinic, or the payment of fees by debtors for assistance provided by such clinics in pursuing their Fair Credit Reporting Act rights, is not prohibited in Virginia. Of course, it should be noted that a credit repair clinic might be conducted in such a manner as to constitute the unauthorized practice of law. Such a matter should properly be brought to the attention of the Unauthorized Practice of Law Committee of the Virginia State Bar for an advisory opinion. Additionally, it may very well be that in practice, the businesses here in question may misrepresent the services so as to violate the Consumer Protection Act or other regulatory statutes. To find such violations requires a case-by-case analysis of the facts, however, and I can draw no conclusions about them without having all of the facts of the particular situation before me.

1 See Richmond Ass'n of Cr. Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).
2 Section 59.1-196 et seq.

CONTRACTS. HOME SOLICITATION SALES ACT, VIRGINIA. "PRIOR NEGOTIATIONS" EXCLUSION REFERS ONLY TO NEGOTIATIONS BETWEEN BUYER AND SELLER WHICH TOOK PLACE AT SELLER'S RESIDENCE.

January 29, 1985

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

You ask whether the Virginia Home Solicitation Sales Act, §§ 59.1-21.1 through 59.1-21.7 of the Code of Virginia (the "Act"), applies to the following situation:

"An automobile salesman telephones a customer who had purchased a car from him to inquire about how the car is performing. During the discussion, the customer inquires about the possibility of purchasing or leasing another car. The salesman agrees to bring the paperwork on the new car to the customer's home, where the papers are signed. The customer does not visit the business premises."

Section 59.1-21.2 provides, in pertinent part, the following definition:

"Home solicitation sale' means a consumer sale or lease of goods...in which the seller or a person acting for him engages in a personal solicitation of the sale or
lease at any residence other than that of the seller and the buyer's agreement or offer to purchase or lease is there given to the seller or a person acting for him. It does not include...a sale or lease made pursuant to prior negotiations between the parties." (Emphasis added.)

Under a very similar definition of the term "home solicitation contract," the California courts have held that the mere fact that the seller appears at the buyer's home in response to an invitation from the buyer is insufficient to remove the resulting agreement from the ambit of the home solicitation sales act. *Weatherall Aluminium Products Co. v. Scott*, 71 Cal.App.3d 245, 139 Cal.Rptr. 329 (1977). There, the court said:

"It was undoubtedly the Legislature's purpose in enacting the statute to protect consumers against the types of pressures that typically can arise when a salesman appears at a buyer's home. One such pressure arises in the usual door-to-door sales situation and consists of the buyer being forced to make an immediate decision regarding a product or service which he had not contemplated acquiring until the seller appeared at his door. This type of pressure, of course, is not present in a situation such as that under consideration here where the buyer invites the seller to his home. A second and equally serious pressure arises, however, from the fact that the seller may be an intimidating presence once inside the buyer's home. A reluctant buyer can easily walk away from a seller's place of business, but he cannot walk away from his own home, and he may find that the only practical way of getting the seller to leave is to agree to buy what the seller is selling. This latter type of pressure may arise regardless of whether or not the buyer invited the seller to call at his residence."

Id. at 331. Protection of consumers from the same types of pressure no doubt led to the enactment of the Virginia statute as well.

Your inquiry and the Virginia statute raise another issue which was not decided in *Weatherall*. The Virginia statute contains a provision, not present in the California statute at issue in *Weatherall*, which excludes from the definition of home solicitation sales "a sale or lease made pursuant to prior negotiations between the parties." Thus, as you suggest, the pivotal question is whether the posited fact situation would fall within the "prior negotiations" exception and, therefore, not be considered a "home solicitation sale."

The question whether "prior negotiations" occurred must be decided on the facts of each case. In this particular situation, two aspects must be examined to determine whether prior negotiations occurred as contemplated by the Act. First, did the prior sale of a separate car constitute prior negotiations. Second, did the telephone conversation constitute prior negotiations.

With respect to the prior sale, based upon the brief statement of facts, I am unable to conclude that it constitutes prior negotiations under the Act in relation to the lease or purchase of the second car. All that the prior sale indicates is that the parties had prior dealings. The second transaction is distinct in time, place and terms.  

Turning to the telephone conversation, it is doubtful that the General Assembly intended a very brief prior telephone contact to trigger the "prior negotiations" exception. If that were the case, a seller could always deliberately remove a transaction from the reach of the Act simply by visiting the buyer's residence more than once or by preceding his visit with a telephone call. Such an interpretation of that phrase would not protect consumers from the sales pressures described above and against which the statute is intended to protect.
Based on the brief description of the facts in your letter, I am unable to conclude that the conduct which occurred between this buyer and seller was sufficient to constitute "prior negotiations." The only negotiations were apparently at the buyer's home. If that be the case, it is my opinion that the transaction you describe is governed by the Act.  

As indicated above, each case must be examined in light of its own terms. For example, it may be that ongoing negotiations on fungible items would constitute prior dealings, depending upon the facts of the case.

There may be additional facts and circumstances of which I am not advised that could change the result in this particular situation. Moreover, there are, no doubt, many other factual situations in which "prior negotiations" might precede a visit by the seller to the buyer's residence. My opinion is limited strictly to the facts stated in your letter and based solely on the Act. I draw no conclusions about other law which may affect this transaction, and I make no judgments about other transactions.

CONTRACTS. SALE OF TOBACCO ALLOTMENT BY COUNTY DID NOT WARRANT REFUND OF PART OF PURCHASE PRICE WHEN ALLOTMENT CHANGED.

August 2, 1984

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

You request my opinion whether the buyer of a tobacco allotment is entitled to a refund in the following factual situation.

Prior to 1984, the Scott County Board of Supervisors held a burley tobacco allotment pursuant to regulations of the U.S. Department of Agriculture Agricultural Stabilization and Conservation Service ("ASCS"). In the past, the county has leased this allotment each year. Because of recent changes in federal law, the county was required to divest itself of its burley allotment on or before December 1, 1983, or lose it. Accordingly, in October 1983, the county advertised for bids based on its then current allotment of 2747 pounds. In early November 1983, the county accepted a bid for "$2.50 per pound for 2747 pounds of burley tobacco allotment, $6,867.50." The transfer was made and payment received and the contract was consummated in November 1983.

In conjunction with the transfer, ASCS Form 375 was executed by the county and the purchaser on November 7, 1983. The form stated that the allotment to be transferred was 2747 pounds and further contains the following language above the signature line for the receiving farm: "I agree to the transfer to the allotment or quota, subject to adjustment, including adjustments for differences in productivity." (Emphasis added.) Thus, the parties were on notice that the government retains the authority to adjust the size of the allotment.

On April 25, 1984, ASCS reduced all allotments by 10 percent for the 1984 crop year. The buyer now seeks a refund from the county of $2.50 per pound for 275 pounds, or $687.50.

In my opinion, the buyer is not entitled to a refund. The sale of the county's burley tobacco allotment was for not only the 1984 allotment but a permanent transfer or sale of the ownership of the allotment which, at the time of its sale, contained a specified number of pounds "subject to adjustment." The Request to Bid did not limit the
allotment to the 1984 crop year. You have told us that the size of the allotment stated in the Request to Bid was based on the best information available at the time the Request was issued. Both parties to the contract were aware of the possible adjustment of the actual allotment by ASCS subsequent to consummation of the sale. ASCS Form 375, signed by both parties, specifically notes the possibility of adjustment. As stated by the Supreme Court of West Virginia:

"It is the duty of contracting parties to provide against contingencies, as they are presumed to know whether the completion of the duty they undertake be within their power."  

_Burch v. Potter_, 123 W.Va. 528, 17 S.E.2d 438, 440 (1941). Inasmuch as the parties totally failed to provide for the contingency now at hand, there is little basis upon which the purchaser may seek to avoid his bargain because of official revision of the allotment. The bargain was made for a permanent transfer of the allotment, subject to further adjustment by ASCS as a matter of law. At the time of the November 1983 transfer, the county conveyed to the purchaser all that he sought to purchase, which was ownership of the specified number of pounds. Thereafter, the purchaser assumed the risk of a change in the allotment.

Absent agreement to adjust the price upon the subsequent occurrence of an adjustment to the allotment, I do not believe there is sufficient evidence to conclude that the bargain should now be revised after the contract has been consummated. If the county had wished to protect the purchaser against the effect of an adjustment, then it should have so provided in the contract documents.

I, therefore, conclude that the purchaser of the Scott County allotment is not entitled to a refund for the reduced tobacco allotment for 1984.

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1 Although the successful bid was based on $2.50 per pound, not all bids received by the county were calculated on a poundage basis. Some were lump sum bids or contained a combination of poundage and a lump sum.

CORPORATIONS. NONSTOCK. REMOVAL OF DIRECTORS GOVERNED BY § 13-219, ABSENT SPECIFIC PROVISION IN BYLAWS OR ARTICLES OF INCORPORATION.

February 12, 1985

The Honorable V. Earl Dickinson  
Member, House of Delegates

You have asked a question concerning the application of § 13-219 of the Code of Virginia and certain provisions of the articles of incorporation to the procedure for removing corporate directors of the Lake Monticello Owners' Association, Inc. Specifically, you inquire whether, in order to remove a director, the number of votes in favor of removal must equal or exceed the number of votes which the director received when he was elected. Section 13.1-221 states, in part: "A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation and if none be provided may be removed at a meeting called expressly for that purpose, with or without cause, by such vote as would suffice for his election."

The portions of the articles of incorporation of the Lake Monticello Owners' Association, which you attached to your request, do not specify any procedure for the
removal of a director. One of the articles does provide that members of the Association shall have the right to vote for removal of directors. Accordingly, relying upon § 13.1-221, removal of a director may be accomplished at a meeting expressly called for that purpose "by such [a] vote as would suffice for his election."

The portion of the articles of incorporation which you have furnished does not clearly establish a procedure by which an individual director may be elected. The articles merely state that "those persons duly nominated receiving the greatest number of votes shall be the new Directors." Section 13.1-219 provides, in pertinent part: "The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members...." In the absence of any provision in the articles of incorporation or bylaws to the contrary, in my opinion the vote to remove a director must be in accordance with § 13.1-219.

CORPORATIONS. NONSTOCK CORPORATION ACT, VIRGINIA. APPLICABILITY TO COMMUNITY ACTION AGENCY.

August 30, 1984

The Honorable Douglas G. Campbell
County Attorney for Tazewell County

You have requested my opinion concerning the applicability of the Virginia Nonstock Corporation Act, §§ 13.1-201 through 13.1-298 of the Code of Virginia, to the Tazewell County Development Corporation ("TCDC") and the compliance of that corporation with the Act. Your request raises three questions: first, whether the Nonstock Corporation Act applies to TCDC; second, whether there are valid amendments to the original Articles of Incorporation adopted in 1965; and third, whether the board of directors may take valid action when there are vacancies on the board at the time of the action.

Section 13.1-203 provides, in part, that the provisions of the Nonstock Corporation Act apply to all corporations organized under it. The 1965 Articles of Incorporation of TCDC expressly state that it is a nonstock corporation organized under the Act. Accordingly, it is my opinion that the provisions of the Nonstock Corporation Act apply to TCDC.

The passage of the Community Action Act, § 2.1-587 et seq. does not require a different conclusion. TCDC's status as a nonstock corporation and its status as a community action agency are separate and independent. Nothing in the Community Action Act relieves TCDC of its obligation to comply with the Nonstock Corporation Act. Nor does there appear to be anything in the former that conflicts with the latter. TCDC must comply with both acts to be a community action agency. See Houth v. Southeastern Tidewater Opportunity Project, 420 F.Supp. 171 (E.D. Va. 1976).

Turning to the second question, according to the records of the State Corporation Commission, TCDC was granted a charter on May 13, 1965. Since that time, I am advised that the Commission's records show only one amendment to the Articles of Incorporation, dated August 15, 1984. If I am correctly advised, the only question with respect to whether the Articles have been amended properly arises out of this amendment.

Under TCDC's original Articles, the corporation has members who have voting rights. Article (C) provides:
"The Corporation shall have members and membership shall be of one class. Any person eighteen years of age and over, who is interested in promoting the purposes for which this corporation is formed and who is willing to subscribe to the By-Laws of the corporation shall be eligible for membership, and the corporation may accept cash donations from said members. Each member shall be entitled to one (1) vote at membership meetings, including the election of Directors, but no member shall be entitled to receive any dividends or profit of a pecuniary nature by reason of his membership from the corporation, and no part of the net earnings of the corporation shall inure to the benefit of any individual."

The August 15, 1984 amendment deletes this paragraph, making no further provision for voting rights of members.

The amendment to the Articles of Incorporation recites that it was adopted by a two-thirds majority of the board of directors and that members of the corporation have no voting rights with respect to it. In my judgment, the only reasonable interpretation of the language quoted above is that the original Articles intended for members to have voting rights on all important corporate issues, particularly those as basic to the corporate structure as whether members should retain the voting rights themselves. Inasmuch as the corporation apparently has members, and I interpret the original Articles to give them general voting rights, the amendment to the Articles of Incorporation must be submitted to the members for approval under §§ 13.1-236 and 13.1-237 of the Code. In the absence of any evidence that the members approved the change, I must conclude that the amendment was not adopted in accordance with the Nonstock Corporation Act. In my opinion, the corporation should conduct its affairs under the original Articles of Incorporation unless and until an amendment is approved by the membership.

As to the third question, you conclude that the TCDC board of directors was improperly constituted and could not act because there were vacancies on the board of directors at various times. I must disagree with this conclusion. The general rule is that the power of a board of directors is not suspended by vacancies on the board unless the number of directors remaining is less than a quorum. W. Fletcher, Cyclopedia of the Law of Private Corporations § 421 (rev. perm. ed. 1982). Thus, in Crump v. Bronson, 168 Va. 527 (1937), the board of directors could not act because only one of the three directors was available to vote. One position was vacant and the vote of the other director could not be counted because of his personal interest. See W. Fletcher, Cyclopedia of the Law of Private Corporations, supra, at § 425. The Crump case does not stand for the proposition that two of the three directors were unable to act because of a vacancy in the third position on the board.

Under § 13.1-223, a quorum of directors is a majority of the number of directors fixed by the bylaws or by the Articles of Incorporation if there is no bylaw fixing the number. Assuming the July 19, 1979 bylaws of TCDC remain current, the number of directors is fixed at fifteen. Thus, eight directors constitute a quorum.

While I have not examined all the records, I have examined the minutes of the TCDC board meetings of May 10, 1984 and May 21, 1984. In each case at least eight directors were present. Thus, I cannot conclude that any action taken at those meetings was invalid because there were vacancies on the board at that time. I have insufficient information to conclude that other actions of the board may have been invalid for any reason.

In summary, while I agree that the members of the corporation were improperly disenfranchised by the directors' adoption of the August 15, 1984 amendment to the Articles of Incorporation, there is no indication in the material supplied to me that the board is currently improperly constituted or that any other action of the board is invalid.
1 As you requested, we have not examined the federal law aspects of this situation. To the extent any federal law imposes requirements for eligibility for participation, the federal requirements would control.
2 There is no intermediate amendment of the Articles withdrawing the members' voting rights on file at the State Corporation Commission. The bylaws of July 19, 1979 could not have withdrawn such voting rights, in my opinion, because bylaws may not contain provisions inconsistent with the Articles of Incorporation. Section 13.1-212. Much of the other material in the bylaws, however, does not appear to be inconsistent with the Articles.
3 I note that eight members of the board approved an amendment to the Articles of Incorporation on May 10, 1984. It is unnecessary to decide whether more votes were required, because the amendment is apparently not of record at the State Corporation Commission.
4 In fact, to conclude otherwise may be to state that Tazewell County has no interest in this matter. Nothing in the original Articles of Incorporation gives Tazewell County any role in the internal affairs of TCDC.

CORPORATIONS. NONSTOCK CORPORATION ACT, VIRGINIA. COMPLIANCE OF COMMUNITY ACTION AGENCIES.

February 15, 1985

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

You inquire about the effect of § 2.1-591(E) of the Code of Virginia on private nonprofit corporations which are also recognized as community action agencies, having charters and bylaws authorizing the entities to receive and disburse grants and other financial assistance. Community action agencies are designated to receive Community Services Block Grants. Some of such agencies are incorporated as nonstock corporations with specific powers set forth in articles of incorporation. The interplay between the Nonstock Corporation Act and the Community Action Act was discussed in my Opinion to the Honorable Douglas G. Campbell, County Attorney for Tazewell County, dated August 30, 1984. There, I ruled that nonstock corporations, which are also community action agencies, must comply with both the Nonstock Corporation Act, § 13.1-201 et seq., and the Community Action Act, § 2.1-587 et seq.

In order to function as a community action agency, a nonstock corporation must maintain both a board of directors under §§ 13.1-220 and 13.1-221 to manage the affairs of the corporation and a community action board as required by § 2.1-591 to administer the community action program. There is nothing in either the Community Action Act or the Nonstock Corporation Act which expressly prohibits one board from serving both functions. Nor is there any conflict in other provisions of these Acts which would prevent one board from serving both functions. The terms of §§ 13.1-220 and 13.1-221 permit the adoption of articles of incorporation and bylaws which would allow the corporation's board of directors to meet all of the requirements of § 2.1-591, and specifically subsection (E) of that section. All that is required is adoption of articles of incorporation and bylaws which would permit the board of directors to function as a community action board.
1 Section 2.1-591(E) reads as follows: "Where a local subdivision of the Commonwealth acts as or has designated a community action agency, the local governing body shall determine the responsibilities and authority of the community action board."

2 Indeed, the only inherent conflict in any of these statutes is internal to the Community Action Act. Section 2.1-588 defines all community action agencies as entities designated by "federal law, federal regulations or the Governor." It leaves no room for a designation by "a local subdivision of the Commonwealth," as assumed in § 2.1-591(E).

3 The adoption of such documents must proceed in accordance with the requirements of the applicable corporate law. For example, where an amendment to existing articles is necessary and members of the corporation have voting rights, an affirmative vote of the appropriate number of members might be required to give the local governing body the right to "determine the responsibilities and authority of the community action board," as contemplated by § 2.1-591(E).

CORPORATIONS. NONSTOCK CORPORATION ACT, VIRGINIA. VALIDITY OF ACTIONS OF BOARD OF DIRECTORS.

October 18, 1984

The Honorable Douglas G. Campbell
County Attorney for Tazewell County

You have asked whether the Tazewell County Development Corporation ("TCDC") must cease doing business until it elects a board of directors pursuant to the procedures contained in its 1965 Articles of Incorporation.

You state that the TCDC boards of directors have not been elected by the members, as required by the 1965 Articles of Incorporation, since bylaws were adopted in 1979. After that time, new boards were elected by outgoing boards. As concluded in the August 30, 1984 Opinion to you, this procedure does not observe the proper corporate formalities.

The members of boards selected as you describe, however, possess the office of director under claim and color of election and have exercised the powers of the office. In my opinion, they are de facto directors whose actions, as a general proposition, are binding on the corporation and the third parties with whom it has dealt since 1979. A.I.M. Per. Corp. v. Ferro. Corp., 139 Va. 366, 124 S.E. 442 (1924); Prickett v. American Steel and Pump Corp., 253 A.2d 86 (Del. Ch. 1969); W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 376, 380, 383, 386 (rev. rm. ed. 1982).

Moreover, I do not find any requirement that the corporation must cease doing business until an election is held under the 1965 Articles of Incorporation. De facto directors may continue the lawful activities of the corporation "necessary to keep its machinery in motion," pending a determination of its lawful officers. See W. Fletcher, Cyclopedia of the Law of Private Corporations, supra, § 380. This is not to say, however, the current de facto status of the board could not be attacked by an aggrieved member or director of the corporation under § 13.1-221 of the Code of Virginia. See Prickett v. American Steel and Pump Corp., supra. Thus, the current board might be subject to removal upon proper legal proceedings. In any event, future elections of directors should comply with the 1965 Articles of Incorporation. In the meantime, the current de facto board owes a fiduciary duty to conduct the business of the corporation properly, just as would a de jure board.
Moreover, in certain situations, there may be some risk that future transactions could be held invalid. W. Fletcher, *Cyclopedia of the Law of Private Corporations*, supra, §§ 380, 385.

**COURT CORRESPONDENCE.** *SECTION 13.1-228 REQUIRES DISCLOSURE OF CERTAIN CORPORATE RECORDS.*

February 4, 1985

The Honorable R. Edward Houck  
Member, Senate of Virginia  
The Honorable V. Earl Dickinson  
Member, House of Delegates

You have asked my opinion whether a portion of the Lake Monticello Owners' Association Policies and Procedures Manual (the "Manual") (provided with your inquiry) correctly applies § 13.1-228 of the Code of Virginia, a portion of the Virginia Nonstock Corporation Act. The relevant portion of the Manual was set forth in your inquiry as follows:

"III. RECORDS AVAILABLE FOR MEMBERSHIP INSPECTION

Members are entitled to review only the formal records of the corporation, such as the minutes of meetings, audit reports and the list of names and addresses of the members. Beyond the above listed, the access to other information is within the discretion of the Board of Directors.

Access to the tapes of Board Minutes will be denied to all individuals except Board members. Board members have the right to listen to but not to copy tapes. The taped proceedings shall not be made available unless subpoenaed. Tapes of meetings are not to be taken from the Administrative Building. Minutes are available in accordance with LMOA Policy 4.05 C."

Section 13.1-228 provides:

"Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time. The record of the names of members entitled to vote shall be prima facie evidence of the right to vote. Any books, records and minutes may be in written form or in any other form capable of being converted into written form within a reasonable time."

Although this section refers to "[a]ll books and records," a previous Opinion of this Office concluded that the section related to "official documents necessary to the functioning of this corporation." See 1981-1982 Report of the Attorney General at 429. Specifically, the Opinion held that correspondence, as such, is not included and would not fall within the statutory designation of "books and records of account" or "minutes of proceedings." It is clear that § 13.1-228 is not all-encompassing. Under certain conditions, the correct and complete books, records of account and minutes of the proceedings of members, board of directors and certain committees may be inspected by each member, or his agent or attorney.
Section III of the Manual set forth above restricts access to "formal records of the corporation, such as the minutes of meetings, audit reports and the list of names and addresses of the members." Access to other records not listed is discretionary. Section 13.1-228 does not use the term "formal," but rather addresses itself to "correct and complete books," "records of account," and "minutes" of meetings. Clearly, all documents in these three categories are intended by the law to be available for inspection by a member. I do note that the relevant portion of § 13.1-228 does not distinguish between books, on the one hand, and tapes, on the other, but treats both alike for necessary purposes. To the extent, therefore, that the Manual denies members access to the "correct and complete books" or "records of account," it is not a correct application of § 13.1-228 of the Virginia Nonstock Corporation Act.

COSTS. CRIMINAL PROCEDURE. ACCUSED CHARGED WITH FELONY AND FOUND GUILTY OF MISDEMEANOR OR PLEADING GUILTY TO MISDEMEANOR REQUIRED TO PAY FELONY COSTS.

January 23, 1985

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

You inquire whether the court reporter's fee under § 19.2-165 of the Code of Virginia and the felony case fees for the services of the clerk of court and the Commonwealth's attorney under §§ 14.1-112(15) and 14.1-121, respectively, should be assessed against a defendant who is put to trial under a felony indictment, and "(a) is found guilty of a lesser included offense which is a misdemeanor; or (b) pleads guilty to a misdemeanor."

This Office has previously concluded in the 1965-1966 Report of the Attorney General at 55 that the court reporter's fee under § 17-30.1 (predecessor to § 19.2-165) and the Commonwealth's attorney's fee are assessable at the felony fee rate against a defendant who is indicted for a felony, tried, and convicted of a lesser included offense which is a misdemeanor. That Opinion cites Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 at 701 (1853), for its holding that costs are not penal in nature but are exacted simply for the purpose of reimbursing to the public treasury the amount which the conduct of the defendant has rendered it necessary to be expended. In the hypothetical situations which you have posed, the defendant's wrongdoing, although ultimately resulting in a misdemeanor conviction, gave probable cause to indict him for a felony.

The Anglea decision has been followed as recently as 1968 in Wright v. Matthews, 209 Va. 246, 183 S.E.2d 158 (1968). The only constitutional limitation on this doctrine is that costs imposed must bear a true relationship to the Commonwealth's expenses. Carter v. City of Norfolk, 206 Va. 875, 147 S.E.2d 139 (1966).

I am, therefore, of the opinion that the court reporter's fee and the Commonwealth's attorney's fee should be assessed against the defendant who is charged under a felony indictment and is convicted of an included misdemeanor offense or pleads guilty to a misdemeanor.

I am further of the opinion that the same principles require that the clerk's fee prescribed in § 14.1-112(15) be assessed against one tried for a felony but convicted of a misdemeanor.

None of the Code sections about which you inquire contains any language justifying a distinction between a contested case which results in a conviction and a case where a
conviction results from a plea of guilty. While § 14.1-121 provides that the Commonwealth's attorney's fee shall be assessed "for each trial of a felony case" (emphasis added), I am of the opinion that the word "trial," as used therein, means not only a hearing where guilt is contested, but also a proceeding where a plea of guilty is received. See Durham v. Commonwealth, 208 Va. 415, 420, 158 S.E.2d 135, 140 (1967). I am, therefore, of the opinion that the court reporter's fee, the clerk's fee under § 14.1-112(15), and the appropriate felony fee for the Commonwealth's attorney should all be assessed when a defendant has been indicted for a felony and ultimately pleads guilty to a misdemeanor.

COUNTIES. BOARDS OF SUPERVISORS. ATTORNEYS. NO AUTHORITY TO PAY ATTORNEY EMPLOYED BY FREEHOLDERS TO SUE COUNTY GOVERNING BODIES.

October 18, 1984

The Honorable Geraldine R. Keyes
County Attorney for Accomack County

You have asked whether the payment by the Board of Supervisors of Accomack County of up to $3,000 in legal fees incurred by six freeholders in their suit against the Board of Supervisors of Accomack County is a proper employment of counsel under § 15.1-507 of the Code of Virginia.

The suit in question against the board alleged an illegal payment of attorneys' fees incurred by the former county administrator in connection with an action against him.

Section 15.1-507 reads as follows:

"The governing body of any county may represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases in which no other provisions shall be made and, when necessary, may employ counsel in any suit against the county or in any manner affecting county property when the board is of the opinion that such counsel is needed." (Emphasis added.)

The emphasized portion of the statute clearly contemplates that the governing body will employ counsel to represent the county in a suit brought against the county. The statute plainly does not pertain to the employment of counsel by third parties outside of the county government. Equally manifest is the absence in the statute of any provision which would authorize a governing body to pay counsel employed by such parties who bring a suit against the county. Accordingly, your question is answered in the negative.

COUNTIES. BOUNDARIES. TAXATION.

August 21, 1984

The Honorable Randall B. Campbell
County Attorney for Russell County

This is in reply to your letter concerning the boundary line between Wise and Russell Counties, which are separated by the Clinch River. Wise County was created by Ch. 107, Acts of Assembly of 1856, the first paragraph of which, insofar as it relates to your inquiry, reads as follows:
"Be it enacted by the general assembly, that so much of the counties of Lee, Scott and Russell as is contained within the following boundaries, to wit...thenee down Clinch river to the mouth of Guest's river...shall form one distinct and new county, and be called and known by the name of The County of Wise." (Emphasis added.)

You relate that a construction project has changed the natural course of the Clinch River where it forms the boundary line between the two counties. You ask my opinion on the following questions:

1. Where the natural course of a river is changed by diverting the flow into man-made channels, and where the former course of the river constituted the boundary between two counties, what principles of law may be applied to determine the new boundary?

2. Are the provisions of §§ 15.1-1026 to 1031 applicable to such a situation, and if so, are the commissioners thus appointed bound to apply the principles enunciated above?

3. May two counties agree, by action of the respective Boards, to divide the tax base of a disputed area of land without adjusting the boundary lines as provided in Chapter 24 [of Title 15.1]?

With respect to question number one, I am of the opinion that the applicable principles are as set out in Woody v. Abrams, 160 Va. 683, 692, 169 S.E. 915 (1933), where the following appears:

"'When the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary line follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.'

***

These rules apply whether we are dealing with public or with private interests.

"States and individuals alike are subject to the losses and gains of erosion and accretions; but neither can have the boundaries of his domain changed by avulsion, or by the diversion of the water effected by human agencies." (Citations omitted.) (Emphasis added.)

Sections 15.1-1026 through 15.1-1031 of the Code of Virginia comprise Art. 1, Ch. 24 of Title 15.1, the applicability of which is governed by § 15.1-1026 as follows:

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

In answer to your second question, any commissioners appointed to determine the true boundary line between the two counties necessarily would be bound by the principles
stated in Woody v. Abrams, insofar as they are applicable. Following that case, Art. 1, Ch. 24 of Title 15.1 would appear to apply if there is doubt or a dispute as to the location of the middle line of the old channel of the Clinch River, which remains as the true boundary between the two counties pursuant to the act creating Wise County.\(^1\) Compare 1981-1982 Report of the Attorney General at 105 (because the precise location of the boundary line between Essex and Richmond Counties, at the Rappahannock River, involves a question turning primarily upon facts peculiar to the area such as maps, surveys and common understanding, appointment of a fact-finding body pursuant to § 15.1-1026 is recommended).

With regard to your third question, each commissioner of the revenue is responsible for ascertaining the real property located within his jurisdiction so that all such property\(^2\) and only that which is so located\(^3\) will be assessed in his county for tax purposes. I am unaware of any statutory authority for two county governing bodies to agree to divide the tax base of a disputed area of land along a common boundary line without regard to where each taxable parcel lies in relation to that boundary.\(^4\) Accordingly, your question is answered in the negative.

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\(^1\)An alternative to the procedure in Art. 1 of Ch. 24 is set out in Art. 2, under which the governing bodies of the two counties may establish the boundary line by agreement. See § 15.1-1031.2.

\(^2\)See § 58-796.

\(^3\)See § 58-814. See also § 58-854.

\(^4\)Compare Reports of the Attorney General: 1955-1956 at 213; 1950-1951 at 196 (a tract of land lying in two counties should be assessed in each respective county in accordance with the acreage lying therein, there being no authority for the commissioners to agree that such tracts alternatively will be taxed entirely in one or the other of the counties).
attorney in any county, the Commonwealth's attorney is thereby relieved of any duty imposed upon him by law to advise or represent the county or any of its boards, officials or employees in civil matters, and all such duties thereafter shall be performed by the county attorney.

In light of the above-referenced statutory provisions, under the circumstances you relate, in my opinion, the conclusion is inescapable that the county attorney is the "appropriate" attorney under § 15.1-506.2, whose responsibility it is to defend the county social services director in any civil action brought against him as a result of his conduct in the discharge of his official duties. The same conclusion has been reached consistently in prior Opinions of this Office addressing the same or similar questions in analogous circumstances. See, e.g., Reports of the Attorney General: 1982-1983 at 172; 1979-1980 at 90; 1975-1976 at 84. Section 63.1-54.1, to which you refer, authorizes the local welfare board, with the approval of the county governing body, to employ legal counsel in civil matters, and relieves the county attorney of his responsibility to represent the board and department employees in any such matter, once other counsel is employed. This section has no effect upon the allocation of duties between the Commonwealth's attorney and the county attorney.

COUNTIES. RETIREMENT SYSTEMS. COUNTY BOARD OF SUPERVISORS MAY ESTABLISH VOLUNTARY EARLY RETIREMENT INCENTIVE PLAN.

July 10, 1984

The Honorable George R. St. John
County Attorney for Albemarle County

You ask whether the School Board for Albemarle County may establish a voluntary early retirement incentive plan for its school employees. Specifically, you ask whether (1) the plan must be made subject to annual appropriations by the board of supervisors consistent with Art. VII, § 10 of the Constitution of Virginia (1971), (2) whether the plan contemplates emoluments or privileges from the community not rendered in consideration of public services in violation of Art. I, § 4, and (3) whether the school board has legal authorization under the Dillon Rule to implement the proposed plan.

The retirement plan, as represented, is designed as a concurrent supplement for persons already eligible and receiving early retirement benefits under the Virginia Supplemental Retirement System ("VSRS"). School board employees would receive a local benefit augmenting the VSRS benefit. The amount, when added to the VSRS payment, would equal their entitlement payable solely from VSRS had they continued in State service for five more years or until age 65, whichever date arrives sooner.

The benefits paid by the plan are not given in consideration of services rendered by the participating employee on a part-time basis. Rather, the benefits are truly retirement benefits. I assume that county and/or State appropriations would be used to fund the local benefit.

Your first inquiry concerning whether the plan must be subject to annual appropriations is answered in the affirmative. Article VII, § 10(b) explicitly provides that "[n]o debt shall be contracted by or on behalf of any county...except by authority conferred by the General Assembly by general law." In Virginia, the local school boards have no appropriation power. Furthermore, the General Assembly has explicitly provided that "[n]o school board shall expend or contract to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board." See
§ 22.1-91 of the Code of Virginia. Thus, the plan must be made subject to annual appropriations by the board of supervisors.

Regarding your second inquiry concerning emoluments and privileges from the community, I am of the opinion that the referenced retirement benefits payable to school board employees would not violate Art. I, § 4. It is well recognized that legislative bodies may provide retirement benefits for their public employees in consideration for public services. See, e.g., State v. Sims, 133 W.Va. 239, 55 S.E.2d 505 (1949), where the Supreme Court of West Virginia recognized that, "payment of retirement benefits to teachers of all classes may be said to be for a public purpose." 133 W.Va. at 245, 55 S.E.2d at 508.

Your third inquiry is whether the proposed plan is barred by the Dillon Rule of strict construction, which limits the powers of political subdivisions of the State to those expressly conferred or by necessary implication. Stated differently, the question is whether the school board itself has the legal authority to provide the retirement benefit over and above the level authorized by the General Assembly. For the reasons hereinafter stated, I am of the opinion that such a plan may be implemented, if duly established by the board of supervisors, pursuant to § 51-112 of the Code.

Virginia has long adhered to the Dillon Rule that the powers of local governing bodies are limited to those conferred expressly or by necessary implication. See Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Moreover, in Arlington County, the Court cited Kellem v. School Board of the City of Norfolk, 202 Va. 252, 117 S.E.2d 96 (1960), for the specific proposition that:

"School boards...constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other...."

202 Va. at 254, 117 S.E.2d at 98.

This Office has held that local school boards may provide fringe benefits to their employees as part of the total compensatory package. See, e.g., Reports of the Attorney General: 1977-1978 at 360 (group health insurance for teachers); 1974-1975 at 199 (prepaid prescription drug program for teachers); 1970-1971 at 233 (group hospital insurance for teachers and their families). In each case cited, the exercise of local discretion did not contravene legislative intent. The authority for such fringe benefits has been found in the supervisory powers of a school board vested by operation of § 7 of Art. VIII, and the legislative enactments governing payments to teachers.

Article VIII, § 7 does not define the powers included within the grant of supervision, and while the language of this section appears to be broad in scope, the authority therein may be circumscribed by the General Assembly. See, e.g., Arlington County, supra, in which the Court observed, "[t]he general power of school boards to supervise does not necessarily include the right to deal with the labor relations of employees in any manner the boards might choose, unfettered by legislative restriction." 217 Va. at 576, 232 S.E.2d at 41. See also DeFebio v. County School Board, 199 Va. 511, 100 S.E.2d 760 (1957), appeal dismissed, 357 U.S. 218, 78 S.Ct. 1363, 2 L.Ed.2d 1361 (1958).

Consistent therewith, this Office has held that the General Assembly may set a minimum salary level for public school teachers. See 1982-1983 Report of the Attorney General at 444. See also School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Likewise, this Office ruled that a sick leave policy contrary to regulations of the Department of Education was not authorized by law. A more favorable local policy would undermine the legislature's grant of authority to the department to set sick leave standards for school board employees. Article VIII, §§ 4, 5(e). See 1975-1976 Report of
the Attorney General at 311.

By analogy, in paying retirement benefits greater than those which a teacher would receive under VSRS, a school board would circumvent the legislative determination of the maximum level of retirement benefits available during VSRS participation. The General Assembly, however, has authorized local governing bodies to establish separate retirement plans. Section 51-112, in pertinent part, provides:

"The governing body of each county, city and town may, by ordinance adopted by a recorded vote of a majority of the members...establish a system of pensions, including death benefits, covering injured, retired or superannuated officers and employees of such county, city or town, and payable to such officers and employees, or their dependents...."

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For the purpose of this section the term employees may include teachers or other employees of city and town school boards."^4

Accordingly, I am of the view that a supplemental retirement plan for school teachers adopted pursuant to § 51-112 is permissible.

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1 Article I, § 4 provides, in pertinent part: "That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services...."

2 Article VIII, § 7, formerly § 133 of the Constitution of Virginia (1902), provides: "The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law." (Emphasis added.)

3 Section 51-111.31 authorizes VSRS participation by school board employees. Section 51-111.53 et seq. provides the basic eligibility standards and amounts of benefits.

4 It is noted that the last sentence of the statute mentions teachers employed by cities and towns but not counties. Because the statute as a whole, and its heading, speak to cities, towns, and counties, the omission of counties in the last sentence is manifestly inadvertent.

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COUNTIES. SANITARY LANDFILLS. REGULATION OF SOLID WASTE DISPOSAL.
COUNTY MAY LICENSE AND REGULATE MAINTENANCE AND OPERATION OF SANITARY LANDFILLS LOCATED NEAR HIGHWAYS; STATE PREEMPTS FIELD IN REGULATING LOCATION OF SUCH FACILITIES; CITY LANDFILL OPERATION IN COUNTY MUST COMPLY WITH COUNTY ZONING ORDINANCE; STATE DOES NOT PREEMPT FIELD IN REGULATION OF SOLID WASTE DISPOSAL UNDER §§ 32.1-177 THROUGH 32.1-186.

January 4, 1985

The Honorable J. Robert Dobyns
Member, House of Delegates

This is in reply to your request for my opinion concerning State and local legislation applicable to property located in Montgomery County on which the City of Radford proposes to establish a sanitary landfill. The site in question is located in a zoning district within which a landfill operation is a permitted use, subject to a conditional use...
permit, under the county zoning ordinance. It also is located within one thousand feet of the right-of-way of an interstate highway. The city has applied to the county for a conditional use permit, but the county planning commission has recommended against granting of the same for the reason, among others, that a sanitary landfill located within one thousand feet of an interstate highway right-of-way would not comply with the Montgomery County Zoning Ordinance. Section 18.3 of the Zoning Ordinance provides:

"Junkyard. An establishment or place of business which is maintained, operated or used for storing, keeping or selling junk or for the maintenance or operation of an automobile graveyard, and the term shall include garbage dumps and sanitary landfills. They shall not be located closer than one thousand feet from an interstate or primary right-of-way or five hundred feet from any other public highway or street." (Emphasis added.)

The first question presented is whether the underscored portion of the above-quoted provision is valid, in that it differs from the provisions of § 33.1-348(c) of the Code of Virginia which contains certain exceptions to the distance requirement under which the proposed sanitary landfill site could qualify. Section 33.1-348(c) provides as follows:

"No junkyard shall be hereafter established, any portion of which is within 1,000' of the nearest edge of the right-of-way of any interstate or primary highway or within 500' of the nearest edge of the right-of-way of any other highway or city street, except the following:

(1) Junkyards which are screened by natural objects, plantings, fences, or other appropriate means so as not to be visible from the main-traveled way of the highway or city street, or otherwise removed from sight.

(2) Junkyards which are located in areas which are zoned for industrial use under authority of state law or in unzoned industrial areas as determined by the State Highway and Transportation Commission.

(3) Junkyards which are not visible from the main-traveled way of the highway or city street." (Emphasis added.)

Section 15.1-28(a) confers authority upon localities to regulate junkyards in the following words:

"The governing body of each county, city and town in this State may adopt ordinances imposing license taxes upon and otherwise regulating the maintenance and operation of places commonly known as automobile graveyards and junkyards and may prescribe fines and other punishment for violations of such ordinances."

The section goes on to provide that the term "junkyard," for these purposes, shall have the same meaning ascribed to it in what is now § 33.1-348.

Prior Opinions of this Office, in construing the above statutes and their predecessors, hold that a locality may impose license taxes upon and otherwise regulate the maintenance and operation of automobile graveyards and junkyards, and otherwise exercise such zoning and regulatory powers as the locality may have in areas outside those specified in § 33.1-348(c). Nevertheless, at least three Attorneys General have ruled that the General Assembly, in enacting § 33.1-348 and its predecessor, intended to preempt the field for the State with respect to regulation of the location and fencing of any such facility, any portion of which is within 1000' of the right-of-way of an interstate or primary highway, or within 500' of the right-of-way of any other highway or city street. See Reports of the Attorney General: 1970-1971 at 91, 247; 1969-1970 at 72, 73; 1966-1967 at 75; 1964-1965 at 60; 1960-1961 at 19; 1958-1959 at 44.
The General Assembly has not acted to overrule my predecessors' consistent and long-standing interpretation of legislative intent, and therefore, under well-settled rules of statutory construction, it may be presumed to be correct. *Browning-Ferris v. Commonwealth*, 225 Va. 157, 300 S.E.2d 603 (1983); *Deal v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983). Accordingly, in answer to the first question, under the circumstances described, I am of the opinion that the ordinance provision in question is invalid insofar as it fails to include the exceptions contained in § 33.1-348(c).

The next question presented is whether a proposed city landfill for solid waste disposal, to be established on city-owned land adjacent to the city but located in the county, is subject to the county zoning ordinance. In an Opinion contained in 1982-1983 Report of the Attorney General at 458, I expressed 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." Consistent with that view, I am of the opinion that the city must comply with the reasonable regulations contained in a properly enacted county zoning ordinance.

The third question is whether the provisions of Title 32.1, specifically the provisions of §§ 32.1-177 through 32.1-186, preempt local ordinances with respect to regulation of the establishment of sanitary landfills for solid waste disposal. A prior Opinion of this Office considered substantially the same question and held that the power to regulate solid waste disposal is possessed jointly by the State and a local government. See 1981-1982 Report of the Attorney General at 273; compare also 1983-1984 Report of the Attorney General at 86. I concur in that conclusion, and, accordingly, the third question is answered in the negative.

1See former §§ 15-18 and 33-279.3.
2I note that according to the information attached to your letter, the language of the ordinance was only "one of the reasons" for the Planning Commission's recommendation.

3Note, however, the limitation contained in the answer to the first question, supra. In this instance, as noted above, a landfill operation is a permitted use in the district governing the site in question, subject to a conditional use permit, under the county zoning ordinance.

4Sections 32.1-177 through 32.1-186 comprise Art. 3 of Ch. 6 of Title 32.1, relating to "Solid and Hazardous Waste Management."

5The Opinion goes on to state that it does not follow from this conclusion that all local ordinances governing solid waste are valid. Section 1-13.17 requires that local ordinances not be inconsistent with State law, and this section can have the effect of invalidating local ordinances under appropriate circumstances. See 1981-1982 Report of the Attorney General at 274.

**COUNTIES. SOVEREIGN IMMUNITY. COUNTY NOT LIABLE FOR TORTS RESULTING FROM PERFORMANCE OF EMERGENCY MEDICAL SERVICES BY SALARIED EMPLOYEES.**

June 3, 1985

The Honorable Thomas W. Athey
County Attorney for York County
You have asked several questions concerning public transportation of patients in emergency medical situations. I will answer your questions in the order they were asked.

You first ask whether the patient, the attending emergency medical care personnel, or the telemetry physician should properly choose the medical facility for treatment in an emergency situation requiring transport by ambulance. I am aware of no case decisions, statutes or Department of Health regulations which would provide a dispositive answer to this inquiry. As a matter of practice, however, the Virginia Department of Health generally encourages emergency medical care technicians to meet the needs and desires of the patient or his/her family, and that a joint decision should be agreed to when possible. In cases where the condition of a patient is severe, however, the Department has indicated that reliance should be placed on the physician to select the closest, most appropriate facility to which the patient should be transported.

You next ask what the county's potential liability would be if it bypasses the closest medical facility capable of managing a medical problem to go to a hospital of the patient's choice. A county is protected from liability by the doctrine of sovereign immunity if the function performed is governmental in nature. See Messina v. Burden, 228 Va. 301, 321 S.E.2d 557 (1984). The provision of health care by a municipal corporation is a governmental function. See The City of Richmond v. Long's adm'r., 58 Va. (17 Gratt.) 375 (1867). Therefore, the county could not be liable for torts which resulted from the performance of emergency medical services. See 1975-1976 Report of the Attorney General at 147. Likewise, an employee of a municipal corporation who performs emergency medical services will also fall within the doctrine of sovereign immunity, unless he commits an intentional tort or is so negligent as to exceed the scope of his employment. Id. This is because the provision of medical services is an activity which requires judgment and discretion. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). Whether an employee has committed an intentional tort or has been so negligent as to exceed the scope of his employment would depend on the facts of a particular case.

Section 8.01-225 of the Code of Virginia further provides immunity for emergency medical care attendants and licensed physicians as follows:

"Any emergency medical care attendant or technician possessing a valid certificate issued by authority of the State Board of Health who in good faith renders emergency care or assistance whether in person or by telephone or other means of communication, without compensation, to any injured or ill person, whether at the scene of an accident, fire or any other place, or while transporting such injured or ill person to, from or between any hospital, medical facility, medical clinic, doctor's office or other similar or related medical facility, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such emergency care, treatment or assistance...."

Any licensed physician who directs the provision of emergency medical services, as authorized by the State Board of Health, through a communications device shall not be liable for any civil damages for any act or omission resulting from the rendering of such emergency medical services unless such act or omission was the result of such physician's gross negligence or willful misconduct."

I am, therefore, of the opinion that if the bypass of the closest medical facility capable of managing a medical problem to go to a hospital of the patient's choice was in good faith by the medical care attendant and was not the result of the physician's gross negligence or willful misconduct, either or both of those individuals would be immune from liability.
COUNTIES, CITIES AND TOWNS. CONTRACTS. INDEBTEDNESS.

August 1, 1984

The Honorable Theodore V. Morrison, Jr.
Member, House of Delegates

This is in reply to your request for my opinion whether a county may enter into a lease for a term of five years for office space to be utilized by a department of county government, the rent therefor being stated in the total amount for the entire term, but payable in equal monthly installments each month of the term.

You refer to a prior Opinion of this Office, contained in the 1974-1975 Report of the Attorney General at 28, which considers a virtually identical question. That Opinion held that such a lease violates Art. VII, § 10 of the Constitution of Virginia (1971) prohibiting counties from contracting debts payable from revenues not collectible in the current year. Such an arrangement either must first be submitted to the qualified voters of the county for approval in a referendum (which itself must be authorized by statute), or must provide that future lease payments are subject to the condition that the board of supervisors appropriate funds during each year in which a payment is to be made. The 1974 Opinion is consistent with Virginia law and states the long-standing position of this Office on such matters, most recently reaffirmed in an Opinion contained in the 1982-1983 Report of the Attorney General at 149. For the reasons stated therein, your question is answered in the negative.

You ask also whether, if a county is prohibited from entering into a lease for a term of more than one year, the constitutional prohibition applies as well to a city or a town. Your question is answered in the negative. Article VII, § 10(b), which imposes the referendum requirement as a condition of incurring county debt in excess of one year, does not apply to cities and towns. A city or town may incur debt without a referendum but is subject to a debt ceiling based on the assessed value of the jurisdiction's taxable real estate. See Art. VII, § 10(a); 1 Reports of the Attorney General: 1981-1982 at 44 and 48; 1977-1978 at 297. It should be noted, however, that apart from the constitutional limitations imposed, cities and towns may incur debt only as authorized by the General Assembly. Thus, any leasing arrangement which results in a city or town indebtedness must be grounded upon authority conferred in general law or the municipality's charter. See, e.g., Reports of the Attorney General: 1981-1982, supra; 1979-1980 at 60; 1977-1978, supra.

1Art. VII, § 10(a) provides, in part, as follows: "No city or town shall issue any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed ten per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes." Subsection 10(a)(1) excludes from determination of the debt ceiling for a city or town obligations payable from the revenue for the current year. This class of indebtedness also is excluded from the county referendum requirement, pursuant to subsection 10(b), which gives rise to the "one-year indebtedness" rule applied to counties.
COUNTIES, CITIES AND TOWNS. CONTRACTS. LIMITATION ON INDEBTEDNESS. SETTLEMENT OF ANNEXATION AGREEMENTS. ANNEXATION SETTLEMENT AGREEMENT BETWEEN CITY AND COUNTY PROVIDING FOR FUTURE PAYMENT OF COUNTY REVENUES TO CITY MUST BE APPROVED BY COUNTY VOTERS IN REFERENDUM; REFERENDUM MUST BE AUTHORIZED BY GENERAL LAW.

October 29, 1984

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

This is in reply to your letter concerning a proposed settlement of annexation issues between the City of Franklin and Isle of Wight County. Under a proposed voluntary settlement agreement to be adopted pursuant to § 15.1-1167.1 of the Code of Virginia, the city would (1) agree to waive its right in the future to seek an annexation of certain county territory adjacent to the city; (2) agree to continue to provide certain of its services to the territory without future charges for the services; and (3) participate in a five-year joint economic development effort that would include the sharing of capital development costs on an equal basis with the county within the defined geographical area. In exchange for the city's agreements, the county would agree to three forms of revenue sharing which would involve payments by the county to the city from certain locally derived revenues, as follows:

A. The county would pay to the city, by the third year of the agreement, 15 percent of all local tax revenue, with certain exceptions, collected each year from the specified area. That obligation would continue in perpetuity.

B. If the economic development effort attracted a new industrial or commercial business to the specified area, the county would pay the city one-half of the net revenue derived from utilities extended to the business.

C. If such a new business located within the area during the life of the economic development program, the county would also pay the city in perpetuity one-half of the local tax revenue generated each year by the business.

Based upon the above, you request my opinion as follows:

1. Whether the revenue sharing provisions of the proposed settlement agreement would be valid without the approval of the qualified voters of the county. You note that § 15.1-1167.1 does not require the holding of a referendum as a prerequisite to the execution of a revenue sharing agreement, but it has been suggested that Art. VII, § 10 of the Constitution of Virginia (1971), requires voter approval of the revenue sharing proposals.

2. If Art. VII, § 10 does require voter approval in this instance, and in the absence of present enabling legislation authorizing such a referendum, whether it is necessary to provide for the required election by general law, such as by amending § 15.1-1167.1, or whether the constitutional requirements would be met by adoption of a special act allowing an election on the particular agreement proposed here.

While efforts to resolve annexation issues between a city and a county by agreement rather than by litigation are commendable and should be encouraged, the result, as you recognize, nevertheless must be consistent with constitutional requirements.
With regard to your first question, you refer to my Opinions of June 11, 1984, to the Honorable Thomas J. McCarthy, Jr. (1983-1984 Report of the Attorney General at 384), and of July 26, 1984, to the Honorable Frank W. Nolen (1984-1985 Report of the Attorney General at 102), in which similar agreements were considered. The McCarthy Opinion involved an agreement purportedly made between a town and a 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 under § 58-441.49(h). In addressing the question presented, I reiterated the holding of a prior Opinion 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. The Nolen Opinion involved a "voluntary settlement of annexation and immunity" agreement entered into between a county and city under § 15.1-1167.1. The agreement itself recognized that those of its provisions which required future county payments to the city made voter approval necessary under Art. VII, § 10(b), and the questions presented were whether Art. VII, § 10(b) is self-executing in authorizing a referendum, or whether, instead, additional enabling legislation would be necessary in order to submit the agreement to the voters in an election. I opined that Art. VII, § 10(b) is not self-executing and that additional legislation would be necessary to authorize a referendum on such an agreement.

You suggest in your letter that the Franklin/Isle of Wight agreement differs from those considered in the McCarthy and Nolen Opinions in material ways which could affect resolution of the constitutional issue. You state, for example, that the revenues flowing from the county to the city would be derived solely from a limited geographical area and, in some instances, solely from a particular business within that area. Also, in exchange for the payments it makes, the county would receive each year tangible benefits in the form of a continuing waiver of the city's right to file an annexation action, along with the services provided by the city to the territory in question. By virtue of these features of the proposed agreement, it has been suggested that the constitutional referendum requirement does not apply because the revenue sharing provisions would fall within, or be analogous to, the exceptions applicable to revenue bonds, special funds and/or continuing service contracts.

Article VII, § 10(b) provides 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."

Article VII, § 10(b) clearly prohibits a county from contracting a debt without the approval of county voters in a referendum, unless the debt falls within an exception recognized under Art. VII. Subsection 10(a)(1) excepts obligations issued in anticipation of the collection of the revenues of the county for the current year and, therefore, would not be applicable to the agreement. Neither does the agreement involve bonds for school capital projects within the exception provided in subsection 10(b). Because these exceptions are not applicable and assuming the proposed agreement will create a county
debt upon its execution, then in order to escape the requirement of prior county voter approval in a referendum, the debt must be of the class of debts listed in subsection 10(a)(3), or otherwise must fit within another judicially recognized exception hereinafter discussed.

The debt exception from the referendum requirement allowed by Art. VII, § 10(a)(3) is for "[b]onds...the principal and interest on which are payable exclusively from the revenues and receipts of a water system or other specific undertaking or undertakings from which the...[county] may derive a revenue or secured, solely or together with such revenues, by contributions of other units of government." In effect, this constitutionally listed exception comes under the "special fund doctrine" recognized by the courts, to which you make reference. The first case in Virginia to recognize the doctrine was Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949), which quoted the principle as follows:

"Obligations, issued by a state, if payable only from the revenue to be realized from a particular utility or property, acquired with the proceeds of the obligations, if payable only from the revenue to be realized from special taxes for a particular utility or property, acquired by the obligations or proceeds, or if payable only from a special fund to be raised from the sale or lease of lands previously set apart for the purpose of the obligations, do not generally constitute debts of the state within the meaning of constitutional limitations on indebtedness; but constitutional limitations have been held to apply to obligations incurred for a particular utility or property, although payable from a special fund derived from such property owned by the state at the time of the creation of the indebtedness and the revenue of which might be applied to the discharge of the general obligations of the state, or where the special fund is to be replenished by general taxation. However, it has been held that if such resort to general taxation is merely contingent no debt within the limitation of the constitution has been created. ***' (Emphasis by the Court.) 188 Va. at 842-843.


From my examination of these cases and other authorities, I conclude that the arrangement under consideration here does not involve the type of revenue-producing, self-liquidating county project contemplated under the "special fund doctrine." Under the agreement, the county would obligate itself to pay over to the city future county revenues, derived from tax levies and utility charges, which otherwise would be available for general county purposes, to obtain, primarily, a city promise not to attempt to annex certain county land in the future. In my opinion the special fund doctrine does not apply in such circumstances. See generally 15 McQuillin, Municipal Corporations § 41.31 et seq. (3d ed. 1970); 56 Am.Jur.2d Municipal Corporations § 648 (1971); 64 Am.Jur.2d Public Securities and Obligations § 429 (1972).

I also am of the opinion that the city's proposed agreement to waive its right to pursue annexation of county land in the future does not constitute an essential public service for the benefit of county residents, such as water, electricity, sewerage or transit service, under the "service contract doctrine" recognized in Virginia, which exempts from the debt limitations of Art. VII, § 10(b) county financial obligations payable in future installments as the service is rendered. See Fairfax County v. County Executive, 210 Va. 680, 173 S.E.2d 869 (1970); Fairfax County v. County Executive, supra note 4; see generally 15 McQuillin, Municipal Corporations § 41.38 (3d ed. 1970); 56
Taking all of the above into consideration, in answer to the first part of your inquiry, I am of the opinion that the revenue sharing provisions of the proposed settlement agreement would be of doubtful validity without prior approval of the qualified voters of the county in a referendum. There is no presently applicable statutory authority for a referendum on such indebtedness, and therefore, additional legislation will be necessary to provide such authority. See Nolen Opinion, supra. In answer to the second part of your inquiry, whether legislation authorizing such a referendum should take the form of a general law or a special act, I refer you to the text of Art. VII, § 10(b), quoted above, which states that county debt may be contracted only by authority conferred by general law, and that provision for county elections on such debt must be made in the general law authorizing the debt; and to the last sentence of Art. VII, § 1, which states that "[i]n this article, whenever the General Assembly is authorized or required to act by general law, no special act for that purpose shall be valid unless this article so provides."

1 The general terms of a proposed comprehensive settlement are contained in a "Statement of Intent" jointly executed by the jurisdictions, a copy of which was obtained subsequent to receipt of your Opinion request.

2 See 1982-1983 Report of the Attorney General at 149 (in the absence of voter approval, any contract entered into in one fiscal year and requiring payments in future years must be made subject to the condition that the board of supervisors appropriate funds during each year in which a payment is to be made).

3 You state also, however, that the amount of the tax revenues from the area to be paid to the city is expected to significantly exceed the cost or value of the services provided.

4 A "debt" in the context of the constitutional limitation on local debt means an obligation which may directly or indirectly require the payment of money to discharge. Fairfax County v. County Executive, 210 Va. 253, 259, 169 S.E.2d 556 (1969); Button v. Day, 205 Va. 629, 642, 139 S.E.2d 91 (1964).

It may be argued here that the obligation of the county, under either of the paragraphs labeled "B" and "C" above, is only contingent, under the definition of "contingent debt," as an existing demand, the enforceability of which is dependent on a contingency which may never happen. Button, supra note 4, 205 Va. at 642-643. It should be noted, however, that in Button the Court declined to consider whether a contingent indebtedness should be excluded from constitutional debt limitations. 205 Va. at 644.

COUNTIES, CITIES AND TOWNS. DILLON RULE. RULE OF STRICT CONSTRUCTION APPLICABLE TO LOCAL GOVERNING BODIES.

May 13, 1985

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

The Town of Weber City and the Town of Gate City are two towns located within Scott County. The county presently charges each town a landfill use fee for the town's deposits of solid waste in the county's landfill.

You have asked whether Scott County may eliminate its landfill use fee charged to the Town of Weber City, pursuant to § 32.1-183 of the Code of Virginia, upon the condition that Weber City repeal its motor vehicle license fee, without jeopardizing the
county's legal ability to continue to charge the Town of Gate City a landfill use fee. You indicate that this proposal would be a compromise between Scott County and Weber City, and that Gate City would probably contest the landfill use fee charged it under these circumstances.

Consumer utility taxes are assessed pursuant to §§ 58.1-3812 and 58.1-3814. Both statutes provide that county consumer utility taxes shall not apply in towns which meet certain conditions. You advise that Scott County, Weber City and Gate City levy a utility consumer tax. The county's landfill use fee is imposed against the two towns by virtue of § 32.1-183, which reads, in pertinent part:

"If a county levies a consumer utility tax and the ordinance provides that revenues derived from such source, to the extent necessary, be used for solid waste disposal, the county may charge a town or its residents, establishments and institutions an amount not to exceed their pro rata cost, based upon population for such solid waste management if the town levies a consumer utility tax."

In sum, a county may charge a town for the disposal of its solid waste if (1) the county levies a consumer utility tax; (2) the county's solid waste ordinance provides that revenues derived from its consumer utility tax be used for solid waste disposal to the extent necessary; and (3) the town also levies a consumer utility tax. See § 32.1-183; 1978-1979 Report of the Attorney General at 85. You state that both Weber City and Gate City satisfy these conditions, and that Scott County has enacted the appropriate ordinances.

Local motor vehicle license fees are authorized by § 46.1-65. Section 46.1-65(a) provides that counties, incorporated cities, and towns may charge license fees upon motor vehicles. Section 46.1-65(d) provides, in pertinent part:

"If in any county imposing license fees and taxes under this section, a town therein imposes like fees and taxes upon vehicles of owners resident in such town, the owner of any vehicle subject to such fees or taxes shall be entitled, upon such owner's displaying evidence that he has paid the amount of such fees or taxes, to receive a credit on the fees or taxes imposed by the county to the extent of the fees or taxes he has paid to such town."

To summarize the effect of the proposed compromise, Scott County would forebear its landfill charge to Weber City, and Weber City would, in turn, repeal its motor vehicle license fee. As a result, Scott County would receive the revenue derived from its motor vehicle license fee paid by Weber City residents. Weber City would be relieved of its obligation to pay Scott County for the use of the county's landfill.

Virginia follows the Dillon Rule of strict construction applicable to the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). The Code specifically sets out numerous areas where local governing bodies may act jointly pursuant to an agreement. Examples of these areas include capital projects, economic growth sharing, annexation, and creation of water and sewer authorities. Section 15.1-21 provides for the joint exercise of powers exercised or capable of exercise by political subdivisions. This section does not, however, grant any additional substantive authority to a local governing body. 1972-1973 Report of the Attorney General at 128. I am unaware of any statute that authorizes two local governing bodies to enter into a binding agreement to forego their powers to charge fees or taxes in consideration of reciprocal action by the other jurisdiction.

The provisions of §§ 32.1-183 and 46.1-65 are permissive, however, in that a county
"may" charge a town for solid waste disposal, and a town "may" charge a motor vehicle license fee that is credited against any county license fee.

Assuming Scott County unilaterally eliminates its landfill charge against the Town of Weber City, pursuant to its authority under § 32.1-183, and Weber City unilaterally eliminates its motor vehicle license fee, pursuant to its authority under § 46.1-65, I turn to your specific question whether Gate City could successfully challenge the county's landfill charge to that town on the ground that a similar charge was not made to Weber City.

In Town of Ashland v. Supervisors, 202 Va. 409, 117 S.E.2d 679 (1961), the Supreme Court of Virginia considered Hanover County's constitutional challenge to the Town of Ashland's motor vehicle license fee enacted pursuant to § 46.1-65. The county claimed that § 46.1-65(d) discriminated against county residents because it empowered the county to tax county residents and not town residents, while residents of both the county and the town benefited from county tax expenditures. The Court stated that uniformity and equality of various license taxes are not essential, so long as the classifications are reasonable and not arbitrary. The Court held that the classification of towns as separate taxing units for motor vehicle licenses was reasonable and not such hostile discrimination against counties as to be arbitrary. 202 Va. at 416, 117 S.E.2d at 684.

In my opinion, Town of Ashland supports the conclusion that it would not be unconstitutional discrimination for Scott County to charge Gate City a landfill use fee while not charging Weber City a similar fee if the different treatment was neither arbitrary nor hostile discrimination against Gate City. The justification for the disparate treatment of Gate City would be the contributions of Weber City residents to county revenues by payment of the county motor vehicle license fee, which presently is paid to the town. Gate City residents, on the other hand, contribute to town revenues by paying the town motor vehicle license fee. Charging Gate City a landfill use fee would redress the differing contributions to county revenues which, in turn, support the operations of the landfill.

You next ask if the county could accomplish the same object by appropriating to the Town of Weber City, under authority of § 15.1-544, the amount received from the town for the use of the county landfill.

Section 15.1-544 reads, in pertinent part: "The boards of supervisors...may appropriate such sums as the board may desire to any incorporated town or towns within the boundaries of the county," In a prior Opinion found in the 1974-1975 Report of the Attorney General at 33, this Office concluded that a county may appropriate to a town the revenue a town would have collected if the town continued to charge a fee for a business and professional license. In light of the permissive language quoted above, it is my opinion that Scott County would have the authority to make the desired appropriation to the Town of Weber City. As discussed in the prior Opinion, however, the board of supervisors could not bind its successors to continue the appropriations, nor could the town council bind its successors not to reenact a town motor vehicle license fee.

In summary, it is my opinion that Scott County and Weber City do not have the authority to enter into a binding agreement under which Scott County would eliminate its landfill use charge against Weber City in consideration for Weber City's repeal of its town motor vehicle license fee. The county could, however, voluntarily appropriate an amount equal to its landfill charge to the town, pursuant to its authority under § 15.1-544, or in the alternative, the town could voluntarily repeal its license tax and the county may voluntarily repeal its landfill charge to Weber City.
This is in reply to your letter concerning a "Voluntary Settlement of Annexation and Immunity" agreement entered into between the City of Lexington and Rockbridge County pursuant to § 15.1-1167.1 of the Code of Virginia. Section 4.00 of the agreement recognizes that the provisions which prescribe future county payments to the city require that the agreement be submitted to the county voters for approval pursuant to Art. VII, § 10(b) of the Constitution of Virginia (1971), and commits the parties to jointly seek necessary legislative changes to allow the agreement to be placed before the county voters in a referendum. You ask my opinion on the following questions:

"(a) Is Art. VII, § 10(b) [of the Constitution] self-executing in that the question of approval or rejection of the Agreement may be placed on the ballot in the County at the November 1984 general election pursuant to the Constitution?"

(b) "Is enabling legislation necessary to place the question on the ballot in the County?"

The applicable portion of Art. VII, § 10(b) reads 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.)

Article VII, § 10 does not, of itself, grant any power to localities, but instead limits the borrowing power which the General Assembly may confer upon them by statute or by city or town charter. See, e.g., 1982-1983 Report of the Attorney General at 66. It is "self-executing," that is, it does not require implementing legislation, to the extent that it imposes this limitation. See Robertson v. Staunton, 104 Va. 73, 51 S.E. 178 (1905). Article VII, § 10(b), however, expressly provides, in the language quoted and emphasized above, that a general law is required to authorize any county debt and that the law must
also make provision for a referendum on the incurrence of such debt, unless it fails within one of the listed exceptions. To that extent Art. VII, § 10(b) manifestly is not "self-executing," that is, it does not authorize any referendum without implementing legislation. Accordingly, your first question is answered in the negative.

With regard to your second question, I refer you, first, to § 24.1-165, which provides that, with exceptions not applicable here, "[n]o referendum shall be placed on the ballot, unless specifically authorized by statute...." Because § 15.1-1167.1 does not provide for a referendum on those portions of an agreement which create indebtedness covered by Art. VII, § 10(b), nor is there any other referendum authority of which I am aware that would apply to the indebtedness contemplated in the agreement under consideration here, it is my opinion that additional legislation will be necessary to authorize the agreement to be placed before the voters of the county for their approval or rejection in a referendum.2

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1Section 15.1-1167.1 provides, in part, as follows: "Recognizing that the counties, cities and towns of the Commonwealth may be able to settle the matters provided for in Chs. 21 (§ 15.1-966 et seq.), 21.1 (§ 15.1-977.1 et seq.), 21.2 (§ 15.1-977.19:1 et seq.), 22 (§ 15.1-982.1 et seq.) and 25 (§ 15.1-1032 et seq.) of this title through voluntary agreements and further recognizing that such a resolution can be beneficial to the orderly growth and continued viability of the counties, cities and towns of the Commonwealth the following provisions are made:

1. Any county, city or town may enter voluntarily into agreement with any other county, city or town or combination thereof whereby any rights provided for its benefit in the aforementioned chapters may be modified or waived in whole or in part, as determined by its governing body, provided that the modification or waiver does not conflict with the Constitution of Virginia.

2. The terms of the agreement may include fiscal arrangements, revenue and economic growth sharing, dedication of all or any portion of tax revenues to a revenue and economic growth sharing account, boundary line adjustments, acquisition of real property and buildings and the joint exercise or delegation of powers as well as the modification or waiver of specific annexation, transition or immunity rights as determined by the local governing body including opposition to petitions filed pursuant to § 15.1-1034."

You indicate that the commission was not created pursuant to any specific statutory source of authority. I note, however, that § 15.1-21 of the Code of Virginia authorizes the joint exercise by local political subdivisions of such powers that they individually otherwise have, and the creation and funding, by agreement, of separate legal administrative entities for that purpose. Section 15.1-21(c) specifies what is to be included in any such agreement. Nothing in that section, or in any other statute of which I am aware, requires the return of unexpended funds appropriated for and given to an entity validly created by joint agreement of two or more localities. Assuming, without deciding, that the commission was validly created by agreement under the authority of § 15.1-21, in my opinion the disposition of the unexpended appropriations in the hands of the commission at the end of a fiscal year would be controlled by the terms of the agreement itself, the intent of which necessarily must be determined locally by the parties involved.

Section 15.1-21(a) provides that "[a]ny power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State may be exercised and enjoyed jointly with any other political subdivision of this State...." (Emphasis added.) Section 15.1-21 may be employed only if each participating political subdivision has the authority to exercise the power independently that it wishes to exercise jointly with the other participating subdivisions. See Reports of the Attorney General: 1977-1978 at 132; 1972-1973 at 126; 1971-1972 at 105, 107. Similarly, pursuant to § 15.1-21(c)(2), a separate legal entity may be created jointly by agreement only if independent legal authority exists for its creation. See 1976-1977 Report of the Attorney General at 239.

The agreement creating the commission and the commission's bylaws indicates that its purpose is to promote economic development in the participating jurisdictions. Sections 15.1-10 and 15.1-10.1 provide authority for localities, within certain limitations, to advertise and publicize the resources and advantages of their communities for purposes of increasing economic development. See 1975-1976 Report of the Attorney General at 25. I express no opinion whether these sections, or any other statutory provisions, provide sufficient authority for creation and funding of the commission under consideration here.

1 You suggest that retention of such unexpended funds by the entity past the end of a fiscal year could be construed as a violation of Art. VII of the Constitution of Virginia (1971). Article VII, § 10, to which I assume you refer, places limits on the indebtedness which a county, city or town may incur. I do not interpret the circumstances as described here to create a county obligation to make payments in future years or to create any other county indebtedness subject to the restrictions of Art. VII, § 10.

2 I do note, however, that the commission could not spend such funds for an unauthorized purpose.

COUNTIES, CITIES AND TOWNS. PLANNING COMMISSIONS. ZONING. APPEAL OF PLANNING COMMISSION DECISION UNDER § 15.1-456(b) AVAILABLE ONLY TO OWNER OR AGENT.

September 24, 1984

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

This is in reply to your request for my opinion whether a person other than the owner or owners or their agents may appeal a decision of a local planning commission regarding compliance with a locality's comprehensive plan to the governing body.
Section 15.1-456(a) of the Code of Virginia relates to the authority of the commission to make these determinations and the appeal procedure. Subsection (b) provides, in pertinent part:

"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 language of the statute expressly gives the right of appeal of the planning commission's decision only to the "owner or owners or their agents." I am unaware of any other statute or rule of statutory construction which would extend this language to include other parties or interested persons. Accordingly, your question is answered in the negative.

1Compare, e.g., § 15.1-496.1, which gives the right of appeal to the Board of Zoning Appeals to "any person aggrieved" and "any officer, department, board or bureau of the county or municipality affected by" the decision of a zoning administrator or other administrative officer in the administration or enforcement of a local zoning ordinance.

COUNTIES, CITIES AND TOWNS. PLANNING DISTRICT COMMISSIONS. MEMBERSHIP MUST INCLUDE COUNCIL MEMBER OF TOWN ELECTING TO PARTICIPATE; METHOD OF SELECTION OF MEMBERSHIP ESTABLISHED BY CHARTER AGREEMENT.

October 19, 1984

The Honorable Ford C. Quillen
Member, House of Delegates

This is in reply to your letter asking two additional points regarding the subject of my Opinion to you of August 20, 1984. In that Opinion, relying upon the text of § 15.1-1403 of the Code of Virginia, I stated that membership on a planning district commission established under the Virginia Area Development Act must include one representative from each town of 3,500 or more population located within the district whose governing body has elected to participate in the commission. You now inquire as follows:

"[W]here does this representative come from (citizen-at-large, governing body, etc.), and who is the appointing authority (the town governing body or can the appointment be made by the county board of supervisors from the county in which the town is located)?"

You state that the case in question relates to the Town of Wise, which presently has two members on the planning district commission, each appointed by the Wise County Board of Supervisors. The Council of the Town of Wise has asked that it be allowed a representative on the commission.

Section 15.1-1403(a) provides that the governmental subdivisions within a planning district's geographic boundaries "acting by the governing body may organize a planning district commission by written agreement among them." Section 15.1-1403(b) lists the provisions which must be included in a charter agreement, among which are the following:
"(4) The composition of the membership of the planning district commission. At least a majority of its members shall be elected officials of the governing bodies of the governmental subdivisions within the district, with each county, city and town of more than 3,500 population having at least one representative. Other members shall be qualified voters and residents of the district who hold no office elected by the people. Should the charter agreement, as adopted, so provide, an alternate may serve in lieu of one of the elected officials of each of the governing bodies of the participating governmental subdivisions. (Emphasis added.)

Section 15.1-1402(c) defines "[g]overnmental subdivision" to mean "the counties, cities and towns of this State," and § 15.1-1402(e) states that the term "[g]overning body" shall include the council of a town.

Prior Opinions of this Office held that each participating governmental subdivision must be represented on the Commission by at least one elected official of that subdivision. See Reports of the Attorney General: 1976-1977 at 331; 1970-1971 at 293. The language of the statutes indicates that the "elected official" contemplated is a member of the governmental subdivision's governing body. Accordingly, in answer to the first part of your inquiry, if the Town of Wise has a population in excess of 3,500 and its council has elected to become a part of the planning district commission, its one required representative of the commission should be a member of the town's council.

With regard to the second part of your inquiry, § 15.1-1403(b)(5) states that the planning district commission's charter agreement shall set forth the method of selection of the commission's members, and, accordingly, that document must be examined to identify the appointing authority.

COUNTIES, CITIES AND TOWNS. PLANNING DISTRICTS. MEMBERSHIP ON COMMISSIONS. TOWNS. EACH PARTICIPATING TOWN OF 3,500 POPULATION WITHIN PLANNING DISTRICT TO BE REPRESENTED ON COMMISSION.

August 20, 1984

The Honorable Ford C. Quillen
Member, House of Delegates

This is in reply to your request for my opinion whether the Virginia Area Development Act, contained in Art. 1, Ch. 34, Title 15.1 of the Code of Virginia, §§ 15.1-1400 through 15.1-1452 (the "Act"), requires that any town within a planning district which has a population greater than 3,500 be represented on the planning district commission by at least one member.

The Act authorizes creation of regional planning and service delivery entities by the governmental subdivisions within a planning district as designated by the State Department of Planning and Budget. Section 15.1-1402(c) defines "[g]overnmental subdivision" to mean "the counties, cities and towns of this State," and § 15.1-1402(e) states that the term "[g]overning body" shall include "the board of supervisors of a county, the council of a city or town...." Section 15.1-1403 provides, in pertinent part, as follows:

"(a) At any time after the establishment of the geographic boundaries of a planning district, the governmental subdivisions embracing at least forty-five percent of the population within the district acting by the governing body may organize a planning district commission by written agreement among them. Any governmental subdivision not a party to such charter agreement shall continue as a part of the
planning district but, until such time as such governmental subdivision elects to become a part of the planning district commission as hereinafter provided, shall not be represented in the composition of the membership of the planning district commission....

(b) The charter agreement shall set forth:

** * * *

(4) The composition of the membership of the planning district commission. At least a majority of its members shall be elected officials of the governing bodies of the governmental subdivisions within the district, with each county, city and town of more than 3,500 population having at least one representative....Should the charter agreement, as adopted, so provide, an alternate may serve in lieu of one of the elected officials of each of the governing bodies of the participating governmental subdivisions. (Emphasis added.)

The first sentence of subsection (b)(4) expressly states that each town within a district with a population exceeding 3,500 must have a representative on the planning district commission. It is fundamental, however, that the proper construction of a statute is to be derived from an examination of the whole body of the Act, with effect given to every word and part and all parts harmonized, if possible. See, e.g., McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623; Rockingham Bureau v. Harrisonburg, 171 Va. 339, 198 S.E. 908 (1938); C.&O. Ry. Co. v. Hewin, 152 Va. 649, 148 S.E. 794 (1929). In order to give effect to the language of § 15.1-1403(a), quoted and emphasized above, it is necessary to construe subsection (b)(4) to require a representative on the planning district commission from each town of 3,500 or more population located within the district whose governing body has elected to participate. This interpretation is inescapable in light of the wording of the last sentence of subsection (b)(4), quoted and emphasized above. With the proviso as just stated, your question is answered in the affirmative.

COUNTRIES, CITIES AND TOWNS. POLICE. AUXILIARY POLICE FORCES. LOCAL GOVERNING BODY MAY PRESCRIBE ANY TYPE OF UNIFORM FOR AUXILIARY POLICEMEN WHICH DOES NOT RESEMBLE UNIFORM OF SHERIFF'S OFFICERS OR POLICE; STATUTES DO NOT CONTEMPLATE USE OF AUXILIARY POLICEMEN IN UNDERCOVER WORK.

November 8, 1984

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

This is in reply to your request for my opinion whether § 15.1-159.5 of the Code of Virginia authorizes a local governing body to prescribe any type of uniform for auxiliary policemen, including clothes used in undercover work.

Section 15.1-159.5 is part of Art. 4, Ch. 3 of Title 15.1, relating to auxiliary police forces in counties, cities and towns. Section 15.1-159.2 authorizes the governing body of any city, county or town in the State to establish, equip and maintain an auxiliary police force and to call it into service for specified reasons. Section 15.1-159.3 authorizes the governing body to make such appropriation as may be necessary "to arm, equip, uniform and maintain" (emphasis added) an auxiliary police force. Section 15.1-159.4 provides, among other things, that "[t]he governing body shall have the authority to prescribe the uniform, organization, and such rules and regulations as it shall deem necessary for the operation of the said auxiliary police force." (Emphasis added.)
Section 15.1-159.5, to which you specifically refer, reads as follows:

"The governing body of the county, city or town may call into service or provide for calling into service such auxiliary policemen as may be deemed necessary (1) in time of public emergency, (2) at such times as there are insufficient numbers of regular policemen to preserve the peace, safety and good order of the community, or (3) at any time for the purpose of training such auxiliary policemen. At all times when performing such service, the members of the auxiliary police force shall wear the uniform prescribed by the governing body." (Emphasis added.)

The authority delegated to local governing bodies by the above-referenced statutes is written in broad language, at least with respect to decisions whether to have an auxiliary police force, the size of the force, who will be appointed to it, and how it will be equipped and maintained. Particularly with regard to your inquiry, the governing body is authorized to prescribe the uniforms to be worn, and there is no express limitation on the governing body's discretion to prescribe what the uniform of any auxiliary police officer shall be.\(^1\)

The statute does limit the calling into service of auxiliary policemen to three specified types of circumstances, at which time, in each instance, the prescribed uniform must be worn. None of the types of circumstances listed appears to contemplate inclusion of undercover work. Moreover, the requirement that a uniform be worn at all times certainly is at odds with the practical necessity in undercover work that an officer be clothed in such manner as to make him indistinguishable from the rest of the populace or segments thereof.

Accordingly, in answer to your inquiry, it is my opinion that the governing body has authority to prescribe any type of uniform for its auxiliary police force, subject to the limitation discussed in footnote 1, but that the statutory provisions governing auxiliary police forces do not contemplate the use of auxiliary policemen in undercover work.

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\(^1\)Note, however, the Opinion found in the 1971-1972 Report of the Attorney General at 364, wherein it was held that the uniform prescribed for auxiliary police in a locality pursuant to § 15.1-159.4 should not resemble or be in facsimile of the uniform of members of the sheriff's department or police department of the locality or of the officers of an adjoining locality.

COUNTIES, CITIES AND TOWNS. SOVEREIGN IMMUNITY. GOVERNMENTAL FUNCTION. CITY NOT AUTHORIZED TO VOLUNTARILY PAY TORT CLAIM FROM WHICH COURT HAS DETERMINED CITY TO BE IMMUNE UNDER DOCTRINE OF SOVEREIGN IMMUNITY.

October 15, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

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

"A private citizen in the City of Virginia Beach has allegedly suffered damage as a result of actions of the City, which actions have been determined by a Court of record to have been undertaken by the City as a 'governmental function' and the City was held immune under the doctrine of sovereign immunity. Your opinion is
requested on the matter of whether or not the City of Virginia Beach acting through its governing body, the City Council, may enact an ordinance for the special benefit of the claimant, which would allow the City to pay the claimant for the damages sustained notwithstanding the ruling of the Court."

In the exercise of its governmental functions, a municipal corporation is immune from liability in tort. *Freeman v. City of Norfolk, 221 Va. 57, 266 S.E.2d 885 (1980); Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939).* The general rule is that a municipal corporation may not waive or contract away its governmental immunity absent specific statutory authority for such action. See 18 McQuillin, *Municipal Corporations § 53.28* (3d ed. 1984). In *Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957)*, the Supreme Court of Virginia held that because a county is a political subdivision of the State and its freedom from liability for tort is likened to the immunity inherent in the State, it is fundamental and jurisdictional and cannot be waived. The same rationale is applicable to cities when exercising governmental functions.

In my opinion, voluntary payment of a claim determined by a court not to be a legal obligation of the city is the same in principle and effect as a waiver of the city's governmental immunity. It may not be done absent specific statutory authority to that effect. See Reports of the Attorney General: 1980-1981 at 317; 1975-1976 at 318; 1971-1972 at 102; 1969-1970 at 70; compare 1976-1977 Report of the Attorney General at 51. There is no specific statutory authority of which I am aware that would allow the City of Virginia Beach to pay a claim under the circumstances you describe. Accordingly, your inquiry is answered in the negative.

COUNTIES, CITIES AND TOWNS. TAXICAB REGULATION. CITY MAY NOT DISCRIMINATE IN REGULATION OF TAXICABS SOLELY ON BASIS OF RESIDENCY OF OPERATOR.

November 9, 1984

The Honorable Sidney Barney
Commonwealth's Attorney for the City of Petersburg

This is in reply to your letter concerning regulation of taxicabs in the City of Petersburg. You relate that the city has adopted an ordinance, under authority of § 56-291.3:1 et seq. of the Code of Virginia, to license and regulate taxicabs operating within the city, including provisions which establish rates and which limit the number of taxicab licenses, based upon local population. A neighboring county adopted a similar ordinance and licensed approximately forty taxicabs. The largest portion of their business consists of transporting passengers from the county into the city and from the city into the county. You state that the influx of taxicabs operating in the city has had an adverse financial impact on city-licensed taxicabs. You ask whether the city has the authority, by ordinance or otherwise, to restrict county-licensed taxicabs from picking up passengers within the city for transportation into the county.

Section 56-291.3:2 authorizes the city council to require a license and to impose upon and collect a license tax from every person, firm, association or corporation who or which operates any taxicab in the city, and to impose penalties for violation of the license tax ordinance and for operation of a taxicab without obtaining the required license. Section 56-291.3:3 states, however, that the city may not require a license or impose a license tax for the operation of a taxicab for which a similar license is imposed or a tax is levied by the county, city or town of which the vehicle's owner or operator is a resident, except that a license may be required and a tax imposed in such a case if the owner, lessee or operator of the vehicle maintains a taxicab stand or otherwise solicits
business within the city. Section 56-291.3:5 provides misdemeanor penalties for persons convicted of violating city council regulations adopted pursuant to the preceding statutory authority.

Section 56-291.3:7 reads as follows:

"A. It is the policy of this Commonwealth, based on the public health, safety and welfare, to assure safe and reliable privately operated taxicab service for the riding public in this Commonwealth; and in furtherance of this policy, it is recognized that it is essential that counties, cities and towns be granted the authority to reasonably regulate such taxicab service as to the number of operators and the number of vehicles which shall provide such service and regulations as to the rates or charges for such taxicab service, even though such regulations may have an anti-competitive effect on such service by limiting the number of operators and vehicles within a particular jurisdiction.

B. The governing body of any county, city or town in the Commonwealth may regulate by ordinance and limit the number of taxicab operators and the number of taxicabs within its jurisdiction in order to provide safe and reliable privately operated taxicab service on any highway, street, road, lane or alley in such county, city or town. The governing body may promulgate such reasonable regulations to further the provisions of this section including, but not limited to, minimum liability insurance requirements. However, such ordinances and regulations shall not prescribe the wages or compensation to be paid to any driver or lessor of any such motor vehicle by the owner or lessee thereof."

The above statute grants broad authority to the city council to control the number of taxicabs on its streets and to decide which persons will be allowed to operate them. This statute does not, however, specifically authorize a locality to base its licensing and regulation procedures solely on the residence of the licensee. Thus, while the city cannot condition its licensure upon the requirement of residency and the statutes do not authorize the city to discriminate against county-licensed taxicabs simply on the basis of residency, the statutes do give the city the authority to restrict taxicabs soliciting business in the city to those taxicabs licensed by the city, to the end that the citizens will be assured a safe and reliable taxicab service.

Presumably, once the city determines the maximum number of licenses which it will grant, it will award the licenses to qualified applicants upon neutral criteria, such as the order of the date of the application.

CRIMINAL LAW. COMMUNITY DIVERSION INCENTIVE ACT. CONVICTED DEFENDANT ELIGIBLE FOR PARTICIPATION IN COMMUNITY DIVERSION PROGRAM WHILE APPEALING CONVICTION.

April 23, 1985

The Honorable Charles R. Hawkins
Member, House of Delegates

You ask whether a convicted defendant may be referred or diverted to a community diversion incentive program while pursuing a direct appeal of his conviction. The defendant was referred by the sentencing judge pursuant to the applicable provision of the Community Diversion Incentive Act, § 53.1-180 et seq. of the Code of Virginia (the "Act").
Section 53.1-184.1 states that the court imposing sentence may suspend execution of that sentence (a) pending its assessment of the recommendations of the community corrections resources board, or (b) until the offender has successfully completed the community diversion program. Thus, the suspension of execution of the sentence is the procedure to be utilized by the court when invoking the provisions of the Act. This suspended sentence, as your question implies, constitutes an appealable judgment. See Fuller v. Commonwealth, 189 Va. 327, 53 S.E.2d 28 (1949). If the defendant appeals that judgment, the fact that he is appealing his conviction does not render him ineligible for the community diversion program if the court deems his participation proper upon review of the board's recommendations. Nothing in the Act or case law precludes his participation under such circumstances.

CRIMINAL LAW. DISORDERLY CONDUCT. PERSON ON PRIVATE PROPERTY MAY BE CONVICTED UNDER § 18.2-415.

January 28, 1985

The Honorable Willard R. Finney
Member, House of Delegates

You ask whether a person standing on private property could be guilty of disorderly conduct under § 18.2-415 of the Code of Virginia. You pose the situation of a person standing in a private driveway adjacent to a public road or street. In my opinion, such a person could be subject to prosecution for disorderly conduct if his or her conduct were of the type proscribed by the statute.

Loud and abusive language uttered by a man standing on his porch to a passerby 30 feet away on the public highway has been held to be disorderly conduct by the Supreme Court of Virginia. Hackney v. Commonwealth, 186 Va. 888, 45 S.E.2d 241 (1947). This case stands for the proposition that disorderly conduct can be committed by a person physically located on private property if the "public inconvenience, annoyance or alarm," which the statute prohibits, is visited upon those in a public place.

CRIMINAL LAW. SEIZURE AS EVIDENCE OR AS CONTRABAND OF DUPLICATE AND RESTRICTED DRIVER'S LICENSES PROPER.

January 23, 1985

The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You have asked whether a police officer may seize a duplicate driver's license and a restricted license from a motorist suspected of violating several provisions of the Motor Vehicle Code. According to the facts you present, the officer stopped the motorist for a traffic infraction. When the officer performed a routine license check using the duplicate license presented by the motorist, he discovered that the motorist's license had been suspended as a result of an earlier conviction for driving while intoxicated (hereinafter "DWI"). The motorist then produced a restricted "VASAP license" for the officer. Apparently, the driver had obtained a duplicate license from the Division of Motor Vehicles before his trial on the DWI charge and had surrendered only his original license to the court upon conviction.

According to these facts, it is apparent that the officer had probable cause to
believe that the motorist was in violation of several sections of the Motor Vehicle Code at the time he seized the duplicate license. Among the sections potentially violated was § 46.1-350 of the Code of Virginia, which prohibits the operation of a motor vehicle by one whose license or privilege to drive has been suspended or revoked. It is also a violation of § 46.1-384 to possess a driver's license which one knows has been cancelled, to possess a license "for the purpose of evading the intent of [the Driver's License Act]," and to refuse to surrender any license which has been suspended by the court. Finally, it is a violation of § 46.1-385 to knowingly make a false statement on any application for a duplicate license.\(^1\)

Upon reviewing the restricted license issued by the court under § 18.2-271.1, the officer also had probable cause to believe that the driver had violated the terms of the court's restricted license order. According to your facts, the driver informed the officer that he was "driving around with his girlfriend looking for someone to work on his car," which was not one of the purposes for which the court had issued the restricted driver's license.

Based on the facts posited by you, the officer would have probable cause to believe that this driver had violated various provisions of the Motor Vehicle Code and the court's restricted license. I am, therefore, of the opinion that he may seize the duplicate and restricted licenses as evidence of the motorist's offenses.

\(^1\)Section 46.1-379 authorizes a duplicate license to be issued in the event an original driver's license is lost, stolen or destroyed.

CRIMINAL LAW. STATUTORY BURGLARY. PERSON WHO REMAINS IN BUSINESS ESTABLISHMENT AFTER CLOSE OF BUSINESS DAY WITH PREVIOUSLY FORMED INTENT TO COMMIT LARCENY MAY BE CONVICTED OF STATUTORY BURGLARY UNDER § 18.2-91.

January 28, 1985

The Honorable Willard R. Finney
Member, House of Delegates

You inquire whether a person who enters a business establishment as a customer during daytime business hours with the previously formed intent to commit larceny therein, and who then secretes himself in the store and commits larceny after the close of business, can be convicted of statutory burglary pursuant to § 18.2-91 of the Code of Virginia.

Although the Supreme Court of Virginia has not ruled on this precise issue, I am of the opinion, given the existing case law, that proof of the facts contained in your hypothetical situation would sustain a conviction under § 18.2-91.

An invitee enters a place of business during normal business hours, with the implied consent of the owner or occupier. Such consent is not unlimited, however. It is impliedly conditioned by time, place and purpose. It has been held that when a person enters a store during business hours with the intent to commit larceny, and thereafter secretes himself within the store for the purpose of committing the larceny after business hours, there has been a constructive breaking, and the consent for the original entry is deemed void ab initio. See Brooks v. State, 25 Md.App. 194, 333 A.2d 352 (1975), aff'd on other

The Supreme Court of Virginia has acknowledged that a breaking may be actual or constructive. Johnson v. Commonwealth, 221 Va. 872, 275 S.E.2d 592 (1981); Clarke v. The Commonwealth, 66 Va. (25 Gratt.) 908 (1874). In Clarke, the Court noted that where entry is gained by "pretense of business," such entry would amount to a constructive breaking by fraud. Id. at 913.

Accordingly, the elements of statutory burglary under § 18.2-91 would be present, and a conviction could be had under the facts posited in your hypothetical situation.

CRIMINAL LAW. WIRETAPPING. INTERSPOUSAL INTERCEPTION OF WIRE COMMUNICATIONS UNDER § 19.2-62(1)(a).

April 5, 1985

The Honorable J. Randolph Smith, Jr.
Commonwealth's Attorney for the City of Martinsville

You ask whether a wife may testify against her estranged husband in a criminal case resulting from his placing a wiretapping device on her telephone line. In the situation you present, the wife had remained in the marital home after the parties separated, and had entered into a new lease on the property in her name alone. Six weeks after separating, she discovered, concealed in the basement, a device attached to her telephone line which recorded all her telephone conversations.

It is my opinion that the wife may testify without the consent of the husband in a criminal prosecution against him for installing the wiretapping device. Under common law, a wife could testify against her husband only if the offense involved personal violence or physical assault. Section 19.2-271.2 of the Code of Virginia allows a wife to be called as a witness against her husband without his consent "in the case of a prosecution for an offense committed by [him]...against [her]...." This statute was recently interpreted by the Supreme Court of Virginia in the case of Hudson v. Commonwealth, 223 Va. 596, 292 S.E.2d 317 (1982), wherein the Court reasoned that by virtue of the omission from the statute of language relating to "the person," the General Assembly intended to do more than merely codify the common law. Accordingly, the Court held that § 19.2-271.2 permits spousal testimony in prosecutions for offenses committed by one spouse against the property, as well as the person, of the other. Applying this reasoning to the interpretation of § 19.2-271.2, the offense of the husband, under the facts you posit, is one committed against the wife, even though it does not involve violence.

Regarding the nature of the offense itself, § 19.2-62(1)(a) provides that "any person who...[w]illfully intercepts...any wire or oral communication" shall be guilty of a Class 6 felony. The clear and unambiguous meaning of this statute is to prohibit the interception of all wire communications by any person except as specifically provided by the General Assembly. Further, § 19.2-69 provides a cause of action to any person whose wire or oral communication is intercepted. Thus, the estranged wife in this case is a victim covered by § 19.2-62(1)(a). The United States District Court of the Eastern District of Pennsylvania, in interpreting the nearly identical federal statute, 18 U.S.C.S. § 2511(1)(a), in Kratz v. Kratz, 477 F.Supp. 463, 467 (1979), employed similar reasoning. See also Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984); Heyman v. Heyman, 548 F.Supp. 1041 (N.D. Ill. 1982). There is no exception, in either the Virginia or federal statute, for interspousal interceptions.
I find this reasoning persuasive, while acknowledging that not all courts which have addressed the issue have reached the same conclusion. See Annot., 55 A.L.R. Fed. 938 (1981). (It should be noted, however, that the annotation's cases, holding that the criminal provisions of the federal statute do not apply to interspousal interceptions, involve interception devices being placed either on the jointly occupied marital home or on the interceptor's own home, intercepting incoming calls to children.)

CRIMINAL PROCEDURE. CONTINUANCE IN DRIVING WHILE INTOXICATED CASE.

September 4, 1984

The Honorable Thomas J. Rothrock
Judge, Nineteenth Judicial District

This is in reply to your request for my opinion on two questions relating to the granting of a continuance in a driving while intoxicated ("DWI") case.

Your first inquiry is whether a general district court judge has the authority to require the accused to surrender his driver's license as a condition of granting the continuance.

It is a well-settled rule that the decision whether to grant a motion for a continuance in a criminal trial lies within the sound discretion of the trial court. Shifflett v. Commonwealth, 218 Va. 25, 30, 235 S.E.2d 316, 319 (1977); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982); cert. denied, 460 U.S. 1029. (1983). In determining whether to grant the continuance, the court should consider only whether a continuance is essential to a fair and proper trial. See 4A M.J. Continuances § 50 (1983 Repl. Vol.) From this limited perspective, it appears that the surrender of an accused's driver's license does nothing to assure his fair and proper trial. Accordingly, I am of the opinion the court is not authorized to require the surrender of the accused's license as a condition of granting a continuance.

Your second inquiry is whether a general district court judge may properly inquire of the accused as to any prior DWI convictions, level of blood alcohol content, or involvement in an accident on the present charge or on prior DWI convictions when considering the request for a continuance. While such questions may be relevant in a hearing to determine whether an accused should be admitted to bail or committed to jail, I do not believe they are properly germane to determining the need to grant a continuance. As indicated above, the considerations in determining whether to grant a continuance are different from those involved in determining the terms of bail.

1If the court does determine to grant a continuance, then the Commonwealth's attorney may ask the court to reconsider the terms upon which the accused had been granted bail. See, e.g., §§ 19.2-120, 19.2-123 for a list of criteria to be considered in determining whether to grant bail and the terms of same.

CRIMINAL PROCEDURE. FINES. TRIAL JUDGE AUTHORIZED BY § 19.2-303 TO SUSPEND FINES.
You request my opinion as to the authority of a trial court to suspend a fine that is imposed as punishment in a case. Also, you ask whether the limitations on the conditions of such suspension are the same as those for suspending jail time. You call my attention to §§ 19.2-358 and 19.2-362 of the Code of Virginia.

Section 19.2-303 provides, *inter alia*, that "the court may suspend imposition of sentence or suspend the sentence in whole or in part." (Emphasis added.) In a prior Opinion of this Office, construing similar language of then § 1922(b) of the Code of Virginia (1936), as amended, it was ruled that the term "sentence" referred to both fines and jail time. See 1938-1939 Report of the Attorney General at 234. Section 1922(b) is the forerunner to current § 19.2-303. This interpretation of the term "sentence" has been adopted in other Opinions of this Office. See Reports of the Attorney General: 1968-1969 at 166; 1950-1951 at 157.

The General Assembly is presumed to have had knowledge of this Office's interpretation of the term "sentence." Its failure to make any amendments in subsequent legislation evinces legislative acquiescence in the Attorney General's interpretation. See *Browning-Ferris v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605 (1983); *Deal v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983). Accordingly, it is my opinion that § 19.2-303 enables a trial court to suspend both jail terms and fines.

This conclusion is consistent with §§ 19.2-358 and 19.2-362. Section 19.2-362 restricts the ability of a trial court to remit fines and penalties to cases of contempt or as provided in § 19.2-358. Section 19.2-358 addresses instances where an individual defaults on a fine imposed as a sentence. The term "remit" is not defined within the provisions of the Code that relate to sentences. 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 the context of a statute, words which the legislature has seen fit to employ are to be given their usual and ordinary meanings. See *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938). The word "remit" is defined in *Black's Law Dictionary* 1163 (rev. 5th ed. 1979) as "to pardon or forgive; to annul." Similar definitions are given in the *American Heritage Dictionary of the English Language* and *Webster's New Collegiate Dictionary*. Suspension of a sentence, in contrast to a remission, means either a delay in its imposition or the staying of its execution. It is not a pardon, excuse or immunity from the punishment. See *Richardson v. Commonwealth*, 131 Va. 802, 109 S.E. 460 (1921). Accordingly, § 19.2-362 and its reference to § 19.2-358 are inapposite to the trial court's authority to suspend sentences as set forth in § 19.2-303.

You next ask whether the limitations on the conditions for suspension of fines are the same as the limitations on the conditions of suspension of jail time. Because the term "sentence" refers to jail time and fines, it is my opinion that the limitations on the conditions of suspension set forth in § 19.2-303.1 are equally applicable to both.

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1. After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, or if it appear compatible with the public interest, and in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment, and may also place the defendant on probation under the supervision of a probation officer, during
good behavior, for such time and under such conditions of probation as the court shall determine."

DEPARTMENT OF SOCIAL SERVICES. DIVISION OF SUPPORT ENFORCEMENT PROGRAMS. AMENDMENTS TO TITLE IV OF SOCIAL SECURITY ACT REQUIRE LIMIT IN APPLICATION FEE FOR NONPUBLIC ASSISTANCE CHILD SUPPORT ENFORCEMENT SERVICES TO $25 BEGINNING OCTOBER 1, 1985.

October 15, 1984

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked whether the Virginia Department of Social Services may continue charging an application fee for nonpublic assistance child support enforcement services in excess of $25 after October 1, 1984, in light of the enactment of the federal Child Support Enforcement Amendments of 1984 (Section 3(c) of Pub. L. 98-378).

Pub. L. 98-378 changes part D of title IV of the Social Security Act, in part, by amending section 454(6)(B) to limit the application fee for nonpublic assistance child support enforcement services to $25. Although certain provisions of the new federal law are effective October 1, 1984, the section amending section 454(6)(B) has an effective date of October 1, 1985.

The federal law in existence prior to the amendments to section 454(6)(B) provides an option to the states to charge an application fee for nonpublic assistance child support enforcement services based on a fee schedule according to each applicant's income. I am advised that the Virginia Department of Social Services, in conforming to the requirements of § 63.1-287(8) of the Code of Virginia and the option authorized by current federal law, therefore charges an application fee based on a fee schedule related to each applicant's income.

I am of the opinion that the Virginia Department of Social Services may charge an application fee for child support enforcement services in excess of $25 according to its fee schedule until October 1, 1985.

DEPARTMENT OF SOCIAL SERVICES. SOCIAL SERVICES BOARD ACTED WITHIN AUTHORITY IN ADOPTING REGULATIONS FOR VARIOUS CHILD CARE AGENCIES SETTING EDUCATION AND/OR EXPERIENCE LEVEL FOR OPERATORS AND STAFF.

October 18, 1984

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

You have asked whether § 63.1-202 of the Code of Virginia provides a statutory basis for the State Board of Social Services to include in its regulations for various child care agencies education and/or experience requirements for the operators or staff in such licensed facilities. You further state that the Department has long interpreted this section to give the Board broad authority to authorize regulations concerning the knowledge, educational preparation, and experience that would qualify staff to work in such facilities.
Section 63.1-202 states:

"The State Board shall prescribe general standards and policies for the activities, services and facilities to be employed by persons and agencies required to be licensed under this chapter, which standards shall be designed to ensure that such activities, services and facilities are conducive to the welfare of the children under the custody or control of such persons or agencies.

Such standards may include, but need not be limited to, matters relating to the sex, age, and number of children and other persons to be maintained, cared for, or placed out, as the case may be, and to the buildings and premises to be used, and reasonable standards for the activities, services and facilities to be employed. Such limitations and standards shall be specified in each license and renewal thereof."

While this statute is not as clear as would be preferred, one can conclude that, in adopting standards for "activities" as provided for in § 63.1-202, the Board could reasonably construe that term to include qualifications and abilities of those administering the activities as well as the activities themselves. I am informed that the Board had adopted specific educational and experience requirements for child day care placing agencies as early as 1967 and has continuously maintained such requirements, thus establishing the Board's interpretation of § 63.1-202 as granting it such authority.


The fact that House Bill 1364, which was introduced in the 1975 Session of the General Assembly, failed to be adopted is not dispositive of your question. House Bill 1364 would have amended § 63.1-202 and would have specifically provided for education and experience standards for personnel of child welfare agencies. The General Assembly is presumed to be cognizant of such construction accorded to a statute by public officials charged with its administration and enforcement, and when such construction has long continued without the General Assembly changing it, the General Assembly will be presumed to have acquiesced therein. Commonwealth v. Radiator Corp., 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960); Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983). While the General Assembly declined to pass House Bill 1364, it also has declined to amend § 63.1-202 to deprive the Board of the authority which it has long believed it possesses.

I am, therefore, of the opinion that the Board has acted within its authority under § 63.1-202 in adopting regulations for various child care agencies which set requirements for education and/or experience levels for the operators or staffs in such licensed facilities.

1 In County of Henrico v. Mgt. Rec., Inc., 221 Va. 1004, 277 S.E.2d 163 (1981), the Court held that employment agencies were subject to a section of the Henrico County Code imposing a business license tax upon "a furnisher of domestic help, labor or employment." It cited the case of Dept. Taxation v. Prog. Com. Club and then relied upon the fact that Henrico had construed the ordinance in that manner for over twenty years. The nearly twenty-year interpretation of § 63.1-202 by the Board here compares favorably to the facts relied upon by the Court in County of Henrico v. Mgt. Rec., Inc., supra.

2 The situation here differs from that which I addressed in an Opinion dated October 18, 1984, to the Honorable John C. Buchanan. Here, the statute is ambiguous, there is a long administrative interpretation, and the General Assembly has not acted to...
reverse the administrative interpretation. In the situation addressed in the Buchanan Opinion, the plain language of the statute controlled. Moreover, there was no long-standing administrative interpretation upon which one might rely.

ELECTIONS. FAIR ELECTIONS PRACTICES ACT. POLITICAL ACTION COMMITTEES MUST MAKE REPORTS OF CONTRIBUTIONS AND EXPENDITURES EACH YEAR ON SCHEDULE SET FORTH IN § 24.1-257.1; CANDIDATES' REPORT ON SCHEDULE SET FORTH IN § 24.1-257.

October 19, 1984

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

This is in reply to your request for my opinion concerning the Fair Elections Practices Act, contained in § 24.1-151 et seq. of the Code of Virginia, which establishes financial reporting requirements for elections in Virginia. You ask the following questions:

"1. What are the financial reporting procedures and schedules applicable to political action committees formed to support a candidate for election to a statewide office, prior to and during the year of election to such office?

2. What are the financial reporting procedures and schedules applicable to a candidate for election for a statewide office, prior to and during the year of election?"

1. PACs

A "political action committee" (hereinafter "PAC") is defined in § 24.1-254.2 as "any organization, other than a campaign committee or political party committee, established or maintained to receive and expend contributions for political purposes, and subject to the provisions of §§ 24.1-254.1 and 24.1-255." Pursuant to § 24.1-254.1, any PAC which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $100 must file with the State Board of Elections a statement of organization, within ten days after its organization, or, if later, ten days after the date on which it has information which causes it to anticipate it will receive contributions or make expenditures in excess of $100. A statement of organization must be filed in any calendar year in which these conditions exist. Section 24.1-254.1 specifies the information which must be included in a statement of organization. Any change in information previously submitted in a statement of organization must be reported within a ten-day period following the change, and § 24.1-254.1(d) requires a PAC to notify the Secretary of the State Board of Elections if it disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $100.

The first paragraph of § 24.1-255 requires a PAC to pay over or deliver to a candidate's treasurer, or report to the candidate's treasurer in such detail and form as to allow the treasurer to comply fully with candidate reporting requirements, all moneys, services or other things of value over $100, collected, received or disbursed on behalf of the candidate or in relation to his candidacy.

The second paragraph of § 24.1-255 requires a PAC to include in its financial reports contributions made to it by a political party committee. The third paragraph of § 24.1-255 provides that any PAC which expends any funds in excess of $500 for a
statewide election for the purpose of influencing its outcome, or which publishes or broadcasts to the public any material about a candidate designed to influence voters to vote for or against him, shall maintain records and report all such receipts and disbursements or moneys, services or other things of value over $100.

Section 24.1-258 specifies the form and required contents of the reports of contributions and expenditures which a PAC must make. Section 24.1-257 provides that the reports of contributions and expenditures prescribed in § 24.1-258 must be filed by a PAC with the State Board of Elections in accordance with the schedule set out in § 24.1-257.1, which reads as follows:

"Committees as defined in § 24.1-254.1 shall file the reports of contributions and expenditures as prescribed in § 24.1-258 in accordance with the following schedule: (i) eight days before the first Tuesday in March, (ii) eight days before the first Tuesday in May, (iii) eight days before the second Tuesday in June, and (iv) eight days before the Tuesday after the first Monday in November. Each such report shall be complete as of the eleventh day before the designated Tuesday and be complete for the entire period not covered by the last preceding filed report or, if it is the first such report filed, be complete for the entire period from the time the committee was organized.

Any contribution given or expenditure made of more than $1,000 in connection with an election for statewide office, or more than $500 in connection with an election for any other office, which is given or made after the eleventh day before any Tuesday designated above shall be reported in writing within 72 hours to the State Board of Elections; however, any such contribution given or made within the 72 hours prior to the Tuesday shall be reported and a report thereof received by the State Board no later than the Monday immediately preceding the Tuesday.

Each committee shall file a report no later than the thirtieth day after the November general election to be complete through the twenty-fifth day after such election.

In addition each committee shall file an annual report on January 15 for the preceding calendar year.

The reporting requirements shall continue in effect for each committee until a final report is filed which sets forth (i) all receipts and disbursements not previously reported, (ii) an accounting of the retirement of all debts, and (iii) the disposition of all residual funds. The final report shall include a termination statement, signed by an officer of the committee, that all reporting is complete and final."

I note that enactment of § 24.1-257.1 by Ch. 480, Acts of Assembly of 1984, worked a material change in the schedule of reporting for PACs and other persons and groups included within the definition of "committee" contained in § 24.1-254.1. Formerly, a committee was required to file an annual report of contributions and expenditures made during a calendar year by the following January 15, in addition to a calendar year statement of organization, but otherwise its schedule followed the schedule for candidate filings for the election involved, as set forth in § 24.1-257. A committee (including a PAC) must now report its contributions and expenditures on the schedule established in § 24.1-257.1, quoted above, every year, whether or not contributions have been made to candidates for nomination or election. Section 24.1-257.1 became effective on July 1, 1984. Thus, the first report due from a PAC under this new schedule must be filed with the State Board eight days before the Tuesday after the first Monday in November of this year, which is October 29, 1984, even though no statewide office of the Commonwealth is involved in the November 6 election, with reports thereafter becoming due as indicated in § 24.1-257.1.
2. Candidates

Section 24.1-253 requires a candidate for nomination or election to statewide office to appoint a campaign treasurer and file a form with the State Board of Elections indicating the treasurer's name and address, and the name of his campaign committee, if any, upon or before the acceptance of any contribution or the expenditure of any funds for his candidacy, or upon or before qualifying as a candidate, whichever first occurs. If he fails to appoint and report the appointment of a treasurer, the candidate will be deemed to have appointed himself treasurer and must comply as such with the provisions of the Act.

Section 24.1-254 requires each such candidate to designate on the form filed with the State Board a campaign depository, and all funds and monetary contributions received by the candidate or his campaign committee must be deposited in the depository in an account identifying the name and existence of the political candidacy. Any expenditure over twenty-five dollars on behalf of a candidate, directly or indirectly, must be paid by check from the designated depository account. See also § 24.1-255, discussed above.

Section 24.1-256 requires the candidate or his treasurer to keep campaign books and records as follows:

"Every candidate or his treasurer shall keep detailed, full and accurate accounts of all contributions, money, services, or valuable things over one hundred dollars in value, received, promised, loaned or borrowed, or reported, and of all expenditures, disbursements and promises of payment or disbursements of money or valuable things over one hundred dollars in value made by or reported to any candidate or by such treasurer. Such statement and account shall set forth the sum or valuable thing over one hundred dollars in value so received, or disbursed, or promised, loaned or borrowed, or reported, as the case may be, and the date when, the name and address of the person from whom received, promised, loaned or borrowed, or reported, or to whom paid or promised, as the case may be, and the object and purposes for which the money, or other valuable thing, was received, or disbursed, or promised, as the case may be. Such books and records may be destroyed or discarded at any time after one year from the date of filing the final report required by § 24.1-257 unless a court of competent jurisdiction shall order their retention for a longer period."

Section 24.1-258 specifies the form and contents of a candidate's required report of contributions and expenditures. Section 24.1-257 requires a candidate for nomination or election to statewide office, or his designated treasurer, to file reports of contributions and expenditures with the State Board of Elections on schedules set out in subsections (A)(1) and (A)(1.1), which may be summarized as follows:

- Annual reports must be filed on January 15 of the year following the first year in which contributions are received or expenditures made and each year until the nomination or election occurs.

- At the time candidacy is declared for nomination or election, a report is due of any previously unreported contributions or expenditures.

- Thirty (30) days before a primary including transactions through the 35th day.

- Eight (8) days before a primary including transactions through the 11th day.

- Eight (8) days before a convention or mass meeting including transactions through the 11th day.
Thirty (30) days after primary or nomination complete through the 25th day.

Thirty (30) days before the general election including transactions through the 35th day.

Eight (8) days before the general election including transactions through the 11th day.

Any contribution of $1,000 or more received between the 11th day and the nominating method or election must be reported within 72 hours and if received within 72 hours of the nomination or election must be reported prior to nomination or election.

Thirty (30) days after the general election including transactions through the 25th day.

Sixty (60) days after the election if any funds remain, or there are outstanding obligations, or any unreported funds have been received.

Six (6) months after the election if any funds remain, or there are outstanding obligations, or any unreported funds have been received.

Annually thereafter if any funds remain, or there are outstanding obligations, or any unreported funds have been received until a final report is filed.

A final report must set forth all previously unreported receipts and disbursements, an accounting of the retirement of all debts, and the disposition of all residual funds. This report must include a termination statement signed by the candidate.

Each nominating method, each primary election and each general election is to be reported separately. Surplus funds may be transferred following any nominating method and following any election for use in a campaign for a succeeding election. Section 24.1-257.1(C).

The above also represents change from former law governing the reporting requirements applicable to candidates, in that, prior to the effective date of the 1983 amendments, a candidate was not required to make continuing post-election reports if his campaign fund carried a surplus, and the additional prenomination and preelection report requirements set forth in § 24.1-257(A)(1.1) did not previously exist.

In summary, if a PAC is formed which meets the requirements discussed herein, then it must file the required forms and financial reports on the designated dates. Conversely, if a person wishes to be treated in law as a candidate, then he must meet the requirements imposed upon candidates which I have also discussed herein.

\(^1\)The January 15 annual reporting date was added to § 24.1-257 by Ch. 119, Acts of Assembly of 1983, as part of a new subsection (A)(1.1), which established an additional prenomination and preelection reporting schedule pertaining to elections for statewide office and the General Assembly. It became effective on January 1, 1984.

\(^2\)See the summary of the Fair Elections Practices Act prepared and distributed by the State Board of Elections pursuant to § 24.1-252.

\(^3\)See supra note 1.
ELECTIONS. OFFENSES. "WRITINGS" GOVERNED BY § 24.1-277. SECTION 24.1-277 GOVERNS WRITINGS CONCERNING CANDIDATES FOR PARTICULAR PUBLIC OFFICES IN PARTICULAR ELECTION; DOES NOT GOVERN WRITINGS CONCERNING PERSON'S ACTIVITIES AS MEMBER OF GENERAL ASSEMBLY OR ACTIVITY AS CANDIDATE IN PAST ELECTION.

January 14, 1985

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your request for my opinion concerning a questionnaire which was sent to voters in your district on December 5, 1984, by a firm which you indicate is in the business of conducting bipartisan polls. You have supplied a photocopy of a portion of the questionnaire, which contains several numbered statements directed at your activities as a past candidate for election to, and as a member of, the House of Delegates. Persons receiving the questionnaire are asked to "consider some statements that might be made to persuade you not to vote for Frank Medico and indicate whether you find the argument convincing." Each of the statements is worded in the form of a value judgment critical of your activities, and the respondent is asked to mark one of a number of spaces provided with each statement, giving choices of answers ranging from "[v]ery [e] convincing" to "[v]ery [u] nconvincing." You request my opinion on the matter, in light of § 24.1-277 of the Code of Virginia.

Section 24.1-277 provides, in pertinent part, as follows:

"(1) As used in this section 'writing' includes any written, printed or otherwise reproduced statement or advertisement of any class or description....

(2) It shall be unlawful for any person to cause any writing...to appear concerning any potential nominee or candidate, any candidate for nomination or any candidate for any office elective by the qualified voters...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.

* * *

(4) Any person violating any provision of this section shall be deemed guilty of a misdemeanor." (Emphasis added.)

I take your letter to inquire as to whether § 24.1-277(2) has been violated in this instance in that, although you identify the responsible organization, "the person causing the writing" is not "identified by full name and address on the writing," as required by § 24.1-277(2). In my opinion, your inquiry must be answered in the negative.

Section 24.1-277 is directed at writings concerning candidates or potential candidates for election to particular public offices in particular elections. See § 24.1-1(2), which defines "[c]andidate" as

"any person who seeks or campaigns for any office of the Commonwealth or 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.'"
Because the questionnaire was sent out on December 5, 1984, it cannot reasonably be considered to be related to a particular election campaign in which you were then, or are now, engaged as a candidate, as that term is defined. Despite its use of the expansive phrase, "potential nominee or candidate," § 24.1-277 is a penal statute which must be strictly construed. See § 24.1-277(4); 1956-1957 Report of the Attorney General at 97 (construing repealed § 24-456, the predecessor to § 24.1-277); see also 1968-1969 Report of the Attorney General at 87. I interpret the statements and suggested responses under consideration here to invite critical expression concerning your activities as a candidate in an election now past and your activities and effectiveness as a member of the House of Delegates. As such, applying the rule of strict construction, I conclude that they do not constitute a writing governed by § 24.1-277.

**ELECTIONS. PRIMARIES. VACANCIES IN OFFICE. NOMINATION TO FILL VACANCY MAY BE VOTED FOR UPON DATE SET FOR REGULAR PRIMARY REGARDLESS OF WHETHER REGULAR PRIMARY SCHEDULED.**

March 21, 1985

The Honorable Susan H. Fitz-Hugh
Secretary, State Board of Elections

This is in reply to your request for my opinion whether a party primary may be called and held on the statutorily prescribed primary day for the purpose of nominating a candidate to fill a vacancy in office, regardless of whether a regular primary is held to select candidates for the regularly scheduled general election. I understand that your inquiry relates to an election to fill the unexpired term of office of a county Commonwealth's attorney who has resigned.

Commonwealth's attorneys, who are required to be elected in each county and city pursuant to Art. VII, § 4 of the Constitution of Virginia (1971), are regularly elected in November general elections. See § 24.1-86 of the Code of Virginia. Section 24.1-1(5)(c), which defines the term "[s]pecial election" to include an election to fill a vacancy in office, provides, in pertinent part, as follows with regard to the filling of vacancies: "An election to fill a vacancy in any county, city or town office, including any office named in Article VII, § 4, of the Constitution of Virginia, regularly elected in a November general election shall be held on a regular November general election day...." See also § 24.1-76. Thus, an election to fill a vacancy in the office of Commonwealth's attorney must be held on the November general election day.

Primary elections are governed by the provisions of Art. 5 of Ch. 7, Title 24.1, which consists of §§ 24.1-170 through 24.1-200. Section 24.1-171 states that "[t]his article shall not apply to the nominations of...candidates to fill vacancies unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries." (Emphasis added.) Section 24.1-174(a) states, in part, that "[p]rimaries for the nomination of candidates for offices to be voted on at the general election in November shall be held on the second Tuesday in June next preceding such election." (Emphasis added.) Section 24.1-172 provides, in part, that "[e]ach party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy...."

Reading all of the above provisions together, it is my opinion that, provided all of the other applicable requirements of Art. 5 of Ch. 7 can be met, a party primary may be called and held on the regularly scheduled primary day, in this case the second Tuesday in June 1985, for the purpose of nominating a candidate for election to fill a vacancy in the office of Commonwealth's attorney, which election is required to be held on the general
election day in November 1985. This conclusion is consistent with that of an Opinion on
the same subject contained in the 1970-1971 Report of the Attorney General at 181, and
with the prior Opinions cited therein, to the effect that the primary method may be used
to nominate candidates to fill a vacancy if the regular primary date can be utilized, but
not if a vacancy occurs at a time when the regular primary date could not be utilized.
Nothing in Art. 5 expressly requires as a prerequisite to use of the primary method to
nominate to fill a vacancy that a regular primary first be called. I am aware that two
prior Opinions of this Office may be read to impose such a prerequisite. See Reports of
the Attorney General: 1979-1980 at 160; 1970-1971 at 182. To the extent that either of
those Opinions is inconsistent with the conclusion reached in this Opinion, it is
overruled. Your question is answered in the affirmative.

ELECTIONS. REFERENDA. COST OF CONDUCTING REFERENDUM UNDER § 22.1-42
TO BE BORNE BY COUNTY.

October 15, 1984

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

You ask my opinion on the following questions:

"1. Should the 'petition' referred to in § 22.1-42 of the Code of Virginia, providing
for a referendum on the question of changing the method of selecting members of
the local school board, be carried on the Law or Chancery side of the Court?

2. Should the cost of publishing the notice of such referendum pursuant to
§ 22.1-42, be borne by the petitioners, the Commonwealth or the locality?"

Section 22.1-42 reads, in pertinent part:

"Upon a petition filed with the circuit court of any county to which the provisions
of this article are applicable signed by a number of registered voters of the county
equal to fifteen per centum of the number of votes cast in the county in the
preceding presidential election asking that a referendum be held on the question of
changing the method of selection of members of the county school board, the court
shall, by order entered of record, require the regular election officials on the day
fixed in such order to open the polls and take the sense of the qualified voters of
the county on the question printed on the ballot as herein provided. The clerk of
the county shall cause a notice of such referendum to be published in some
newspaper published or having a general circulation in the county once a week for
three successive weeks prior to such referendum and shall post a copy of such
notice during the same time at the front door of the courthouse of the county.

* * *

The ballots shall be counted, returns made and canvassed as in other elections, and
the results certified by the electoral board to the State Board of Elections, the
clerk of the county and the circuit court; and the court shall enter of record the
results of such referendum."

Neither the foregoing statute nor Ch. 7 of Title 24.1, which governs such elections,
characterizes the proceedings as law or chancery actions. I am unaware of any statute
which specifies which order book required by § 17-28 is to be used for entering the
proceedings and orders relating to an election. Despite this absence of express
legislative direction, I believe the legislative intent can be inferred from § 14.1-112(18), which fixes the clerk's fee in elections as follows:

"The clerk shall charge a fee of five dollars at each election held in his county, city or town, payable out of the respective treasuries thereof, for each voting precinct located therein, for services performed in compliance with Title 24.1; provided, however, the total charge under this section shall not exceed fifty dollars."

Had the General Assembly intended election proceedings to be treated as chancery causes, it would have enacted the clerk's fee schedule as a part of § 14.1-113, the section which specifies clerk's fees in chancery causes. I am, therefore, of the opinion that the petition referred to § 22.1-42, and all proceedings relating to the referendum should be carried on the law side of the court.

Turning to your second question, I think it manifest that the cost of publishing the notice of the referendum is to be borne by the county in which the referendum is to be conducted. Both §§ 22.1-42 and 24.1-165 (governing special elections and referendums) make it quite clear that such a referendum is to be conducted as any other election. Section 24.1-96 provides that the cost of conducting elections under Ch. 7 of Title 24.1 shall be paid by the counties and cities, respectively.

Section 17-28 provides for two order books, to be known as the common-law order book and the chancery order book.

ELECTIONS. REGISTRARS. PERSONNEL POLICIES AND PROCEDURES. APPLICABILITY OF LOCAL GOVERNMENT POLICIES AND PROCEDURES.

October 19, 1984

The Honorable Royston Jester, III
Member, House of Delegates

This is in response to your request for my opinion concerning the obligation of the general registrar to adhere to certain personnel policies and procedures of his municipality. Specifically, you inquire whether the registrar is bound by the decision of a panel in a grievance proceeding under § 15.1-7.1 of the Code of Virginia. I assume for purposes of this question that you refer to a situation in which an employee of the general registrar has initiated a grievance proceeding. In addition, you inquire whether the general registrar must follow the municipality's employee selection policies and procedures when appointing assistants and employees.

Section 24.1-45 provides for the appointment of assistant registrars and other employees of the general registrar. Assistant registrars must meet the same legal limitations and qualifications and fulfill the same requirements as the general registrar with the exception that an assistant registrar may be an officer of election. The qualifications of other employees are not specified.

Section 15.1-7.1 provides, in pertinent part, that the governing body of every county, city and town which has more than fifteen employees shall establish a grievance procedure for its employees. Thus, it is necessary to determine whether assistant registrars and other employees are employees of the locality for purposes of the grievance procedure mandated by § 15.1-7.1.
There is no statutory guidance in responding to your specific questions. Prior Opinions of this Office, however, may be used in reaching a conclusion. In an Opinion found in the 1983-1984 Report of the Attorney General at 300, I concluded that the general registrar may be regarded as the employee of the locality for the purposes of retaining certain employment benefits, including annual and sick leave and health and hospitalization benefits.

In an Opinion found in the 1983-1984 Report of the Attorney General at 143, I concluded that the county electoral board could be required to comply with the county's purchasing ordinance, even though the board may not be restricted by the governing body in carrying out its statutory responsibilities. See also Reports of the Attorney General: 1972-1973 at 325 and 1959-1960 at 167.

Addressing your specific question in light of the foregoing, I do not believe that providing employees of the general registrar with a grievance procedure applicable to all other city employees would constitute an unreasonable interference with the registrar's official functions. I, therefore, am of the opinion that your first question must be answered in the affirmative.

Your second question relating to employee selection policies and procedures must also be viewed in light of the prior Opinions of this Office. Generally speaking, the registrar must follow the practices of the locality. See Reports of the Attorney General: 1983-1984 at 300 and 1972-1973, supra. That conclusion, however, must be applied in light of the equally applicable limitation that the registrar must be free to operate his office as required by law, without unreasonable interference by the local governing authorities. Section 24.1-45 is clear in vesting power in the electoral board to determine the number of assistants, but the registrar employs all other employees.

I am, therefore, of the opinion that your second question cannot be answered unequivocally. The policies and practices of employee selection of the locality can be imposed upon the registrar only to the extent that such policies and procedures do not interfere with the orderly functions of the duties imposed upon the registrar. Each case would, of necessity, be viewed on its own facts.

ELECTIONS. VACANCIES IN OFFICE. JUDGES. "SENIOR JUDGE," FOR PURPOSES OF § 24.1-76, IS JUDGE OF CIRCUIT SENIOR IN SERVICE.

April 1, 1985

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

This is in reply to your request for my opinion concerning statutory provisions governing the filling of a vacancy in the office of Commonwealth's attorney. You refer to § 15.1-40.1 of the Code of Virginia, which provides that a vacancy in such office shall be filled "by a majority of the circuit judges of the judicial circuit for the county or city pursuant to the provisions of § 24.1-76." Section 24.1-76(A) provides, in pertinent part, as follows:

"When a vacancy occurs in any elected county, city, town or district office and no other provision is made for filling the same, a majority of the circuit judges of the judicial circuit for the county or city in which it occurs shall make an interim appointment to the office until the vacancy can be filled by a special election as provided in subsection B of this section. If a majority of such judges cannot agree, then the senior judge shall make the appointment." (Emphasis added.)
You ask whether the term "senior judge" in the emphasized language of the above quotation refers to the judge who has served the longest time in office or whether it means the chief judge of the circuit.

Section 17-116.2(a) provides that judges of courts of record shall be circuit judges. That section provides further that "[t]he judges of each circuit shall select from their number by majority vote a judge who shall be the chief judge of the circuit, who shall serve for the term of two years." Section 17-116.2(c) provides that "[u]nless otherwise provided by law, powers of appointment within a circuit shall be exercised by a majority of the judges of the circuit," and in case of a tie, the Chief Justice of the Supreme Court is to appoint a circuit judge from another circuit who shall act as tie breaker. Section 24.1-76(A), quoted above, varies the appointment procedure in this particular instance by giving the senior judge of the circuit the power of appointment in the event a majority of the judges cannot agree.

Because, pursuant to § 17-116.2(a), the term of a chief judge is two years, the chief judge would be the "senior judge" for purposes of § 24.1-76(A) only if the phrase "chief judge" means the same thing as "senior judge." No Code provision expressly or impliedly equates those two phrases. In my opinion, they are distinct from each other, and the latter phrase refers to the judge who is senior in service as a circuit judge.

This interpretation is consistent with the legal tradition in Virginia that the term "senior" judge or justice is meant to refer to the judicial officer senior in service. See, e.g., former §§ 17-119.1, 17-137.3 and 17-137.4, which were repealed by Ch. 544, Acts of Assembly of 1973. See also § 17-93, which states that the justice "longest in continuous service" shall be Chief Justice of the Supreme Court, giving legislative recognition to a practice which had evolved independently of constitutional and statutory provisions on the subject. See II A. Howard, Commentaries on the Constitution of Virginia 727 (1974).

Accordingly, in answer to your inquiry, in my opinion the "senior judge," for purposes of § 24.1-76, means the judge of the circuit who has served the longest time in office.

1Section 17-116.2 was enacted as part of the "court consolidation bill," Ch. 544, Acts of Assembly of 1973. Chapter 544 was the final result of legislative proposals to enact into law recommendations of the Court System Study Commission, created in Senate Joint Resolution No. 5 of the 1968 Regular Session of the General Assembly, to make a "full and complete study of the entire judicial system of the Commonwealth...." The Commission's findings and recommendations ultimately were reported in House Doc. No. 6, 1972 Regular Session of the General Assembly. With regard to courts of record, the Commission recommended, among other things, that the State be divided into administrative divisions, each to have a chief judge responsible for administration of the courts. See the Commission's Report, House Doc. No. 6, supra pp. 3, 16-23. The Commission recommended that the chief judge not be chosen by seniority, but by ability and willingness to administer, and that the senior judge of the circuit also have administrative responsibilities, thus evidencing a recognized distinction between a "chief judge" and a "senior judge." Id. at 22. The Commission's recommendations were introduced in the 1972 Regular Session of the General Assembly as House Bill 265, which was carried over to the 1973 Session. At that Session, H.B. 265 was amended as to these administrative particulars and ultimately enacted as Ch. 544, placing § 17-116.2 in the Code in its present wording. As may be noted, § 17-116.2 requires the selection of a chief judge of the circuit every two years, and no mention is made of the senior judge having separate administrative responsibilities.

2Compare State v. Hueston, 44 Ohio St. 1, 4 N.E. 471, 477 (1888), interpreting the phrase "senior judge" in an appointment statute with reference to its understood meaning.
by custom and the provisions of law relating to the courts in Ohio: "In consonance with
history and legislation, and with custom in the state, and by analogy with the rule as to
precedence furnished by law for the supreme and circuit courts, the term 'senior judge' in
this statute means the judge who has served the longest under his present commission."

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ELECTIONS. VOTER REGISTRATION. LAND AREAS SEPARATED ONLY BY BODY
OF WATER "CONTIGUOUS" FOR PURPOSE OF VOTER REGISTRATION LAWS.

October 4, 1984

The Honorable Susan H. Fitz-Hugh
Secretary, State Board of Elections

This is in reply to your request for my opinion whether land areas separated by a
body of water are "contiguous" for purposes of voter registration in Virginia. Your
inquiry involves an interpretation of § 24.1-46 of the Code of Virginia, which provides, in
pertinent part, as follows:

"In addition to the other duties provided by law, it shall be the duty of the general
registrar to:

* * *

(1a) Remain within the territorial limits of the county or city for which he was
appointed to register voters, except that a registrar may go into a county or city in
the Commonwealth contiguous to his county or city to register voters of his county
or city when conducting registration jointly with the registrar of the contiguous
county or city.

(1b) Accept the registration application from a resident of any county or city in
the Commonwealth contiguous to his county or city and promptly forward the
completed application to the registrar of the applicant's residence who shall then
determine the qualification of any applicant whose application was accepted
hereunder prior to or on the final day of registration and who shall notify the
applicant at the address shown on the application of the acceptance or denial of his
registration." (Emphasis added.)

The General Assembly has not provided a statutory definition of the term
"contiguous" for election law purposes. Therefore, the word must be given its ordinary
and popular meaning.1 The Supreme Court of Virginia has described "contiguous" as a
geographical term which usually means either touching or in close physical proximity,2 in
the context of litigation over the meaning of that term in § 6.1-39(c) of the banking
statutes, throughout which the cities of Norfolk and Portsmouth, which are separated by
the Elizabeth River, were considered to be contiguous. First Virginia Bank v.
Commonwealth, 212 Va. 654, 655, 187 S.E.2d 186 (1972).3 Although the term is described
as a relative one, depending considerably on the context and the subject under
consideration,4 it is held that territories not separated by intervening lands but only by
water may be considered contiguous to each other. See 17 C.J.S. Contiguous 359 (1963).

Taking all of the above into consideration, I am of the opinion that land areas which
are separated only by a body of water, with no territory of like kind between them, may
be considered "contiguous" for purposes of § 24.1-46.

2 See Black's Law Dictionary 290 (5th ed. 1979) (in close proximity; neighboring; adjoining); Webster's New World Dictionary 307 (2d College ed. 1974) (in physical contact; touching; near, next, or adjacent).

The principal related case is Commonwealth of Va. Ex Rel. State Corp. Com'n v. Camp, 333 F.Supp. 847 (E.D. Va. 1971), wherein the court held that, under the geographical construction of "contiguous" as meaning "adjacent to or nearby," the Comptroller of the Currency acted properly in granting a certificate of authority for a bank located in Norfolk to establish and operate a branch in the contiguous city of Hampton. The court observes as follows, 333 F.Supp. at 851: "That the General Assembly of Virginia was aware of the many rivers separating cities and counties in Virginia is a foregone conclusion. They are, indeed, natural geographic boundaries for cities and counties throughout Virginia." Compare 1958-1959 Report of the Attorney General at 19 (Norfolk and Newport News are "adjoining" cities under the compensation statutes).

In the context of the Virginia election laws, I note that the General Assembly, in apportioning the Commonwealth into electoral districts, each of which must be composed of "contiguous and compact territory" pursuant to Art. II, § 6 of the Constitution of Virginia (1971), has created districts composed of jurisdictions which are separated by various bodies of water. See §§ 24.1-4.3, 24.1-14.2, in which, for examples, the first congressional district and the third State senatorial district each is composed of jurisdictions separated by the Chesapeake Bay.

EMINENT DOMAIN. TAKING OF PRIVATE PROPERTY FOR PRIVATE USE. "PUBLIC USE" DEFINED.

June 25, 1985

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your letter in which you ask several questions concerning a county's exercise of the power of eminent domain. You state that the county board of supervisors approved a special use permit in the name of a private firm which proposes to construct an office building. One condition of the permit requires the firm to install a two-way service drive for the proposed development. The land for the service drive presently is in private ownership, and a portion of it is located on the corner of property owned by a private country club. You state that the county implicitly has agreed to condemn an easement over that portion of the country club property necessary to complete the drive, on behalf of the development firm, if the firm cannot purchase the easement. Based upon those facts, as you present them, you ask:

(1) Whether the county can use its powers of eminent domain to take property from one private owner (the country club) for the use of another private owner (the development firm);

(2) whether the county can allow private firms or persons to use the county's power of eminent domain to acquire land or easements for the benefit of such private firms or persons;

(3) with what restrictions, if any, the county must comply if it can acquire property from one private owner for use by another private owner; and
1984-1985 REPORT OF THE ATTORNEY GENERAL

(4) whether the county's power of eminent domain must be used only when public necessity is established.

I first will review the relevant statutes. The governing bodies of cities and towns are authorized to condemn private property for the purposes of laying off streets, walks and alleys, and for providing off-street automobile parking by § 15.1-14 of the Code of Virginia. See Realty Corporation v. City of Norfolk, 199 Va. 716, 720, 101 S.E.2d 527, 530 (1958). The board of supervisors shares this power by virtue of § 15.1-1522. See, e.g., 1973-1974 Report of the Attorney General at 263. Section 25-232 authorizes the governing body of any county to condemn private property for the purpose of opening or constructing roads or for any other public purpose authorized by law.

Section 15.1-236 sets out the various statutory procedures a locality may follow in the exercise of its power of eminent domain as follows:

"A. Subject to the provisions and limitations of this article, proceedings for the acquisition of property and of property interests by counties, cities and towns in all cases in which they now have or may hereafter be given the right of eminent domain may be instituted and conducted in the name of the governing body of such county, city or town and the procedure may be mutatis mutandis the same as is prescribed in Article 7 (§ 33.1-89 et seq.) of Chapter 1 of Title 33.1 for condemnation proceedings by the State Highway and Transportation Commission in the construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth, or § 33.1-229, or the same as is prescribed in Chapter 1.1 (§ 25-461 et seq.) of Title 25 of the Code of Virginia."

Section 15.1-237 sets out additional procedures required when property is condemned for certain purposes:

"No property shall be condemned for the purposes specified in §§ 15.1-14, 15.1-15 and 15.1-292 unless the necessity therefor shall be shown to exist to the satisfaction of the court having jurisdiction of the case or shall be declared by resolution of the governing body following a public hearing...."1

Turning now to your first question, the Supreme Court of Virginia has stated that "the spirit of the Constitution of Virginia and the Federal Constitution prohibits the taking of private property for private use under any conditions." Phillips v. Foster, 215 Va. 543, 546, 211 S.E.2d 93, 96 (1975). Your inquiry, therefore, requires determination of whether the contemplated use of the service drive is a public or a private use.

The initial determination of the character of the use of condemned land is generally made by legislative declaration. The legislative declaration that property is to be condemned for a "public use," however, is subject to judicial review. Stewart v. Highway Commissioner, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972); Light v. City of Danville, 168 Va. 181, 208, 190 S.E. 276, 287 (1937).

With respect to roads, the test of whether a public use exists has been stated as follows:

"Whether a road sought to be constructed is a public road or one merely for the benefit of a private individual is not tested by the fact that such an individual will receive a greater benefit than the public generally. The test is not the length of the road, or how many actually use it, but how many have the free and unrestricted right in common to use it. It is a public road if it is free in common to all citizens."
In the context of mixed private and public uses, the rule has been stated:

"It is difficult at times to observe the line of demarcation between private benefit and public use. When the two are thus so blended, the judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and disregard the private benefit as a mere incident."

*Light*, 168 Va. at 206.

"If the primary and dominant purpose has a direct reference to the public service and public use, and the incidental use tends directly to promote such purpose, then the dominant purpose must control."

*Id.* at 211. If, on the other hand, the benefit to the public is only incidental and collateral to a primarily private purpose of a taking, the taking is not for a public use. *Phillips*, 215 Va. at 547.

The facts as you state them assume that the office building in question will be owned and operated by the private development firm and that the service drive is to be on private property. You do not state whether other buildings will be served by the service drive or whether the public will have a common right to use the service drive. Other factors to be considered in determining whether a public use is contemplated include the presence of the service road or a service drive in the county's development plan for that area, and the possibility of the future dedication of the service drive to the county as a public thoroughfare. *See Burns v. Board of Supervisors*, 218 Va. 625, 238 S.E.2d 823 (1977). In the absence of a right of public access, public ownership, service to other buildings or areas, or future dedication, it would not appear that a public use of the service drive is contemplated. If those other factors are present, then it would appear to be a public use. Because your letter does not disclose adequate facts upon which to base a final determination, I am unable to reach such an opinion.

With regard to your second question, the power of eminent domain, as an incident of sovereignty, can be exercised only when properly delegated by the General Assembly and subject to constitutional and statutory limits. *See Jeter v. Vinton-Roanoke Water Co.*, 114 Va. 769, 76 S.E. 921 (1913). Statutes authorizing condemnation are to be strictly construed and the power exercised in the manner provided by law. *Dillon v. Davis*, 201 Va. 514, 519, 112 S.E.2d 137, 141 (1960). The General Assembly has delegated its power of eminent domain to certain political subdivisions, governmental agencies and public service corporations. In this instance, the power of eminent domain must be exercised in the name of the county through the appropriate action of the board of supervisors. I am not aware of any statute enabling a county to delegate its powers of eminent domain to a private firm to serve private purposes. Accordingly, I answer your question in the negative.

In light of the above answer to your second question, your third question requires no response.

In answer to your fourth inquiry, it is said that the question of whether the taking of private property for a road is for a public purpose is a judicial question reviewable by the courts; but where the public purpose has been established, the necessity or expediency of the road is a legislative question. *Stewart*, 212 Va. at 692; *City of Richmond v. Dervishian*, 290 Va. 398, 405, 57 S.E.2d 120, 123 (1950). If the county acts pursuant to § 15.1-14, however, § 15.1-237 requires that the necessity for the condemnation be established to the court, or that the necessity be declared by resolution of the governing body following a public hearing. If the governing body follows the procedures set out in § 25-46.1 *et seq.*, then § 25-46.7(b)(2) requires that a short
statement of the necessity for the work or improvements be included in the condemnation petition.

1The exercise of a county's condemnation powers under § 25-232 must follow those procedures set out in § 25-46.1 et seq.
2Examples include: counties, cities and towns--discussed in the text above; the State Highway and Transportation Commissioner--§ 33.1-89 et seq.; housing authorities--§ 33-49; public service corporations--§ 56-49.
3The opening of a public street generally is recognized as a public use, and the taking of private property toward that end is for a public purpose. See, e.g., §§ 15.1-14, 15.1-276, 25-232; Richmond v. Carneal, 129 Va. 388, 392, 106 S.E. 403 (1921). Cf. Realty Corporation, supra.

ESCHEATS. PRESUMPTION OF ABANDONMENT OF REAL PROPERTY RAISED AFTER TEN CONSECUTIVE YEARS OF TAX DELINQUENCY ACCORDING TO § 55-170.1.

October 17, 1984

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

You have asked whether § 55-170.1 of the Code of Virginia requires that, for purposes of escheat, real estate taxes or special assessments on property be delinquent for ten consecutive years or any ten years before a presumption of abandonment is raised.

I am of the opinion that § 55-170.1 requires that the ten years of delinquency be consecutive years. This section, enacted by Ch. 315, Acts of Assembly of 1984, defines "evidence of abandonment" as follows:

"'Evidence of abandonment' shall include, but not be limited to, the duration of delinquency for real estate taxes or special assessments, unsuccessful efforts by the commissioner of revenue or real estate assessor to communicate with any person listed in his records as owner, and any other evidence which may be relevant to indicate abandonment. Lands upon which real estate taxes or special assessments have not been paid for ten years shall be presumed abandoned." (Emphasis added.)

The second sentence of this section creates a presumption of abandonment. Thus, delinquency for ten years is not simply evidence but a fact that gives rise to a presumption, i.e., abandonment. Evidence of lesser delinquency may be considered, e.g., five nonconsecutive years along with other facts indicating intent by the owner to relinquish the property. The legislature, however, made one circumstance presumptive of abandonment, without other evidence—a ten-year delinquency in real estate taxes or special assessments.

The plain meaning of "abandonment" is instructive: "The surrender, relinquishment, disclaimer, or cession of property or of rights." Black's Law Dictionary 2 (5th ed. 1979). Thus, where land is placed on the list of escheated properties because the record owner has failed to pay taxes continuously for a number of years and failed to communicate with the commissioner of revenue, such land is properly classified as "abandoned." The fact that an owner fails to pay his taxes from time to time is not indicative of abandonment.
I am, therefore, of the opinion that § 55-170.1 requires that real estate taxes or special assessments on property must be delinquent for ten consecutive years before a presumption of abandonment is raised.

ESCHEATS. TITLE TO ESCHATED PROPERTY GRANTED WITHOUT WARRANTY BY GOVERNOR. PURCHASER ASSUMES RISK OF DEFECT IN TITLE.

May 14, 1985

The Honorable C. J. Boehm
Treasurer of Virginia

You have asked several questions concerning the escheat process in Virginia. Your questions relate to three parcels of escheated property purchased at an escheat auction in 1983. You first ask whether the purchaser of escheated property assumes any risk in buying such property.

When escheated property is sold, title passes by a grant, without warranty, from the Governor under § 55-186.1 of the Code of Virginia. See 1983-1984 Report of the Attorney General at 157. Where title to property passes without warranty, the purchaser takes on himself the risk as to all defects of title. See Robertson v. Robertson, 137 Va. 378, 119 S.E. 140 (1923); Sutton v. Sutton, 48 Va. (7 Gratt.) 234 (1851). Accordingly, the answer to your first question is in the affirmative; the buyer assumes all risks as to defects in title.

You next ask whether the following three situations, individually, constitute evidence of improper escheat on which you could issue a refund under § 55-200(A):  

1. A purchaser states that at the escheat auction he was told a dwelling was located on one of the escheated parcels he purchased; later, he learned there was no such dwelling. The purchaser does not identify the person who told him that there was a dwelling on the property. You indicate that all written descriptions of this parcel used throughout the escheat process contained no reference to a dwelling.

2. The purchaser's attorney states that the land records in the clerk's office do not indicate that the last known owners of the three parcels ever conveyed the escheated land to any other persons or that the last known owners are deceased.

3. The purchaser's attorney also states that the escheator did not receive an annual report from the commissioner of the revenue as called for under § 55-171 or written information from any person as provided in § 55-172 indicating that one of the conditions outlined in § 55-171 existed.

The General Assembly has authorized relief for purchasers of escheated land in certain limited circumstances identified in § 55-200(A). This section provides for a refund of the purchase price to a buyer of escheated land, less expenses of sale and the escheator's fee, on presentation of satisfactory evidence, within a specified time limit, to the State Treasurer that the property described in the grant does not exist or was improperly escheated. The facts you presented concern only whether a refund is warranted under the "improper escheat" standard of § 55-200(A). I will address each fact situation presented separately.

The first fact situation involves the purchaser's statement that at auction he was told a dwelling was located on one of the parcels he purchased. He later learned there
was no such dwelling. The information presented, however, indicates that all written
descriptions throughout the escheat process contained no reference to a dwelling on the
property. Virginia adheres to the common law doctrine of caveat emptor on sales of real
exception to that doctrine applies where a seller makes false representations of a
material fact, constituting an inducement to the contract, on which the buyer has a right
to rely and which would divert a buyer from making the inquiries and examination which
a prudent man ought to make. See Watson, supra, and Armentrout v. French, 220 Va.
458, 258 S.E.2d 519 (1979). Mere expressions of opinion do not constitute false
representations on which a buyer has a right to rely. Kuczynski v. Gill, 225 Va. 367,
302 S.E.2d 48 (1983). I am of the opinion that if you were presented evidence which
showed that a sale of escheated property falls within the exception to the doctrine of
caveat emptor, referenced above, relief would be warranted under the improper escheat
standard of § 55-200(A). That determination is a factual one which you must make.
Because your letter does not indicate the identity of the person making the alleged
statements, I am unable to suggest that the facts which you present necessarily warrant
relief.

The second set of facts, the allegations of the purchaser's attorney that there are
no records in the clerk's office that the last known owners conveyed the escheated
parcels to any other persons or that the last known owners are deceased, would not
constitute sufficient evidence of improper escheat for a refund under § 55-200(A). This
result follows from § 55-171 which, at the time of the escheat process in question, set
forth two conditions after which land is to be placed on a list furnished to the escheator
to begin the process of having the lands declared escheated to the State: (1) lands of
which a person dies seised of an estate of inheritance intestate, without any known heir,
or (2) lands to which no person is known by the commissioner of the revenue or other
appropriate local official to be entitled, including lands which appear to have been
abandoned. The absence of record evidence of conveyance by the last known owners to
any other person in no way defeats either of these two statutory conditions. Moreover,
both conditions of § 55-171 need not be present. Land may properly be listed under the
second condition of § 55-171 and subsequently declared escheated without any
requirement that the last known owner be deceased.

Finally, I turn to the last fact situation, whether the statement by the attorney of
the purchaser that the escheator did not receive an annual report from the commissioner
of the revenue under § 55-171, or information from any person in writing under oath as
provided in § 55-172, indicating that one of the conditions in § 55-171 existed,
constitutes satisfactory evidence of an improper escheat to warrant a refund under
§ 55-200(A). This issue is currently in litigation in the Circuit Court of Smyth County. It
is the policy of this Office not to render Opinions on matters in litigation. See 1977-1978
Report of the Attorney General at 31. Accordingly, I am unable to address whether this
last fact situation warrants a refund under § 55-200(A).

1The three conditions which trigger the escheat process for lands within the
jurisdiction of the commissioner of the revenue are "lands within his district: (1) of
which any person shall have died seised of an estate of inheritance intestate and without
any known heir, (2) to which no person is known by the commissioner or assessor to be
entitled, or (3) lands which appear to have been abandoned." See § 55-171.

2In responding to these fact situations, it is assumed that the statements of the
purchaser and his attorney are further verified in some way, e.g., an affidavit of the
purchaser and the auctioneer, escheator or impartial person present at the auction as to
the first statement. An unverified statement of the purchaser or his attorney would not
constitute sufficient evidence of improper escheat for a refund under § 55-200(A).
This section was amended in 1984. Chapter 315, Acts of Assembly of 1984. No change was made to the introductory language that such grants are given without warranty.

At the time of the sale, which is the subject of your inquiry, the statutory time limit for application for refund was 30 days from the date of delivery of the grant. The current time period is 120 days from the date of the escheat sale. See Ch. 315, Acts of Assembly of 1984.

Section 55-171 was amended in 1984; the last clause of the second condition, "including lands which appear to have been abandoned," is now a third and separate condition. See Ch. 315, Acts of Assembly of 1984.

The escheat and, therefore, the transfer of title to the State occurs on the happening of the condition; the escheat process merely furnishes record evidence of the State's title. Sands v. Lynham, 68 Va. (27 Gratt.) 291 (1876).

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FEES. CLERK MUST CHARGE CLERK'S FEE AND WRIT TAX UPON FILING OF THIRD-PARTY MOTION FOR JUDGMENT. CLERK SHOULD NOT CHARGE WRIT TAX UPON FILING OF COUNTERCLAIM.

February 4, 1985

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

You have asked whether the clerk's fee and writ tax should be charged upon the filing of a third-party motion for judgment, and whether the writ tax should be charged upon the filing of a counterclaim.

The conditions under which the writ tax and clerk's fees may be imposed are set out by statute. Section 58.1-3809 of the Code of Virginia provides that a writ tax is imposed upon the commencement of every action. Section 14.1-112 provides, in applicable part, that a clerk's fee shall be charged the plaintiff at the time of instituting the action. Section 14.1-112(17). Rule 3:3(a) of the Rules of Supreme Court of Virginia provides that an action is commenced by the filing of a motion for judgment. Whether the clerk's fee or writ tax is applicable, therefore, generally depends on whether a motion for judgment is filed. 1967-1968 Report of the Attorney General at 292.

Rule 3:10 governs third-party practice and specifically requires the filing of a motion for judgment. Additionally, the rule recognizes that a party filing a third-party motion for judgment is in the position of a plaintiff, whether initially a plaintiff or defendant. Therefore, it is my opinion that the clerk is authorized to collect a fee pursuant to § 14.1-112(17) and to collect a writ tax under § 58.1-3809 on the filing of a third-party motion for judgment. 1972-1973 Report of the Attorney General at 455.

Rule 3:3 governs counterclaims. A motion for judgment is neither contemplated nor required for the filing of a counterclaim. I am, therefore, of the opinion that an action is not commenced and no writ tax may be imposed on such a pleading under § 58.1-3809. See 1972-1973 Report of the Attorney General at 193.

You suggest that prior Opinions of this Office appear inconsistent in the analysis to be used in determining whether these fees and taxes should be charged. You are incorrect. In a prior Opinion of this Office to which you referred, 1972-1973 Report of the Attorney General at 193, the question posed was whether a writ tax was to be collected on the filing of a counterclaim. Rule 3:9 specifically exempted cross-claims.
from the tax, while Rule 3:8, governing counterclaims, was silent on the issue. In holding a writ tax not applicable to counterclaims, that Opinion properly pointed out that Rule 3:9 declared the cross-claim to be a new action. In a subsequent Opinion, found in the 1972-1973 Report of the Attorney General at 455, it was correctly concluded that the writ tax was to be imposed upon filing of a third-party motion for judgment pursuant to Rule 3:10. There is no inconsistency in those Opinions. In the former, Rule 3:9 declared the cross-claim to be a new action. In the latter, even though not declared to be a new action in Rule 3:10, it is nevertheless clear that a third-party motion for judgment is also an original action, as distinguished from an appeal. Hence, in both instances, the writ tax is to be collected.

FIDUCIARIES. FEE TO COMMITTEE FOR ADMINISTERING ESTATE OF INCOMPETENT WARD, WHEN ONLY ESTATE OF WARD IS SOCIAL SECURITY BENEFITS AND COURT ORDER SILENT AS TO COMPENSATION TO COMMITTEE, NOT PROHIBITED.

June 19, 1985

The Honorable G. C. Jennings
Member, House of Delegates

You ask whether a committee is entitled to a fee for administering the estate of his incompetent ward when the estate consists only of social security benefits and the court order is silent as to compensation to the committee. You state that the social security benefits for the ward are paid to a nursing home at the direction of the local department of social services. You further state that the department now advises the committee that she can no longer deduct a five percent committee fee because the court order does not provide for such a fee.

The right of a fiduciary to receive compensation for administering an estate is purely statutory. Swank v. Reherd, 181 Va. 943, 947, 27 S.E.2d 191, 193 (1943). Section 26-30 of the Code of Virginia provides that a commissioner of accounts, in stating and settling the account of a fiduciary, "shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise."

It does not appear that the General Assembly has enacted any prohibition or otherwise limited such compensation merely because the sole source of the income is social security benefits. I am, therefore, of the opinion that the allowance of a commission to the committee by a commissioner of accounts, to be taken from social security benefits, is not prohibited under Virginia law.

I am informed, however, that the Virginia Department of Social Services' regulations for its Auxiliary Grant program provide that in determining eligibility for and the amount of an auxiliary grant payment, a commission or fee cannot be deducted from the net countable income of the ward, including social security benefits, unless such fee is established by court order. See Manual of Public Assistance, Vol. II, Pt. III, Ch. C, § 7(c).

With respect to the particular situation to which you make reference, I am advised that the committee has applied for an auxiliary grant from the local department of social services on behalf of the incompetent ward, in addition to also receiving social security benefits for that ward. Therefore, unless the court in this instance were to amend its order and set the fee to be allowed, the local department of social services cannot
comply with the State regulations and deduct the fee from the net countable income of the ward in determining eligibility for and the amount of an auxiliary grant payment.

The amount of such compensation is not fixed by the statute, is dependent upon the facts of a particular case, and is ultimately within the sound discretion of the court. See Clare v. Grasty, 213 Va. 165, 170, 191 S.E.2d 184, 188 (1972); Perrow, Executor v. Payne, 203 Va. 17, 121 S.E.2d 900 (1961). Where a commissioner's report is filed with the office of the court, however, and no exceptions are filed, the decision of the commissioner stands confirmed after fifteen days. See §§ 26-33, 26-34.

FIRE PROTECTION. NOT MANDATORY THAT COUNTY PROVIDE FIRE AND RESCUE UNITS.

February 11, 1985

The Honorable R. W. Arnold, Jr.
County Attorney for Louisa County

You ask whether it is mandatory for Louisa County to provide fire and rescue units for county residents.

Sections 15.1-25 through 15.1-26.01 of the Code of Virginia enable the governing bodies of counties, cities and towns to appropriate funds and regulate the establishment of fire-fighting units and rescue squads. The provisions of Title 27 enable the governing body of a locality to establish, regulate and appropriate funds for fire protection services. The localities are also authorized to create fire and rescue districts and to levy a tax to maintain such districts. See § 27-23.1. Section 27-23.6 authorizes the county to contract with any volunteer fire department for fire protection services. These statutes uniformly use the discretionary term "may" rather than the mandatory "shall." I am unaware of any statute in which the General Assembly has imposed an obligation on counties, such as Louisa, to establish and maintain fire and rescue services.


The Supreme Court of Virginia has not considered whether provisions of such services are a legal duty of the locality. Jurisdictions which have considered the question have concluded that a locality is not required to provide fire and rescue services in the absence of a statutory duty. See Huey v. Town of Cicero, 243 N.E.2d 214, 41 Ill.2d 361 (1968); Edmondson v. Town of Morven, 152 S.E. 280, 41 Ga.App. 209 (1930); 63 C.J.S. Municipal Corporations § 776 (1950).

Accordingly, I concur in your conclusion that, in the absence of a statute adopted by the General Assembly imposing such a duty upon the county, Louisa County is not obligated to provide fire and rescue services.

GAME, INLAND FISHERIES AND DOGS. DAMAGE STAMP PROGRAM. ALTHOUGH CLAIMS FOR DAMAGE TO BEEHIVES QUALIFY, CLAIMS FOR DAMAGE TO BEES AND HONEY DO NOT.
April 26, 1985

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You have asked whether a county may, as part of its ordinance under the damage stamp laws (§ 29-92.1 et seq. of the Code of Virginia), prohibit payment of claims for damage by bears to beehives, bees, honey, and honey to be produced. The answer to your inquiry turns upon whether these items are included within the categories of allowable claims set forth in § 29-92.1. Localities are not free to impose restrictions upon the right to recover damages beyond those established by the General Assembly. See 1982-1983 Report of the Attorney General at 256.

Section 29-92.1 provides that damage claims under a local program may be paid from available funds for damage to crops, fruit trees, commercially grown Christmas trees, livestock, or farm equipment caused by deer or bears. This Office has previously ruled that bees are not livestock. See 1979-1980 Report of the Attorney General at 405. Damage to bees would thus not be an allowable claim. Moreover, a "crop" is a product of the soil which is grown and gathered in a single season. See 1982-1983 Report of the Attorney General at 258. Honey is not a product of the soil; therefore, damage to honey, or honey to be produced, would not be an allowable claim.

Finally, a prior Opinion to you (1982-1983 Report of the Attorney General, at 256, 257 n.2) assumed that beehives are farm equipment. The General Assembly has defined hives and their parts as "bee equipment." See § 3.1-610.1(f). Under Ch. 22.1 of Title 3.1, beekeeping is regulated as an agricultural activity. As a result, I conclude that beehives used for agricultural purposes should be treated as farm equipment. Claims for damage to beehives therefore may qualify under a damage stamp program and a locality may not categorically exclude them.1

1As you noted, this Office has previously ruled that an otherwise valid claim may be turned down if, in the particular case, the damage resulted from the claimant's own negligence. See 1982-1983 Report of the Attorney General at 256. The same Opinion concluded that "[t]here is nothing in the damage stamp laws which allows local ordinances to exclude categories of otherwise qualified claims." Id. at 257.

GAME, INLAND FISHERIES AND DOGS. DAMAGE STAMPS. SECTION 29-92.1 ET SEQ. PROHIBITS PAYMENTS TO LANDOWNERS WHO DO NOT ALLOW PUBLIC HUNTING. HOLDERS OF LIFETIME LICENSES NEED NOT PURCHASE DAMAGE STAMPS. UNPAID DAMAGE CLAIMS MAY BE CARRIED OVER TO SUBSEQUENT YEARS. HUNT CLUB MEMBERS MUST PURCHASE BOTH LICENSES AND DAMAGE STAMPS.

January 25, 1985

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You have submitted several inquiries regarding interpretation of the damage stamp laws, § 29-92.1 et seq. of the Code of Virginia. I will respond to your questions in the order presented.

First, you ask whether a county may adopt an ordinance prohibiting payment of claims under its damage stamp program to persons who do not allow public hunting on
comply with the State regulations and deduct the fee from the net countable income of
the ward in determining eligibility for and the amount of an auxiliary grant payment.

The amount of such compensation is not fixed by the statute, is dependent upon the
facts of a particular case, and is ultimately within the sound discretion of the court. See
Clare v. Grasty, 213 Va. 165, 170, 191 S.E.2d 184, 188 (1972); Perrow, Executor v. Payne,
203 Va. 17, 121 S.E.2d 900 (1961). Where a commissioner's report is filed with the office
of the court, however, and no exceptions are filed, the decision of the commissioner
stands confirmed after fifteen days. See §§ 26-33, 26-34.

FIRE PROTECTION. NOT MANDATORY THAT COUNTY PROVIDE FIRE AND RESCUE
UNITS.

February 11, 1985

The Honorable R. W. Arnold, Jr.
County Attorney for Louisa County

You ask whether it is mandatory for Louisa County to provide fire and rescue units
for county residents.

Sections 15.1-25 through 15.1-26.01 of the Code of Virginia enable the governing
bodies of counties, cities and towns to appropriate funds and regulate the establishment
of fire-fighting units and rescue squads. The provisions of Title 27 enable the governing
body of a locality to establish, regulate and appropriate funds for fire protection
services. The localities are also authorized to create fire and rescue districts and to levy
a tax to maintain such districts. See § 27-23.1. Section 27-23.6 authorizes the county to
contract with any volunteer fire department for fire protection services. These statutes
uniformly use the discretionary term "may" rather than the mandatory "shall." I am
unaware of any statute in which the General Assembly has imposed an obligation on
counties, such as Louisa, to establish and maintain fire and rescue services.

The foregoing conclusion is in accord with prior Opinions of this Office. See

The Supreme Court of Virginia has not considered whether provisions of such
services are a legal duty of the locality. Jurisdictions which have considered the
question have concluded that a locality is not required to provide fire and rescue services
in the absence of a statutory duty. See Huey v. Town of Cicero, 243 N.E.2d 214, 41 Ill.2d
361 (1968); Edmondson v. Town of Morven, 152 S.E. 280, 41 Ga.App. 209 (1930); 63 C.J.S.
Municipal Corporations § 776 (1950).

Accordingly, I concur in your conclusion that, in the absence of a statute adopted
by the General Assembly imposing such a duty upon the county, Louisa County is not
obligated to provide fire and rescue services.

GAME, INLAND FISHERIES AND DOGS. DAMAGE STAMP PROGRAM. ALTHOUGH
CLAIMS FOR DAMAGE TO BEEHIVES QUALIFY, CLAIMS FOR DAMAGE TO BEES AND
HONEY DO NOT.
April 26, 1985

The Honorable Bernard J. Natkin  
County Attorney for Rockbridge County

You have asked whether a county may, as part of its ordinance under the damage stamp laws (§ 29-92.1 et seq. of the Code of Virginia), prohibit payment of claims for damage by bears to beehives, bees, honey, and honey to be produced. The answer to your inquiry turns upon whether these items are included within the categories of allowable claims set forth in § 29-92.1. Localities are not free to impose restrictions upon the right to recover damages beyond those established by the General Assembly. See 1982-1983 Report of the Attorney General at 256.

Section 29-92.1 provides that damage claims under a local program may be paid from available funds for damage to crops, fruit trees, commercially grown Christmas trees, livestock, or farm equipment caused by deer or bears. This Office has previously ruled that bees are not livestock. See 1979-1980 Report of the Attorney General at 405. Damage to bees would thus not be an allowable claim. Moreover, a "crop" is a product of the soil which is grown and gathered in a single season. See 1982-1983 Report of the Attorney General at 258. Honey is not a product of the soil; therefore, damage to honey, or honey to be produced, would not be an allowable claim.

Finally, a prior Opinion to you (1982-1983 Report of the Attorney General, at 256, 257 n.2) assumed that beehives are farm equipment. The General Assembly has defined hives and their parts as "bee equipment." See § 3.1-610.1(f). Under Ch. 22.1 of Title 3.1, beekeeping is regulated as an agricultural activity. As a result, I conclude that beehives used for agricultural purposes should be treated as farm equipment. Claims for damage to beehives therefore may qualify under a damage stamp program and a locality may not categorically exclude them.¹

¹As you noted, this Office has previously ruled that an otherwise valid claim may be turned down if, in the particular case, the damage resulted from the claimant's own negligence. See 1982-1983 Report of the Attorney General at 256. The same Opinion concluded that "[t]here is nothing in the damage stamp laws which allows local ordinances to exclude categories of otherwise qualified claims." Id. at 257.
their land or to persons who post their land. This question is answered in the affirmative. A prior Opinion of this Office concluded that landowners who restrict hunting on their land to only relatives and close friends are not eligible for county damage fund payments. See 1981-1982 Report of the Attorney General at 177. I concur with the reasoning of that Opinion. As a result, a county ordinance may not provide for payments to those who do not allow public big game hunting on their land or to those who post their land.

Second, you ask whether a person holding a lifetime hunting license can be required to purchase a damage stamp. This question is answered in the negative. Section 29-52(3) expressly states that a lifetime license shall be deemed to include any damage stamp under the damage stamp laws.

Third, you ask whether payments for damage claims may be carried over into the subsequent year if the county fund is exhausted at the time such claims are approved. This question is answered in the affirmative. The only provision in the damage stamp laws relating to actual payment of claims is found in § 29-92.5. Once a claim is approved by the local governing body or by the appropriate general district court, the local governing body may order its payment from the damage stamp fund. Nothing prevents a fair and reasonable procedure for making such payments from available funds or for carrying over unpaid claims to future years. Not to do so would clearly frustrate the legislative purpose of § 29-92.1 to maximize payments of approved claims. A valid claim should not be defeated merely because it is approved too late for payment from the current year's revenue.

Finally, you ask whether members of hunt clubs which own or lease land for their own use must purchase both a hunting license and a local damage stamp. The answer is in the affirmative in both cases.

Under § 29-52(1), landowners and certain relatives are not required to purchase a license to hunt on their own land. See also a prior Opinion issued to you on this subject, 1982-1983 Report of the Attorney General at 256. Section 29-52(1a) exempts only the majority stockholder and certain relatives with respect to land held by a Virginia corporation. Section 29-52(2) likewise exempts bona fide resident tenants, lessees or renters on lands leased or rented by them, provided they have possession of written consent from the landlord while hunting.

A club, whether or not incorporated, does not hunt and cannot be licensed to do so. Even if it is the nominal landowner, its members are not the "landowners" as that term is contemplated under § 29-52(1). If it is incorporated, only the majority stockholder would be exempt under § 29-52(1a). If the club is a lessee or tenant, its members do not meet the criteria of § 29-52, because such exemptions are intended only for natural persons. Because members of a hunt club do not meet these criteria, they must purchase hunting licenses and purchase big game licenses under § 29-122. It follows, therefore, that such persons must also purchase damage stamps where applicable and affix such stamps to their current hunting licenses as required by § 29-92.3.

1The language of § 29-52, and in particular § 29-52(2), contemplates exemptions for natural persons only. The concept of having possession of a written consent while hunting does not fit a legal person such as a corporation or an association.

GAME, INLAND FISHERIES AND DOGS. DOG LAWS. COMPENSATION FOR LIVESTOCK. METHOD OF DETERMINING FAIR MARKET VALUE UNDER § 29-213.87.
The Honorable C. Jefferson Stafford  
Member, House of Delegates

You have requested my opinion on the appropriate method for the determination of "fair market value" of sheep as contemplated in § 29-213.87 of the Code of Virginia. This section governs payment to an owner of livestock killed or injured by dogs not his own. The owner is entitled to receive compensation by the local jurisdiction from its dog fund for the fair market value of such livestock. See Reports of the Attorney General: 1982-1983 at 215; 1981-1982 at 141. You specifically ask if the board of supervisors should consider the national average price in making a determination, as opposed to arbitrarily setting a value without giving a reason.

When used in the context of evaluating land, "fair market value" is generally defined as the price at which a willing seller and a willing buyer will trade. Bd. of Sup'rs of Fairfax v. Donatelli & Klein, __ Va., ___ S.E.2d 342 (1985); Talbot v. Norfolk, 158 Va. 387, 163 S.E. 100 (1932). Such a determination is, in effect, an appraisal. There are several generally accepted techniques for appraising property.

Although not identical, the appraisal technique of personal property is similar to the appraisal of real estate. United States v. New River Collieries Co., 262 U.S. 341 (1923). The objective in both instances is to arrive at a price which a knowledgeable, willing buyer will pay and which a seller, who is under no compulsion to sell, is willing to accept.

One of the most persuasive methods of arriving at "fair market value" is the use of comparable sales of similar property. When applying that method, it is clear that the sales must relate to comparable property within the reasonable proximity and in point of time to the evaluation of the subject property. Appalachian Power Company v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972). Accordingly, if there is a nationwide market for the livestock, which is the subject of the evaluation, I believe the average price reflected in the national marketplace would be admissible evidence. Even more persuasive, however, would be evidence of the sales price for similar livestock in close proximity to those in question, taking into account the other elements of comparability.

I am, therefore, of the opinion that the board of supervisors may not arbitrarily set the fair market value to be paid for livestock, as provided in § 29-213.87, without consideration of any competent evidence available, including comparable sales of similar livestock.

1The prior Opinions construed the statutory forerunner to § 29-213.87.
their land or to persons who post their land. This question is answered in the affirmative. A prior Opinion of this Office concluded that landowners who restrict hunting on their land to only relatives and close friends are not eligible for county damage fund payments. See 1981-1982 Report of the Attorney General at 177. I concur with the reasoning of that Opinion. As a result, a county ordinance may not provide for payments to those who do not allow public big game hunting on their land or to those who post their land.

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1The language of § 29-52, and in particular § 29-52(2), contemplates exemptions for natural persons only. The concept of having possession of a written consent while hunting does not fit a legal person such as a corporation or an association.

GAME, INLAND FISHERIES AND DOGS. DOG LAWS. COMPENSATION FOR LIVESTOCK. METHOD OF DETERMINING FAIR MARKET VALUE UNDER § 29-213.87.
April 3, 1985

The Honorable C. Jefferson Stafford
Member, House of Delegates

You have requested my opinion on the appropriate method for the determination of "fair market value" of sheep as contemplated in § 29-213.87 of the Code of Virginia. This section governs payment to an owner of livestock killed or injured by dogs not his own. The owner is entitled to receive compensation by the local jurisdiction from its dog fund for the fair market value of such livestock. See Reports of the Attorney General: 1982-1983 at 215; 1981-1982 at 141.1 You specifically ask if the board of supervisors should consider the national average price in making a determination, as opposed to arbitrarily setting a value without giving a reason.

When used in the context of evaluating land, "fair market value" is generally defined as the price at which a willing seller and a willing buyer will trade. Bd. of Sup'rs of Fairfax v. Donatelli & Klein, _ Va. _, 325 S.E.2d 342 (1985); Talbot v. Norfolk, 158 Va. 387, 163 S.E. 100 (1932). Such a determination is, in effect, an appraisal. There are several generally accepted techniques for appraising property.

Although not identical, the appraisal technique of personal property is similar to the appraisal of real estate. United States v. New River Collieries Co., 282 U.S. 341 (1923). The objective in both instances is to arrive at a price which a knowledgeable, willing buyer will pay and which a seller, who is under no compulsion to sell, is willing to accept.

One of the most persuasive methods of arriving at "fair market value" is the use of comparable sales of similar property. When applying that method, it is clear that the sales must relate to comparable property within the reasonable proximity and in point of time to the evaluation of the subject property. Appalachian Power Company v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972). Accordingly, if there is a nationwide market for the livestock, which is the subject of the evaluation, I believe the average price reflected in the national marketplace would be admissible evidence. Even more persuasive, however, would be evidence of the sales price for similar livestock in close proximity to those in question, taking into account the other elements of comparability.

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1The prior Opinions construed the statutory forerunner to § 29-213.87.

GAME, INLAND FISHERIES AND DOGS. FORFEITURE OF DEVICES UNLAWFUL UNDER § 29-172 DOES NOT EXTEND TO LAWFUL DEVICES USED IN OTHER GAME LAW VIOLATIONS.

February 25, 1985

The Honorable William F. Watkins, Jr.
Commonwealth's Attorney for Prince Edward County
You have inquired whether the forfeiture provisions of § 29-172 of the Code of Virginia apply to violations of § 29-163, which section prohibits taking animals, birds and fish during the closed season or, when in season, in excess of the specified limits.

Section 29-172 provides for the forfeiture of certain guns, traps and other devices used in hunting or fishing which are considered unlawful. A prior Opinion of this Office, found in the 1965-1966 Report of the Attorney General at 80, considered whether a gun used to hunt out of season could be taken and destroyed under § 29-172, and concluded that, "unless there are unusual circumstances prevailing...the arresting officer would [not] have authority to take the gun from the accused."

I concur in the above-referenced Opinion. I do not believe that § 29-172 permits the forfeiture of a gun, trap or device, otherwise legal, merely because it is being used out of season, or to take game in excess of the specified limits. While such violations are serious, the penal laws are to be strictly construed and any doubts resolved against the Commonwealth. Given the twenty-year interpretation of this penal statute, if changes are to be made, they should be made by the General Assembly, not by this Office.

GAME, INLAND FISHERIES AND DOGS. VICIOUS DOG NUISANCE.

December 17, 1984

The Honorable Wm. Roscoe Reynolds
Commonwealth's Attorney for Henry County

You ask my opinion on two questions pertaining to the availability of legal procedures to control or dispose of vicious dogs which have attacked human beings. First, when a dog attacks a person and the county in which the attack takes place has not adopted a "vicious dog" ordinance authorized by § 29-213.69 of the Code of Virginia, is there any procedure available for the Commonwealth's attorney to seek a court-ordered destruction of the dog? Second, if the county has adopted an ordinance regulating the control or disposal of vicious dogs, may the county legally authorize a procedure whereby vicious dogs may be destroyed after it is proven in court that the alleged vicious dog has in fact attacked a person or other animal?

The director of a local health department may require the humane destruction of an animal which has bitten a person provided the dog shows active symptoms of rabies or is seriously injured or sick. See § 29-213.68. I am unaware of any other statutory provision which authorizes or mandates the destruction of a dog for biting a human. There are, however, other procedures which the Commonwealth's attorney may follow to have a dog destroyed which has bitten a human. There are a number of cases which have held that a dog accustomed to attack, bite or otherwise injure mankind may be humanely destroyed as a public nuisance when permitted to run at large, or is so negligently kept that he escapes from his confinement. See, e.g., Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028, 26 A.L.R.2d 1362; 4 Am.Jur.2d Animals § 63 (1962). Section 15.1-522 gives a county the same power conferred on cities by § 15.1-14(5) to "[p]revent injury or annoyance from anything dangerous, offensive or unhealthy and cause any nuisance to be abated...." The question whether a dog constitutes a nuisance generally depends on the disposition and conduct of the dog and the manner in which it is kept. If county officials believe a particular dog is vicious and that a vicious dog is a nuisance, they can request the Commonwealth's attorney to file suit to abate the nuisance.

A second procedure for abating a public nuisance is provided in Ch. 1 of Title 48. On complaint by five or more citizens of any county, city or town, the Commonwealth's attorney may make a complaint to the circuit court requesting that the court summon a
grand jury to make presentment that the owner of a vicious dog is creating or causing a nuisance. Upon a trial of such presentment, the owner of the dog can be fined up to $5,000, and the court can order abatement of the nuisance. See § 48-5.

Your second question is whether the county can adopt an ordinance providing for a procedure whereby a vicious dog may be humanely destroyed. Section 29-213.69, in conjunction with §§ 15.1-522 and 15.1-14(5), provides the county with the power to regulate and control vicious and destructive dogs within the county. In addition to this authority, the county may rely on § 29-213.64 to adopt more stringent animal control ordinances than provided in Ch. 9.4 of Title 29. Your second question is, therefore, answered in the affirmative.

GARNISHMENT. EXEMPT FUNDS. EXEMPTION LOST WHEN FUNDS DEPOSITED IN DEBTOR'S BANK ACCOUNT.

October 18, 1984

The Honorable Edgar L. Turlington, Jr.
Judge, General District Court for the City of Richmond

You have asked for my opinion on whether funds, exempt from garnishment under State or federal law, retain their exempt status when deposited in a debtor's bank account.

As you pointed out, Harris v. Bailey, 574 F.Supp. 966 (W.D. Va. 1983), held that funds received as social security benefits and deposited in the debtor's bank account retain their exempt status and may not be attached through the garnishment process. The second case you cited, Bernardini v. Central Nat. Bank, 223 Va. 519, 290 S.E.2d 863 (1982), held that depositing exempt funds "in a general account and commingling them with other nonexempt money" resulted in the funds losing their exemption. 223 Va. at 522.

A review of the pertinent cases reveals that two separate issues must be addressed. First, the retention of a fund's exempt status when deposited in a bank account depends on the legislative language which gives rise to the exemption. Under this standard, social security proceeds and veterans' benefits have been held to retain their exemption on deposit with a bank. Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973); Porter v. Aetna Cas. & S. Co., 370 U.S. 159 (1962). Wages or earnings, however, apparently have been held to lose their exempt status on deposit. Usery v. First Nat. Bank of Arizona, 586 F.2d 107 (9th Cir. 1978).

The second issue involves the responsibility of the bank with regard to each of the exempt funds. No court of which I am aware has specifically considered this issue with regard to funds which retain their exempt status on deposit, with the exception of the Supreme Court of Virginia in Bernardini, supra. In that case, the Court recognized the exempt nature of the social security funds under the Philpott case, but held the funds no longer to be exempt because they had been commingled with other nonexempt funds, and the debtor had taken no steps to inform the bank of the special nature of the funds. The federal court, in Harris, was not required to address this issue because the bank account contained only social security proceeds.

The United States Court of Appeals for the Ninth Circuit, in Usery, specifically held that the bank was under no obligation to "determine the depositor's right to a wage earner's exemption" or "calculate the amount of that exemption before honoring the garnishment." 586 F.2d at 107. Like the Virginia Supreme Court, the Ninth Circuit
acknowledged the significant burden which would be placed on the banks if they were required to make such determinations.

In my opinion, Bernardini is consistent with the above federal cases. Banks are under no obligation to determine the nature of funds or to assert an exemption on behalf of the debtor-depositor. Under Virginia garnishment procedures, § 8.01-511 et seq. of the Code of Virginia, debtors are afforded notice and opportunity to assert any available exemption in a timely manner. The circumstances giving rise to Harris will be avoided in the future, because the debtor has the opportunity to put the bank on notice by filing the "REQUEST FOR GARNISHMENT EXEMPTION CLAIM." Section 8.01-512.4. A hearing must be set within seven business days from the date of filing the claim, with notice given by the clerk to the garnishee. See § 8.01-512.5.

GOVERNOR. PARDONS. EXPUNGEMENT. GOVERNOR DOES NOT HAVE AUTHORITY TO EXPUNGE POLICE OR COURT RECORDS MERELY BY GRANTING ABSOLUTE PARDON. SECTION 19.2-392.2 PROVIDES SOLE METHOD FOR EXPUNGEMENT.

September 13, 1984

The Honorable Howard E. Copeland
Member, House of Delegates

You have asked my opinion whether the Governor of Virginia has the power to order the expungement of an individual's conviction of being drunk in public and trespass as one of the provisions of an absolute pardon.

Article V, § 12 of the Constitution of Virginia (1971) provides the circumstances under which the Governor may grant pardons. This section does not, however, empower him to expunge police or court records. In Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941), the Supreme Court of Virginia ruled that an absolute pardon does not wipe out the fact of a conviction. Additionally, this Office has previously opined that the maintenance of criminal history record information is not a part of the penalty imposed upon an offender, and therefore, an absolute pardon, in and of itself, does not mandate the destruction of such information. See 1977-1978 Report of the Attorney General at 104.

Section 19.2-392.2 of the Code of Virginia, on the other hand, was specifically enacted by the legislature to provide the method for expungement of criminal records under certain limited circumstances. Chapter 642, Acts of Assembly of 1984, amended § 19.2-392.2 by adding subsection (A)(3). This subsection provides that a circuit court may hear and determine expungement of records on the grounds of manifest injustice in cases where a pardon has been granted, upon proper petition and appropriate notice to the Commonwealth's attorney.

Given the fact that no specific authority to expunge is granted the Governor by the constitutional pardon provision and the further fact that the General Assembly has specifically provided for expungement and the method of expungement in the Code, I am of the opinion that § 19.2-392.2 provides the only appropriate means to accomplish expungement.

GOVERNOR. TRANSPORTATION SAFETY. GOVERNOR NOT REQUIRED BY § 46.1-40.5 OR § 46.1-40.6 TO PRESENTLY REALIGN MEMBERSHIP OF BOARD TO
The Honorable Laurie Naismith
Secretary of the Commonwealth

You have requested my opinion on the composition of the Board of Transportation Safety (the "Board"), created by Ch. 778, Acts of Assembly of 1984, codified in §§ 46.1-40.5 and 46.1-40.6 of the Code of Virginia. You specifically ask if the Governor is required, as of July 1, 1984, to bring the membership into alignment with the seven geographic districts of the Commonwealth as required by § 46.1-40.6, or may the alignment be phased in over the course of time as terms expire for members of the Board created under prior law.

Section 46.1-40.6 reads, in pertinent part:

"Seven members of the Board shall represent the seven geographic districts of the Commonwealth utilized by the Division of Motor Vehicles and designated by the Commissioner as operating districts. Each member shall reside in the district he represents....Appointment and confirmation of Board members under this section shall occur only as the terms of the current members of the Board expire under prior law."

Prior to establishing the Board within the Division of Motor Vehicles, the Board existed within the Department of Transportation Safety, codified as Ch. 11 of Title 33.1, §§ 33.1-392 through 33.1-399. Section 33.1-399, which provided for the appointment, terms and composition of the Board, did not contain a requirement that the members represent specific geographic districts.

Although the members of the Board must be appointed from specific geographic districts under the newly enacted law, there is a limitation in § 46.1-40.6 that the new appointments will not be made until the terms of current members of the Board expire under the prior law. That provision must be given the same effect, if possible, as any other provision of the legislation. I, therefore, am of the opinion that the Governor is not required to presently realign the membership of the Board to represent the seven geographic operating districts of the Commonwealth. As the current terms of the existing board members expire, the Governor should select replacements from particular geographic districts as contemplated by § 46.1-40.6.

The Honorable James A. Gondles, Jr.
Sheriff for Arlington County

You have asked for my opinion on the meaning of the term "proper disposition" as it is used in § 32.1-288 of the Code of Virginia. That statute requires a sheriff to "take custody of [a dead]...body for proper disposition" if no responsible person claims the body. Specifically, you have asked whether a sheriff, who has taken custody of a dead body pursuant to that statute, may authorize cremation of the body rather than a casket burial.
The Supreme Court of Virginia has held that the word "proper" is not an absolute, but a relative, word meaning "appropriate" or "suitable." See *Voight v. Reber*, 187 Va. 157, 164, 46 S.E.2d 15, 19 (1948). The General Assembly recognized cremation as an appropriate mode of disposition when it authorized the cremation of dead bodies after use in scientific instruction. See § 32.1-301. In view of the General Assembly's action, I conclude that cremation is a proper disposition of a dead body under the facts which you state.

I must, however, add a qualification to my conclusion. I am advised that there are some religious denominations that do not approve of cremation. Given the historical sensitivity of the Commonwealth and of the General Assembly for the religious convictions of its citizens, I would advise a sheriff not to authorize cremation of any dead body if it is known that cremation offends that person's religious convictions, if any. While I am unaware of any authority that would make a sheriff liable if he cremated the body of a person whose religion did not countenance the procedure, I think the better course of action is to avoid controversy when such religious tenets of the dead person are known.

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HIGHWAYS. DEDICATION OF PLATTED STREETS. SUBDIVISIONS. ABANDONMENT OF ROADS BY COUNTY BOARD OF SUPERVISORS.

November 27, 1984

The Honorable L. Dale McGhee
County Attorney for Henry County

You have asked several questions involving the following fact situation which I quote from your letter.

"A recorded subdivision plat shows a tract divided into various lots and streets serving the lots. Streets were developed and taken into the secondary road system; however, one street shown serving five lots has never been developed or used by the general public. The lots adjacent to the street have been conveyed. The county has taken no action to accept an offer of dedication of the platted road for public use. The plat was recorded prior to the adoption by the county of a subdivision ordinance pursuant to § 15.1-465, Code of Virginia, 1981 Repl. Vol."

I will answer your questions in the order raised.

"1. Is the recording of the subdivision plat showing this road a dedication of the road?"

Recordation of a subdivision plat and sale of lots by reference thereto manifest an intent to make available for public use the platted streets (or easements therein) and constitute a common law offer of dedication. *Ocean Island Inn v. Virginia Beach*, 218 Va. 474, 477, 220 S.E.2d 247, 250 (1975). Nevertheless, until the dedication is accepted by the public, or a competent public authority, it is a mere offer to dedicate no matter how finally expressed. *Brown v. Tazewell County Auth.*, 226 Va. 125, 129, 306 S.E.2d 889, 891 (1983). Acceptance can be formal and express, as by the enactment of a resolution by the appropriate governing body, or by implication arising from an exercise of dominion by the governing body, or from long, continued public use of requisite character. *Id.*

The common law requirement of acceptance after an offer of dedication has now been replaced in Virginia by a series of laws passed by the General Assembly that create a procedure for statutory dedication. See § 15.1-465 et seq. of the Code of Virginia
("Land Subdivision and Development"). Under these laws, the mere recordation of a properly approved subdivision plat vests fee simple title in the governing body as to all streets shown thereon. Brown v. Tazewell County Auth., supra, at 130, 306 S.E.2d at 891. In the situation which you describe, however, the plat in question was recorded prior to enactment of a valid subdivision ordinance by Henry County. I am of the opinion, therefore, that the mere recordation of a plat in such an instance is not sufficient dedication under the common law without a manifestation of acceptance by the public body. See Payne v. Godwin, 147 Va. 1019, 1026, 133 S.E. 481, 483 (1926).

I now turn to the issue of whether Henry County has accepted the offer of dedication, either expressly or impliedly, as a result of action taken by the county or by long, continuous public use. The facts which you have described would argue against express acceptance or acceptances by public use. Likewise, if the county has neither installed utility lines, nor opened, paved or repaired the street, nor taken any other governmental action in maintenance thereof, implied acceptance has not occurred. See Ocean Island Inn v. Virginia Beach, supra.

You indicate, however, that other streets in the subdivision were developed and taken into the State secondary system, apparently at the request of the county. The Supreme Court of Virginia in Ocean Island Inn has held that where a governing body has accepted part of the streets appearing on a recorded plat and "no intention to limit the acceptance" is shown, such partial acceptance constitutes acceptance of all the streets, provided the part accepted is sufficiently substantial to evince an intent to accept the comprehensive scheme of public use reflected in the plat. 216 Va. at 479, 220 S.E.2d at 250. Without further facts, I am unable to opine whether the partial acceptance test has been met in this instance or whether an intent to limit has, in fact, been evinced by Henry County.

Such an intent could be manifested, for example, in the resolution by the Board of Supervisors of Henry County petitioning the Virginia Department of Highways and Transportation to accept the developed roads into the secondary system, while specifically excluding the undeveloped street in question or specifically naming certain roads, but not others.

"2. If no, what would be the effect, if any, of abandonment of the road by the board of supervisors pursuant to § 33.1-156 et seq.?

I am of the opinion that even if the road has not been dedicated by operation of the common law rule of offer and acceptance, statutory abandonment by the board of supervisors pursuant to § 33.1-156 et seq. would have the effect of extinguishing any existing rights of public use as a public road. See Louisa County v. VEPCO, 213 Va. 407, 411, 192 S.E.2d 768, 771 (1972); § 33.1-163 of the Code; 1975-1976 Report of the Attorney General at 161. Moreover, such an action would constitute a formal intent not to accept the offer of dedication of the platted road by the public body. See Ocean Island Inn v. Virginia Beach, supra.

"3. Does the board of supervisors have ownership and authority to declare a dedicated road no longer necessary for public use and sell and convey the land pursuant to § 33.1-165?"

In this question, I assume you are referring to dedicated roads generally, not to the road in the factual situation posited by your first two questions. A dedicated road, although not part of the State Highway System or secondary system of highways, constitutes a "road" under the definition of § 33.1-156, and would generally qualify for abandonment. The board of supervisors must establish that grounds for abandonment exist under § 33.1-157, and follow the procedures for abandonment mandated in § 33.1-156 et seq. The board of supervisors may also act to vacate the road under
I am, however, of the opinion that upon abandonment, unless the county owns the underlying fee, the board of supervisors is ordinarily without power to sell and convey the land pursuant to § 33.1-165. When a highway is abandoned, "the land used for that purpose immediately becomes discharged of the servitude and the absolute title and right of exclusive possession thereto reverts to the owner of the fee, without further action by the public or highway authorities." Bond v. Green, 189 Va. 23, 32, 52 S.E.2d 169, 173 (1949). Only when the county owns the underlying fee would it have the power to sell and convey the land that was once part of the abandoned roadway. See 1976-1977 Report of the Attorney General at 105.

"4. Does abandonment of a dedicated road by the board of supervisors pursuant to § 33.1-165 et seq. affect any private rights of ownership of land to any adjacent road?"

If the dedicator (in this case, the subdivider) does not reserve the fee in the street, it vests in purchasers of the abutting lots to the center of the street or alley, subject to the public rights. Payne v. Godwin, supra. I am of the opinion that a statutory abandonment which would extinguish any public rights would, by operation of law, return unencumbered fee simple title to the adjoining landowners to the center of the abandoned roadway. See Bond v. Green, supra. Except for such reversion, the abandonment of the public land, although relinquishing all public rights, would not affect any existing private rights of landowners adjacent to the road.

### HIGHWAYS. SECONDARY SYSTEM. MECHANISM BY WHICH LOCAL GOVERNING BODY MAY REQUIRE DEVELOPER'S PRO RATA PARTICIPATION UNDER § 33.1-72.1.

August 23, 1984

The Honorable James H. Ward, Jr.
County Attorney for Middlesex County

You have requested my construction of § 33.1-72.1 of the Code of Virginia, which relates to the inclusion of certain streets as a part of the secondary system of State highways. You specifically ask whether subsection (D) of that section provides any mechanism by which a local governing body may require payment from a developer who has retained a speculative interest in property abutting a street which the governing body wishes to have included in the secondary system.

Subsection (C) of § 33.1-72.1 authorizes the Department of Highways and Transportation to include roads and streets in the secondary system upon the recommendation of the governing body of the county, upon compliance with specified conditions. One of the conditions is the requirement that the street must be brought up to the necessary minimum standards specified. The governing body must agree to contribute from county revenue, or from the special assessment of the landowners on the street in question, one-half of the cost to bring the street up to necessary minimum standards for acceptance. Subsection (C) further provides that streets are eligible under the provisions of that subsection only if the developer has not retained a speculative interest in the property abutting such streets. "Speculative interest" is defined. The subsection further provides that the special assessment is to be conducted in a manner provided in § 15.1-239 et seq., mutatis mutandis, i.e., with such changes as may be necessary for the assessment of abutting landowners and other local improvements.
Subsection (D) provides an exception to the rule against including streets when a "speculative interest" is retained by the developers. In such cases, the street may be recommended for inclusion in the secondary system if the governing body deems that extenuating circumstances exist, in which event the county must require a pro rata participation by such developer, as a condition of recommending the inclusion of the street in the secondary system. Subsection (D) provides the basis for the pro rata percentage required, which relates to the amount of land retained. That percentage is then applied to the Department of Highways and Transportation's total estimated cost to construct the street to the necessary minimum standards in order to decide the amount of cost to be borne by the developer. When that amount has been deducted from the total estimated cost, the remainder of the estimated cost shall then be the basis of determining the assessment under the special assessment provision, or for determining the amount to be provided by the county from general county revenues, under subsection (C). The property evaluated for the developer's pro rata percentage is not thereafter assessed in the special assessment authorized in subsection (C).

Section 33.1-72.1 is silent on the collection of the special assessment under subsection (C) and the pro rata percentage required of the developer under subsection (D). The implication is clear, however, that the special assessment imposed on abutting landowners is to be collected as any other tax for other local improvements. Section 15.1-242 provides that assessments upon abutting property for local improvements are to be reported to the collector of taxes, who shall enter the same as provided for other taxes. Subsection (D), however, expressly exempts from the property subject to the special assessment those properties of the developer which are evaluated under subsection (D) for the pro rata percentage of the estimated cost of the construction. Therefore, the amount assessed against the developer is not referred to the tax collector for collection as is provided for the assessments under subsection (C). It necessarily follows that the county governing body may utilize any procedure available for collecting the amount so assessed. If the developer does not agree to the assessment, the dispute must be resolved as any other claim on behalf of the county.

To summarize, I am of the opinion that §33.1-72.1(D) provides ample legal authority for the assessment of a pro rata participation on the part of developers who have retained a speculative interest in abutting property when the governing body determines that extenuating circumstances exist which justify such assessment before recommending a street be included in the secondary system of State highways. Further, the amount so determined may be collected as any other claim on behalf of the county.

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1Section 33.1-72.1 reads, in pertinent part, as follows:
"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 if such street, at the time of such recommendation, either: (i) has a minimum dedicated width of forty feet or (ii) in the event of extenuating circumstances as determined by the Highway and Transportation Commissioner, such street has a minimum dedicated width of thirty feet at the time of such recommendation....Such street shall only be taken into the secondary system of state highways if 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. No such 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 or more 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, or (iii) an equal amount for each parcel abutting on such street. No such special assessment on any parcel shall exceed one-third of the current evaluation of such property for real estate tax purposes. Such streets are eligible under this provision only if 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, or equivalent frontage, abutting such streets shall constitute speculative interest. Special assessments under this section shall be conducted in the manner provided in Article 2 (§ 15.1-239 et seq.) of Chapter 7 of Title 15.1, mutatis mutandis, for assessments for local improvements.

D. In instances where it is determined that speculative interest is retained by the original developer, developers, or successor developers and the governing body of the county deems that extenuating circumstances exist, the governing body of the county shall require a pro rata participation by such original developer, developers or successor developers as a condition of the county's recommendation pursuant to this section. The basis for the pro rata percentage required of such developer, developers, or successor developers shall be the proportion that the value of the abutting parcels owned or partly owned by the developer, developers, or successor developers bears to the total value of all abutting property as determined by the current evaluation of the property for real estate purposes. The pro rata percentage shall be applied to the Department of Highways and Transportation's total estimated cost to construct such street to the necessary minimum standards for acceptance to determine the amount of costs to be borne by the developer, developers, or successor developers. Property so evaluated shall not be assessed in the special assessment for the determination of the individual pro rata share attributable to other properties. Further, when such pro rata participation is accepted by the governing body of the county from such original developer, developers, or successor developers, such amount shall be deducted from the Department of Highways and Transportation's total estimated cost and the remainder of such estimated cost shall then be the basis of determining the assessment under the special assessment provision or determining the amount to be provided by the county when funded from general county revenue under subsection C of this section or determining the amount to be funded as a rural addition under subsection C1 of this section."

HOUSING AUTHORITIES. ADOPTION OF RELOCATION PLAN FOR LOW- OR MODERATE-INCOME FAMILIES. WHEN REQUIRED. DETERMINATION OF CONTROL OF PROPERTY.

April 26, 1985

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

You have asked several questions which focus upon the responsibilities, if any, of a redevelopment and housing authority to adopt a plan of relocation for displaced low- and moderate-income families in a situation in which the authority funds a privately owned housing project through the issuance of its revenue bonds, but never acquires any title interest in the project.
There are two sections in Ch. 1 of Title 36 of the Code of Virginia setting forth the Housing Authorities Law which deserve consideration. Section 36-27.01 provides, in pertinent part:

"In any condemnation proceeding which involves the taking or conversion of properties...owned or controlled by the redevelopment and housing authority...the authority shall adopt a plan of relocation identifying alternative housing for the persons who will be displaced."

This particular statute does not appear to be applicable to the situation which you present because, first, no condemnation proceeding is involved and, second, property owned or controlled by the authority is not to be taken.

I assume, however, that the project in question will be undertaken either under a redevelopment plan, pursuant to § 36-51, or a conservation plan, pursuant to § 36-51.1. In either event, the project may not be undertaken until the governing body (or planning agency or other public agency designated by the governing body) first adopts the requisite plan, which must meet several criteria. One of the specified criteria is that the plan indicate the method for the temporary relocation of persons living in the area subject to the project and the method of providing decent, safe and sanitary dwellings at rents within the financial reach of the income groups to be displaced. See §§ 36-51 and 36-51.1.

As anticipated by § 36-49.1 and as construed by Housing Authority v. Denton, 198 Va. 171, 176, 93 S.E.2d 288 (1956), it is the responsibility of the authority to prepare the plan. Once the plan has been prepared, however, it must be submitted to the governing body for approval, or to such other public agency as may be designated by the governing body. Once it has been approved, it is not necessary for the authority to ratify the plan prior to proceeding with the project.

I also call your attention to the provisions of The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1972, § 25-235 et seq. That Act is applicable to housing authorities (see § 25-238(a)), and if the other prerequisites of the Act are met, then such authorities must comply with the provisions of the Act. In the particular situation which you pose, however, it appears that the Act is not applicable, because State or federal funds are not used, only local funds are to be used. See § 25-236; 1979-1980 Report of the Attorney General at 187. If, however, State or federal funds are involved, and I note that a housing authority is empowered to receive such funds (§§ 36-49(5a), 36-49.1(4a) and 36-54), then it would appear that the Act would be applicable in addition to the other more limited provisions required under Title 36.

INDUSTRIAL DEVELOPMENT. EXPENSES. MEMBERS OF INDUSTRIAL ADVISORY COMMITTEE APPOINTED PURSUANT TO § 15.1-1378(k) MAY BE REIMBURSED FOR COSTS OF TRAVEL TO MEETINGS; AGENCY MAY PAY COSTS OF SOME MEALS AT MEETINGS.

February 12, 1985

The Honorable Franklin M. Slayton
Member, House of Delegates

This is in reply to your request for my opinion whether a county industrial development authority may, pursuant to § 15.1-1378(k) of the Code of Virginia, pay for or reimburse members of its advisory committee for the costs of meals at, and expenses of travel to, the place of the regular business meetings of the advisory committee.
committee holds regular business meetings at a 7:15 a.m. breakfast at least twice a month and, more often, once weekly.

Section 15.1-1378(k) authorizes an authority created under the Industrial Development and Revenue Bond Act "to appoint an industrial advisory committee to advise the authority" and to reimburse the members of the committee "for necessary traveling and other expenses incurred while on the business of the authority." (Emphasis added.) No prior Opinion of this Office has construed subsection (k) of § 15.1-1378. Prior Opinions have construed the travel expense statutes applicable to members of county boards of supervisors, and have held that such persons may be reimbursed for the expenses of travel from their residences to the place of the official meetings of their board in each instance. See Reports of the Attorney General: 1969-1970 at 28; 1963-1964 at 23. In my opinion, the same principle should apply here, and members of an industrial advisory committee therefore may be reimbursed for their travel expenses incurred in attending the regular business meetings of the committee.

Utilizing the same analogy to address the meal portion of your inquiry, I note that § 14.1-7 permits reimbursement of persons traveling on local government business in the same manner as persons traveling on behalf of the State are reimbursed by the State. Section .160 of the State Travel Regulations permits reimbursement for breakfast expenses in certain circumstances for persons on daily travel who leave home before 6:30 a.m.

There is a distinction, however, between reimbursement for meals incurred on travel, on the one hand, and the provision by local government of a meal at a working session of a board or commission. In the latter situation, the meal is furnished for the convenience of the local governmental entity, so that board members can more fully utilize their limited time. Thus, when conditions vary, so as to make it inconvenient or even impossible for the officer or employee to take meals at home or places of their own choice, it is reasonable for the government agency to bear the cost of such meals. For example, the board may follow a practice of continuing to conduct business throughout the day, ordering lunch or dinner to be sent in from a catering service.

In the situation posited by you, the agency meets in the morning prior to normal working hours for other government officers and employees, thereby making it impractical for the members to take their regular breakfast meals at home. Under such circumstances, the members are placed in a different position from the general public. Inasmuch as the statutory provision in § 15.1-1378(k) provides for the payment of necessary traveling "and other expenses" incurred while on the business of the authority, I assume that the General Assembly intended that there would be instances in which the members would incur expenses over and beyond necessary traveling expenses.

In view of the foregoing, I am of the opinion that members of an industrial advisory committee appointed under § 15.1-1378(k) may be reimbursed for travel expense to the place of the meetings, and may have meals provided at regular breakfast meetings of the committee.

INSURANCE. ACCIDENT AND SICKNESS. MEDICAL CARE PROVIDED BY DENTIST FOR CHILD BORN WITH CRANIOFACIAL ABNORMALITIES, INCLUDING CLEFT LIP AND CLEFT PALATE, MUST BE COVERED BY ACCIDENT OR SICKNESS INSURANCE POLICIES PURSUANT TO §§ 38.1-348.5 AND 38.1-348.6.

February 4, 1985

The Honorable John Watkins
Member, House of Delegates
Section 38.1-348.6 of the Code of Virginia pertains to requirements which must be included in certain group accident and sickness insurance policies, and § 38.1-348.5 pertains to the construction of the words "physician" and "doctor" in such policies. You have asked whether those Code provisions cover "all necessary and resultant medical and dental care for a child born with craniofacial abnormalities including cleft lip and cleft palate." I am assuming, for purposes of this Opinion, that such abnormalities have been medically diagnosed as congenital birth defects.¹

Section 38.1-348.5 states, in pertinent part, that "the word 'physician' or 'doctor' when used in any accident or sickness policy, or other contract providing for the payment of medical, surgical, or similar services shall be construed to include a dentist performing such services within the scope of his professional license." Section 38.1-348.6 requires that the accident and sickness insurance policies therein described include coverage for newborn children for "injury or sickness including the necessary care and treatment of medically diagnosed congenital defects and birth abnormalities." (Emphasis added.)

I am informed that the treatment for cleft lip and cleft palate often includes surgical and orthodontic procedures performed by a dentist, as well as prosthetic replacement of teeth performed by a dentist. I am, therefore, of the opinion that §§ 38.1-348.5 and 38.1-348.6 require that the necessary resultant medical and dental care for a child born with craniofacial abnormalities, including cleft lip or cleft palate, must be covered by the insurance policies described therein.

¹Cleft lip and cleft palate are listed as such defects in Birth Defects Compendium, (D. Bergsma, M.D., MPH, 2d ed. 1973).
and bonds and notes of the Federal National Mortgage Association and the Federal Home Loan Banks, and bonds, debentures or other similar obligations of federal land banks, federal intermediate credit banks, or banks of cooperatives, issued pursuant to acts of Congress, and obligations issued by the United States Postal Service when the principal and interest thereon is guaranteed by the government of the United States. The evidences of indebtedness enumerated by this paragraph may be held directly or in the form of securities of any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, provided that the portfolio of such investment company or investment trust is limited to such evidences of indebtedness." (Emphasis added.)

In view of the 1984 amendment which added the last sentence of paragraph (2), it is my opinion that your inquiry may be answered in the affirmative.

JUDGES. RETIRED CIRCUIT COURT JUDGES MAY NOT PERFORM MARRIAGE RITES WITHOUT AUTHORIZATION OF CIRCUIT COURT UNDER § 20-25.

February 15, 1985

The Honorable James M. Lumpkin
Judge, Circuit Court for the City of Richmond

You have asked whether a retired circuit court judge can celebrate the rites of marriage, pursuant to § 20-25 of the Code of Virginia, without the necessity of bond or order of authorization. If so, you then ask whether there would be a geographical limitation upon such a judge within Virginia to celebrate the marriage.

Section 20-25 states that "[a]ny judge or justice of a court of record and any judge of a district court of this Commonwealth may celebrate the rites of marriage either within or without the county or city wherein his court is situated without the necessity of bond or order of authorization." This section also provides that "circuit courts of the Commonwealth...shall appoint one or more persons, resident in the county or city for which such court is held, to celebrate the rites of marriage within the same...." The section provides that any person so appointed must give a bond in the penalty of $500.

Section 51-178(e) deals with recall of retired judges. It provides that any judge or justice who is retired and who has been recalled by the Chief Justice of the Supreme Court to hear a specific case or cases "shall have all the powers, duties and privileges attendant on the position he is recalled to serve."

As a general rule, words in a statute should be given their usual and commonly understood meaning. The word "judge" or "justice" means "[a] public officer who, by virtue of his office, is clothed with judicial authority." This definition would not include one who is retired. Section 51-178(e) indicates those specific circumstances when retired judges and justices can regain the powers, duties and privileges of the position.

I am, therefore, of the opinion that a retired judge may not celebrate the rites of marriage unless he is on active service pursuant to recall by the Chief Justice, in which case no bond would be required and his jurisdiction would be statewide. In the absence of this circumstance, a retired circuit judge could not perform the rites of marriage without authorization and a bond, as any other citizen.
JUDGES. SPECIAL JUSTICES. PUBLIC OFFICERS. INCOMPATIBILITY OF OFFICE. CANONS OF JUDICIAL CONDUCT. ELECTED MEMBER OF LOCAL GOVERNING BODY MAY BE APPOINTED OR SERVE AS SPECIAL JUSTICE UNDER § 37.1-88.

May 2, 1985

The Honorable Clifton A. Woodrum
Member, House of Delegates

This is in reply to your request for my opinion whether the Constitution of Virginia, State statutes or the common law prohibits an elected member of a local governing body of a county, city or town from being appointed and serving as a special justice under § 37.1-88 of the Code of Virginia. Section 37.1-88 reads as follows:

"The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by this title. At the time of appointment each such special justice shall be a person licensed to practice law in this Commonwealth, shall have all the powers and jurisdiction conferred upon a judge by this title and shall serve under the supervision and at the pleasure of the chief judge making the appointment. Special justices shall collect the fees prescribed in this title for such service and shall retain fees unless the governing body of the county or city in which such services are performed shall provide for the payment of an annual salary for such services, in which event such fees shall be collected and paid into the treasury of such county or city."

While § 37.1-88 confers upon special justices the "powers and jurisdiction conferred upon a judge" by Title 37.1, it is important to note that the powers enumerated in Title 37.1 are very limited. See, e.g., § 37.1-89. That title confers upon a special justice authority with respect to presiding over commitment proceedings of persons "alleged to be mentally retarded" (§ 37.1-65.1), authority with respect to presiding over commitment proceedings of persons "alleged or reliably reported to be mentally ill and in need of hospitalization" (§ 37.1-67.1), and authority to authorize medical treatment in very limited circumstances (§ 37.1-134.2).

In all other respects, special justices are not clothed with judicial authority as are general district court judges, juvenile and domestic relations court judges and circuit court judges. For example, a special justice can never be called upon to adjudicate the constitutionality of a local ordinance or the validity of a locality's monetary claim against an individual. Thus, special justices are not viewed as judges in the traditional sense of the word. Rather, they are persons appointed by the chief circuit court judge for a very limited purpose set forth in Title 37.1.

There are no provisions of the Constitution of Virginia, or the Code of Virginia or principles of common law, which prohibit the dual service suggested in your inquiry. I am, therefore, of the opinion that a member of the governing body of a county, city or town may be appointed a special justice pursuant to § 37.1-88 without violating the Constitution of Virginia, State statutes or the common law.
Section 37.1-88 is part of the title which relates to institutions for the mentally ill and mental health generally, certain provisions of which impose duties upon district court judges in the Commonwealth.

JUDGMENTS. MEANING OF "AWARD EXECUTION."

November 1, 1984

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

You have recently asked the definition of the words "award execution" in the last sentence of § 16.1-113 of the Code of Virginia. This provision authorizes the circuit court to affirm certain judgments of courts not of record and to "award execution" on those judgments.

In this context, to award execution means to authorize the appellee to pursue any of the traditional means of enforcement, execution, and recovery of judgments, including those contained in Ch. 18 of Title 8.01. The judgment is enforceable by the same means, and through the same procedures, as any other final order.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. SECTION 16.1-283 NOT SOLE STATUTORY VEHICLE FOR TERMINATION OF PARENTAL RIGHTS.

September 25, 1984

The Honorable James A. Leftwich
Judge, Juvenile and Domestic Relations District Court
for the City of Chesapeake

You have requested my opinion on the jurisdictional authority of the juvenile and domestic relations district courts under § 16.1-279(B) of the Code of Virginia. Specifically, you asked whether the termination of residual parental rights to a child can be effected only by the filing of an appropriate petition under § 16.1-283 or whether termination of such rights may also be effected under § 16.1-279(B). If termination can be effected under § 16.1-279(B), you ask if the requirements of § 16.1-281 must still be met.

Section 16.1-279(B) provides, in part, that if a parent or other custodian seeks to be relieved permanently of the care and custody of any child, or where a public or private agency seeks to gain approval of a permanent entrustment agreement entered into pursuant to § 63.1-56 or § 63.1-204, the juvenile court or the circuit court may, after compliance with § 16.1-277, terminate the parental rights of the parent or other custodian and appoint a local board of public welfare, social services, or a licensed child-placing agency as custodian of the child with authority to place the child for adoption and consent thereto.

Section 16.1-283 provides, in part, that the residual parental rights of a parent may be terminated by the court in a separate proceeding if the petition specifically requests such relief. Such section further states that no petition seeking termination of residual parental rights shall be accepted by the court prior to the filing of a foster care plan pursuant to § 16.1-281.
Given these provisions, the question is whether the requirements of §§ 16.1-283 and 16.1-281 must still be met if relief is sought pursuant to § 16.1-279(B).

Both §§ 16.1-279(B) and 16.1-283 deal with the termination of a parent's residual rights to his or her child. It is a basic rule of statutory construction that when construing statutes on the same subject matter in pari materia, the statutes should be harmonized if possible. See Reports of the Attorney General: 1982-1983 at 484 and 1974-1975 at 219. Applying this principle to the above statutes, that portion of § 16.1-279(B) relating to termination of parental residual rights may be read as applying solely to those two situations which involve a voluntary relinquishing of such rights, while § 16.1-283 involves an involuntary termination of parental rights in situations where a child has been abandoned, a child has been found by the court to be abused and neglected and placed into foster care as a result of a court commitment or voluntary entrustment or other voluntary relinquishment which did not include the giving up of residual parental rights. Further, the language in § 16.1-283 referring to "[n]o petition seeking termination of residual parental rights shall be accepted by the court prior to the filing of foster care plan" may be read as referring only to a petition which is filed under § 16.1-283.

I am, therefore, of the opinion that §§ 16.1-279(B) and 16.1-283 deal with different situations, and that § 16.1-283 is not the sole statutory vehicle for the termination of residual parental rights. In the appropriate situation, § 16.1-279(B) may also be used as a basis for terminating residual parental rights.

I next consider whether the procedures set forth under § 16.1-281 apply if termination may be effected under § 16.1-279(B). Section 16.1-281 deals with the filing of a foster care plan where legal custody is given to a local board of social services or a child welfare agency pursuant to § 16.1-279. That section provides that such a foster care plan need not be prepared if the child is placed in an adoptive home within sixty days following the order of disposition. The section is silent as to whether it is applicable to situations where residual parental rights are voluntarily terminated pursuant to § 16.1-279(B). I am of the opinion that § 16.1-281 does apply where parental rights have been terminated pursuant to § 16.1-279(B) and that, if a child whose rights have been terminated pursuant to that section is not placed in an adoptive home within sixty days following the order, the foster care plan must be filed.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. SPOUSE ABUSE.
ACCEPTANCE OF PETITIONS IN SPOUSE ABUSE CASES BY INTAKE OFFICERS PURSUANT TO § 16.1-260 DISCRETIONARY; NO REQUIREMENT TO FILE SUCH PETITION IN CONJUNCTION WITH CRIMINAL PROCESS.

June 10, 1985

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

You ask whether an intake officer of a juvenile and domestic relations district court has the discretion, under § 16.1-260 of the Code of Virginia, to refuse to accept a petition filed pursuant to § 16.1-253.1 requesting a protective order in a case alleging spouse abuse. You also ask whether a court may refuse to grant the relief provided for spouse abuse situations under §§ 16.1-253.1 and 16.1-279.1 based on the fact that the petitioner has not also obtained a criminal warrant charging the respondent with a criminal violation for conduct that also meets the definition of spouse abuse under § 16.1-228(Q1).

Section 16.1-260(A) provides that all matters alleged to be within the jurisdiction of
the juvenile and domestic relations district court shall be commenced by the filing of a petition, and that complaints, requests and the processing of petitions shall be the responsibility of the intake officer. Section 16.1-260(B), in its first sentence, generally deals with the procedure when an intake officer receives a complaint:

"When the court service unit of any court receives a complaint...alleging facts which may be sufficient to invoke the jurisdiction of the court pursuant to § 16.1-241, the unit, through an intake officer, may proceed informally to make such adjustment as is practicable without the filing of a petition or may authorize a petition to be filed by any complainant having sufficient knowledge of the matter to establish probable cause for the issuance of the petition." (Emphasis added.)

Other provisions in § 16.1-260(B) deal more particularly with procedures for complaints alleging matters which do not include spouse abuse.

I believe the foregoing quote must be interpreted as requiring the following procedure for those complaints which are not specifically provided for elsewhere in the Code. When an intake officer receives a complaint, he must determine whether the complainant has sufficient knowledge of the allegation upon which to establish probable cause for the issuance of the petition. If the intake officer determines that probable cause exists, then under the terms of § 16.1-260(B), quoted above, he may either proceed informally to adjust the matter without the filing of a petition or he may authorize the filing of a petition. While the intake officer has discretion in determining which of the two alternatives is in the best interest of the complainant and the family, he must take action under one of the two alternatives if he has found that probable cause exists. In the absence of a finding of probable cause, the intake officer would still have discretion to proceed informally or to make such referrals as he deems appropriate.

With respect to your second question, §§ 16.1-253.1 and 16.1-279.1 provide for preliminary protective orders and orders of protection, respectively, in cases of spouse abuse. They provide civil remedies for the protection of the petitioner, including prohibition against further acts of spouse abuse, providing the petitioner with possession of the residence occupied by the parties, or requiring the abusing spouse to provide suitable alternative housing for the petitioner and, if appropriate, any children, and ordering one or both of the parties to participate in appropriate treatment counseling or other programs designed to assist the parties. Section 16.1-241(M) specifically confers upon juvenile and domestic relations district court judges exclusive original jurisdiction over all cases, matters and proceedings involving "[p]etitions filed by a spouse for the purpose of obtaining an order of protection pursuant to § 16.1-253.1 or § 16.1-279.1 as a result of spouse abuse." I am not aware of any other statutory provision which would require the bringing of a criminal action against the abusing spouse in order to utilize the remedies provided for in these sections. I am, therefore, of the opinion that a petition for relief as provided in §§ 16.1-253.1 and 16.1-279.1 is not dependent upon the filing of a criminal action for spouse abuse.

JUVENILES. CONFIDENTIALITY OF CIRCUIT COURT RECORDS ARISING OUT OF PROCEEDING INVOLVING JUVENILE.

August 23, 1984

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

You have asked two questions regarding the extent to which circuit court records are confidential when they arise out of a proceeding involving a juvenile. Your questions
are as follows:

"1. If a juvenile is charged and the case is appealed to circuit court, how much of the circuit court record becomes public information?

2. If a juvenile is charged and the juvenile court turns the jurisdiction over to the circuit court, how much of the circuit court record becomes public information?"

Before specifically addressing your questions, it is important to note that § 17-43 of the Code of Virginia provides that the "records and papers of every court shall be open to inspection by any person...except in cases in which it is otherwise specifically provided." The exception germane to your questions is found in § 16.1-307, which provides, in pertinent part:

"In proceedings against a child in the circuit court in which the circuit court deals with the child in the same manner as a case in the juvenile court, the clerk of the court shall preserve all records....Such records shall be open for inspection only in accordance with the provisions of § 16.1-305."1

Therefore, unless your questions fall within this exception, the circuit court records shall be open for public inspection to any person to the same extent any criminal file is open for inspection, regardless of the fact that a juvenile is involved.2

Turning to your first question, I will assume that you refer to the situation where the child was found delinquent in the juvenile court and appeals that decision to the circuit court. In the event of a finding of guilt in the circuit court, § 16.1-296 directs the circuit court judge to treat the child in the same manner as if the case were in the juvenile court. Under these circumstances, § 16.1-307 requires the circuit court clerk to preserve the confidentiality of the records in the same manner as the juvenile court is required to by § 16.1-305. Hence, the records are not subject to public disclosure.

In response to your second question, § 16.1-269 sets forth the circumstances under which the jurisdiction of a case involving a child charged with an offense may be transferred to the circuit court having criminal jurisdiction over such offenses. Once the case is properly before the circuit court, § 16.1-272 permits the court to treat the juvenile either as an adult or in the same manner as if the case were in juvenile court. Consequently, if the child is treated as a juvenile, the provisions requiring confidentiality outlined in § 16.1-307 above will apply. If, on the other hand, the child is treated as an adult, the public disclosure provision of § 17-43 will apply, assuming there is no other pertinent statute imposing limitations. See supra note 2.

You also asked my opinion on the following question:

"May a local school board employ the wife of a sitting school board member as a teacher in the school system?"

Section 2.1-615, which is a provision of the Virginia Comprehensive Conflict of Interests Act, generally prohibits a spouse from being employed by the same school division when the other spouse is a member of the governing school board. In pertinent part, the statute provides:

"[I]t 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 teacher or other school board employee from the public funds, federal, state or local...if such teacher or other employee is the...spouse...of any member of the school board."

The general prohibition is inapplicable when the spouse "has been regularly
employed or employed as a substitute teacher or teacher's aide" prior to the appointment of the other spouse to the board, or "has been regularly employed or employed as a substitute teacher or teacher's aide by the school board" prior to the marriage. See § 2.1-615; 1982-1983 Report of the Attorney General at 691.

In the event such employment is not in violation of § 2.1-615, the board member must be careful not to participate in any matter before the board which would result in an unlawful conflict of interests. Section 2.1-610(A) provides that the board member must 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 a transaction of specific application and his disqualification shall be noted in the records of the agency. As used in this section, '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....If the transaction is one which affects the public generally, although the officer's or employee's interest may also be involved, it will not be necessary for such officer or employee to disqualify himself from participating in the transaction on behalf of the agency."

Whether the foregoing disqualification would be mandatory depends upon the subject matter under consideration by the school board. For example, this Office has held that disqualification is not necessary in school board consideration of general teacher salary levels involving a broad class of teachers, including the wife of a member of the school board, when all teachers in a broad class are treated equally. See 1982-1983 Report of the Attorney General at 689.

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1Section 16.1-305 sets forth specifically how, when and to whom juvenile court records shall be open to inspection.  
2Even the criminal records of adults held in circuit court are not completely open to public inspection. For example, § 19.2-299 directs that presentence reports be sealed upon entry of the sentencing order by the court.

JUVENILES. SUPPORT. SERVICE OF PROCESS SEEKING JUDGMENT PURSUANT TO § 16.1-279(O) ATTAINED PURSUANT TO §§ 8.01-328.1 AND 8.01-329.

August 21, 1984

The Honorable Marvin L. Garner  
Chief Judge, Juvenile and Domestic Relations District Court for Chesterfield County

You have asked what would constitute legal service of process under § 16.1-279(O) of the Code of Virginia for the purpose of reopening a case and granting judgment when a person is presently out of State and owes arrearages on a prior child support order. You then asked if it would make any difference if the person is in the military.

Section 16.1-279(O) allows a juvenile and domestic relations district court to enter judgment for money in any amount for support arrearages. That section provides, however, that "no such judgment shall be entered unless a petition...is duly served on the person against whom judgment is sought, in accordance with the applicable provisions of
Law relating to notice when proceedings are reopened." (Emphasis added.)

Title 16.1 does not specify what notice requirements are necessary to reopen a proceeding against a person in the situation you have described. Section 20-112, however, specifies procedures to be followed by a circuit court when it reopens proceedings:

"When the proceedings are reopened to increase, decrease or terminate maintenance and support for a spouse or for a child, the petitioning party shall give such notice to the other party by service of process or by order of publication as is required by law."

By analogy, it would be proper for a juvenile and domestic relations district court to reopen proceedings, following the same procedures required of a circuit court.

Service of process and publication requirements are found, generally, in Title 8.01. Section 8.01-328.1 et seq. ("long arm" statute) allows a court to exercise personal jurisdiction over nonresident persons in certain situations. Section 8.01-328.1(8)(ii) specifically provides for such jurisdiction over a person who has "been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person...." (Emphasis added.) Section 8.01-329 then provides the various methods of service of process or publication requirements once the "long arm" statute is applicable.

I am, therefore, of the opinion that proper service of process over an individual who is out of State and who owes support arrearage, for purposes of attaining a judgment pursuant to § 16.1-279(O), would be attained by reopening the proceedings pursuant to §§ 8.01-328.1 and 8.01-329. Because these two sections do not distinguish between civilians and individuals in the military, I am further of the opinion that the same process requirement would be applicable to military personnel if a proceeding pursuant to § 16.1-279(O) is initiated.

 Section 16.1-264(A) generally contains requirements for service of process for persons required to receive notice pursuant to § 16.1-263. Section 16.1-264(A) does not, however, specifically mention requirements that must be followed when proceedings are reopened.

LABOR. FAIR LABOR STANDARDS ACT. LAW ENFORCEMENT EMPLOYEES. OVERTIME. DEPUTY SHERIFFS.

March 12, 1985

The Honorable Ralph B. Johnson
Sheriff for Fluvanna County

You have asked whether the recent Supreme Court of the United States case, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. ____, 83 L.Ed.2d 1016, 105 S.Ct. (1985), requires that the provisions of the federal Fair Labor Standards Act pertaining to compensation for overtime be extended to deputy sheriffs.

The Fair Labor Standards Act ("FLSA," or the "Act") was initially enacted in 1938. See 29 U.S.C. § 202(a) et seq. In 1974, amendments to FLSA extended coverage of the Act to nonsupervisory" public employees". In National League of Cities v. Usery,
426 U.S. 833 (1976), the Court ruled that the 1974 amendments were not applicable to public employees of states and municipalities. In that case the Court stated:

"Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies." National League of Cities, supra, at 851.

In Garcia v. San Antonio Metro. Transit Auth., supra, the Court expressly overruled National League of Cities, and held the minimum wage and maximum hour standards of FLSA applicable to the public employees of the San Antonio Metropolitan Authority. The Court stated:

"[W]e perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA [San Antonio Metropolitan Transit Authority], that is destructive of state sovereignty or violative of any constitutional provision." Garcia, 83 L.Ed.2d at 1036.

The overtime compensation requirements of FLSA provide that, unless otherwise excepted, "no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of...[forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." See 29 U.S.C. § 207(a)(1). Subsection (k) of this statute sets forth a partial overtime exemption for law enforcement personnel employed by public agencies and provides as follows:

"No public agency shall be deemed to have violated subsection (a) [overtime requirements] with respect to the employment of any employee...in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

29 U.S.C. § 207(k). Thus, an employee in law enforcement activities is compensated at his regular rate for those hours in excess of a forty-hour workweek, but less than the number of hours set forth in the formula noted above.4

Furthermore, FLSA exempts from its protection any employee of a public agency who is employed in law enforcement activities if the public agency employs during the workweek fewer than five employees in law enforcement activities. See 29 U.S.C. § 213(a)(20).
Accordingly, to the extent the Act is applicable, its requirements pertaining to compensation for overtime do extend to qualifying deputy sheriffs.

1Note 29 U.S.C. § 213(a)(1) provides that the minimum wage and hour standards of FLSA are not applicable to "any employee employed in a bona fide executive, administrative, or professional capacity...."

29 U.S.C. § 203(d) initially defined "[e]mployer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State...." An amendment to this section, enacted April 8, 1974, rewrote the definition of "[e]mployer" to include "a public agency."

3The studies conducted pursuant to this section indicate "the average number of hours in tours of duty in work periods of 28 consecutive days was 171 hours." See 48 Fed. Reg. 40,118 (1983).

I note that in a prior Opinion, this Office opined that the Compensation Board could not be obligated to furnish the funds to meet the overtime payment requirements unless the Board authorized the employer to impose overtime work requirements. See 1974-1975 Report of the Attorney General at 88.

LABOR. STATE EMPLOYEES. LABOR UNIONS. COLLECTIVE BARGAINING. LABOR UNION MAY PEACEFULLY SOLICIT STATE EMPLOYEES TO JOIN UNION; COLLECTIVE BARGAINING BETWEEN STATE AGENCIES AND ORGANIZED GROUPS OF STATE EMPLOYEES UNAUTHORIZED, AGAINST PUBLIC POLICY OF STATE.

February 22, 1985

The Honorable George F. Allen
Member, House of Delegates

I write in response to your recent letter in which you inquire of the law of Virginia as it relates to public employee collective bargaining and joining labor organizations.

With respect to collective bargaining, in 1946 the General Assembly adopted S.J.R. No. 12, Acts of Assembly of 1946 at 1006, which provides, in pertinent part:

"It is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service."

In 1977, the Supreme Court of Virginia considered whether, under then existing law, a local governing body or school board had the power to enter into collective bargaining agreements. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Referring to the efforts in the legislature to enact bills permitting collective bargaining, the Court stated in that case that

"the recent Virginia history of public employee collective bargaining is persuasive, if not conclusive, that the General Assembly, the source of legislative intent, has never conferred upon local boards, by implication or otherwise, the power to bargain collectively and that express statutory authority, so far withheld, is necessary to confer the power." 217 Va. at 578.
The failure of legislative efforts to permit collective bargaining subsequent to 1977 confirms the accuracy of the Court's conclusion.

The public policy of the Commonwealth is against collective bargaining, and neither the executive branch of State government nor the local governments have the power to bargain collectively with their employees. If government representatives and others deviate from the Commonwealth's public policy, the remedy would be by court action to declare the agreements, if any, void and unenforceable, as was done in Arlington. Moreover, if appropriate under the facts of the case, the remedy may include a petition for injunctive relief.

With regard to whether public employees may join labor organizations, I refer you to Art. 3 of Ch. 4 of Title 40.1 concerning "denial or [abridgment of] right to work." By virtue of § 40.1-58.1, that article applies to public employers, public employees and representatives of public employees. Three things should be noted in that article: (1) Section 40.1-60 provides that "[n]o person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer"; (2) § 40.1-61 provides that "[n]o person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment"; and (3) § 40.1-66 which makes certain coercive practices illegal and also provides that "nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union." Thus, it is clear from the above-quoted statutes adopted by the General Assembly that the General Assembly has prohibited compulsory membership and the use of coercive tactics—and declared the same illegal—in the soliciting of membership in public employee organizations.

In sum, the public policy of the Commonwealth prohibits State and local governments from collective bargaining with their public employees. In addition, while the General Assembly has not prohibited public employees from joining employee organizations, it has declared illegal any coercive tactics used in soliciting membership. Finally, the remedies of declaratory judgment and equitable relief are available in those instances where action is inconsistent with the Commonwealth's declared public policy against collective bargaining by public employees.

1For a limited exception in the narrow field of public transportation, see § 15.1-1357.2; Commonwealth v. Arlington County Bd., supra, 217 Va. at 580, 232 S.E.2d at 54.

2By virtue of federal law, there are several exceptions to Virginia's right-to-work law. For example, workers of railroads operating in interstate commerce, 45 U.S.C. § 152, and workers of common carriers by air, 45 U.S.C. § 181, are not given the benefit of a state's right-to-work laws. Nor are workers on federal enclaves given such protection. Lord v. Local Union 2088, Intern. Broth., Etc., 646 F.2d 1057 (5th Cir. 1981).

LIBRARIES. LOANS OF FILM. LEGISLATION MAY AUTHORIZE LENDING FILMS BY STATE AGENCIES TO PRIVATE SCHOOL STUDENTS.

October 30, 1984

The Honorable Joseph B. Benedetti
Member, House of Delegates
You ask whether the General Assembly may request, in the form of House Joint Resolutions 114 and 115 which were carried over from the 1984 Session, that the State Department of Education and the State Library lend films from their libraries to Virginia students, including students in private schools and colleges. House Joint Resolution 114 requests the Department of Education to "permit and encourage use of audiovisual instructional materials by all Virginia students whether they be in public schools, community colleges, private colleges, health agencies, camps, noncommercial educational television stations or prisons." The Resolution also expresses the intent that the Department of Education charge a reasonable rental fee to borrowers to offset the costs of maintaining its film lending services. Similarly, House Joint Resolution 115 requests the State Library to "permit and encourage borrowing of its 16mm films by all Virginians whether they be members of organizations or students."

Manifestly, the request that the Department of Education and the State Library lend films to all Virginia students, without limitation, envisions the lending of films to students attending private sectarian schools. The question arises, therefore, whether a "loan" of teaching aids violates the Establishment Clause of the First Amendment to the Constitution of the United States or the Constitution of Virginia (1971). For the reasons which follow, I do not find a constitutional impediment, on the facts you have provided, to the uniform rental or use of films by the Department of Education or the State Library to all Virginia students, without regard to religious affiliation.

The general rule is that in judging a statute under the Establishment Clause, the statute will be found constitutionally permissible if it has a secular legislative purpose; if its primary effect neither advances nor inhibits religion, and if it does not foster "excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause has been rejected by the United States Supreme Court. See Walz v. Tax Commission, 397 U.S. 664 (1970). So long as there is no excessive entanglement with religion, and the primary effect of its action neither advances nor prohibits religion, a state may, without violating the Establishment Clause of the Constitution of the United States, directly loan secular textbooks to all school children throughout the state. See Board of Education v. Allen, 392 U.S. 236 (1968). See also Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229, 237-238 (1977). When the educational aid is disbursed directly to all students, regardless of public or religious school affiliation, the secular purpose and effect is strengthened. See, for example, Mueller v. Allen, 463 U.S. 388 (1983) (statute upheld providing state tax deductions to all parents for "tuition, textbooks and transportation" for their children attending...school," regardless of whether the school was public or sectarian). Similarly, Art. I, § 16 of the Constitution of Virginia, which likewise guarantees the free exercise of religion, does not prohibit the requests contained in House Joint Resolutions 114 and 115. See Miller v. Ayers, 213 Va. 251, 191 S.E.2d 261 (1972) (upholding loans to students attending private colleges, including sectarian institutions).

On the facts you have provided, I conclude that the primary purpose of the Resolutions is to ensure an educated, well-informed citizenry, and is not to advance the sectarian aims of nonpublic schools. Accordingly, I am of the opinion that there is no constitutional impediment to the Resolutions.  

\[1\] Whether excessive entanglement exists can only be judged on a case-by-case basis. I have no basis for concluding, on the facts you have provided, that improper entanglement would result in this case.
Additionally, Art. VIII, § 10 of the Constitution of Virginia would not be violated. That section precludes an appropriation of public funds to schools "not owned or exclusively controlled by the State or some political subdivision thereof." Here, however, there is no appropriation of public funds to a private school, and the students would be required to reimburse the State a reasonable rental fee.

LIBRARIES. LOCALITY WITHDRAWING FROM REGIONAL LIBRARY MAY NOT CLAIM BOOKS.

February 26, 1985

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

You have asked the following questions:

1. If a political subdivision withdraws from a regional library, is it entitled to a share of the books in the regional library, absent provision for such entitlement in the regional library agreement?

2. If the answer to No. 1 is in the affirmative, upon what basis is the distribution of books in the regional library to be made?

Two or more political subdivisions may, by agreement, establish and maintain a regional free library pursuant to § 42.1-38 of the Code of Virginia. An agreement establishing a regional library usually sets forth provisions governing the administration and control of the library and the proportions in which funds and expenses of the library will be shared. See § 42.1-41.

The only statutory provision governing a political subdivision's withdrawal from a regional library is § 42.1-42, which requires the consent of the remaining members c: two years' notice to them. Nothing in this statutory provision, or in any other provision of which I am aware, expressly entitles a withdrawing political subdivision to claim a share of the books in the regional library.

Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies. Under that rule, localities may exercise only those powers which are expressly granted or which are necessarily or fairly implied, and where there is doubt, the doubt is to be resolved against the existence of the power. See Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980); Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

As noted above, there is no express authority for a county withdrawing from a regional library system to unilaterally claim a share of the library's books. Nor, in my opinion, may such authority be fairly or reasonably implied. Nothing in the statutes generally governing regional libraries provides a basis for such an implied authority. Additionally, the power of political subdivisions to unilaterally withdraw contributed assets when they withdraw from regional projects is usually denied by the General Assembly. See, e.g., § 15.1-1369 (holding cities or counties which withdraw from a regional transportation district to the obligations and commitments made during their membership); § 15.1-1414(b) (requiring governmental subdivisions which withdraw from a regional planning district to relinquish their interests in the regional commission's assets).

Accordingly, I am of the opinion that, under the existing law, a political subdivision
which withdraws from a regional library is not entitled or authorized, absent consent of
the other participating jurisdictions as may be evidenced in the regional library
agreement, to withdraw a share of the books in the regional library. In view of the
foregoing, it is unnecessary to address your second question.

LIENS. NOTICE OF LIEN AGAINST REAL ESTATE MAY BE RECORDED IN
MISCELLANEOUS LIEN BOOK OR DEED BOOK.

October 16, 1984

The Honorable John B. Davis
Clerk, Circuit Court for Augusta County

You have asked (1) whether a notarized document purporting to establish a common
law lien for "the time and labor and money spent in the maintenance and improvement"
of specified real property is a valid document for recordation in the deed book pursuant
to § 17-60 of the Code of Virginia, and (2) if not, what would be the proper procedure, if
any, for recording such a lien.

Section 55-106 imposes a duty on the clerk to record any writing which "is to be 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
General at 65.1 The document in question is a signed and notarized notice of lien on real
property; accordingly, it should be recorded. The question arises, however, as to where it
should be recorded.

Section 17-60 specifies that "writings relating to or affecting real estate which are
authorized to be recorded, shall, unless otherwise provided, be recorded in a book to be
known as the deed book." (Emphasis added.) Section 43-4.1 states that:

"Notwithstanding the provision of any other section of this title, or any other
provision of law requiring documents to be recorded in the miscellaneous lien book
or the deed books in the clerk's office of any court, on and after July one, nineteen
hundred sixty-four all memoranda or notices of liens, in the discretion of the clerk,
shall be recorded in the miscellaneous lien books or the deed books in such clerk's
office, and shall be indexed in the general index of deeds, and such general index
shall show the type of such lien."

Section 43-4.1, therefore, by its own terms has "otherwise provided" for indexing
notices of liens. Accordingly, I am of the opinion that the clerk, in his discretion, may
record the lien in question in either the miscellaneous lien book or the deed book.

1The legal consequences of the writing can be determined only by a court. While I
question the legal efficacy of the "common law lien," it is unnecessary for this Office to
address that question.

MAGISTRATES. MAY NOT ISSUE WARRANT FOR SEARCH CONDUCTED OUTSIDE
JUDICIAL CIRCUIT FOR WHICH APPOINTED.
The Honorable J. R. Zepkin
Judge, General District Court

You have asked whether a magistrate is authorized to issue a warrant for the search of a person or place located in a judicial district other than that for which the magistrate was appointed.

Section 19.2-52 et seq. of the Code of Virginia, which govern the issuance and execution of search warrants, do not specifically answer your question. My review of the various Code provisions relating to magistrates and issuance of warrants, however, leads me to the conclusion that a magistrate may not issue search warrants for execution beyond his own judicial district. For example, § 19.2-35 provides, in part, that a magistrate shall be appointed "to serve the entire judicial district for which the appointment is made." Moreover, the chief judge of the circuit court having jurisdiction within the district has "full" supervisory authority over a magistrate so appointed. In addition, while § 19.2-45(2) bestows upon a magistrate the power to issue a search warrant, § 19.2-44 states that he shall exercise his powers "only in the judicial district for which he is appointed." In my opinion, these provisions are inconsistent with the suggestion that a magistrate may issue a warrant authorizing a search in a judicial district beyond that for which he was appointed.

Section 19.2-66, which pertains to obtaining a wiretap, provides strong support for the above conclusion. This statute states that the Attorney General must apply for a wiretap to a judge for the jurisdiction where the requested intercept is to be made. A wiretap is clearly a search within the meaning of the Fourth Amendment. Inasmuch as a judge and magistrate have the same power under § 19.2-52 to issue a search warrant, I believe that § 19.2-66 indicates that a magistrate may issue warrants for searches only within his judicial district. This analysis is consistent with the admonition contained in the Commonwealth Attorney's Handbook that "the search warrant must be obtained in this jurisdiction where the place to be searched is located." (Emphasis in original.) Handbook (1983 ed.) at 20. Finally, I note that this analysis comports with the general rule as stated by Professor LaFave in his landmark treatise on search and seizure that a magistrate may not issue a warrant for a search of a place situated outside of his jurisdiction.

Accordingly, consistent with these authorities, it is my conclusion that a magistrate may not issue a search warrant for searches to be conducted outside of the judicial district for which he was appointed. In view of this result, there is no need to address your other questions which presupposed an affirmative response to your initial inquiry.

1LaFave on Search and Seizure § 4.2(f) (1978).

MAGISTRATES. TEMPORARY DETENTION ORDERS. ADVICE OF PERSON SKILLED IN DIAGNOSIS OR TREATMENT OF MENTAL ILLNESS MUST BE OBTAINED BEFORE TEMPORARY DETENTION ORDER ISSUED UNDER § 37.1-67.1.
July 5, 1984

The Honorable Sidney Barney
Commonwealth's Attorney for the City of Petersburg

You have asked whether a magistrate must have the advice of a person skilled in the diagnosis or treatment of mental illness before issuing an order of temporary detention pursuant to § 37.1-67.1 of the Code of Virginia. This issue was raised in a previous Opinion found in the 1981-1982 Report of the Attorney General at 239. That Opinion held that a magistrate must obtain such advice before issuing a detention order. The Opinion also held that the magistrate is not bound to follow that advice in determining whether probable cause exists to issue the order.

You have also asked who is a person skilled in the diagnosis and treatment of mental illness. The statutes do not specify the qualifications of such a person. In my opinion the magistrate must exercise his judicial discretion in determining who qualifies to give the advice. I note, however, without limitation, that persons holding the following positions or licenses may meet the requirement: physicians (including psychiatrists), psychologists, and clinical social workers.

Note that the General Assembly did not impose this requirement upon judges or special justices. See § 37.1-67.1.

MEDICINE. ASSISTANTS. "EMPLOY" AS USED IN § 54-281.4.

January 7, 1985

The Honorable Frank Medico
Member, House of Delegates

You have requested my opinion on the meaning of certain words in §§ 54-281.4 and 54-281.5 of the Code of Virginia, relating to the employment of assistants by licensed physicians, osteopaths or podiatrists. Your inquiries are prompted by the concern of your constituents on whether the statute authorizing licensed physicians, osteopaths and podiatrists to employ assistants to perform certain delegated acts is to be narrowly construed so as to limit the employment to a personal employer-employee relationship. The alternative construction would permit hospitals or other entities to supply such medical assistants to the physicians for their use and supervision.

Section 54-281.4 provides, in part:

"(a) A medical physician, an osteopath or a podiatrist licensed under this chapter may be allowed to make application to the Board to employ assistants and delegate certain acts which constitute the practice of medicine to the extent and in the manner authorized by regulations which may be promulgated by the Board. Such acts shall be delegated in a manner consistent with sound medical practice and with the protection of the health and safety of the patient in mind. Such services shall be limited to those which are educational, diagnostic, therapeutic or preventive in nature, but in no case shall they include the establishment of a final diagnosis or treatment plan for the patient, nor shall delegated acts include the prescribing or dispensing of drugs."
(b) No assistant shall perform any acts delegated hereunder except at the direction of the licensee and under his supervision and control. Every licensee who utilizes the services of an assistant for aiding him in the practice of medicine shall be fully responsible for the acts of the assistant in the care and treatment of human beings."

Your three specific questions are as follows:

"1. Does the word 'employ' as it is used in the first sentence of 54-281.4(a) mean 'utilize' or 'pay the salary of'?

2. Does the phrase 'at any one time' as used in the first sentence of 54-281.5 refer to the time of licensure or during the time that medical services are being rendered?

3. Does Virginia Code 54-281.4 allow two or more physicians to make application jointly to employ an assistant?"

At the threshold, it should be noted that the foregoing statute uses inexact language, for the critical word "employ" has varied uses in common parlance, as well as in a legal context. For example, Webster's New Collegiate Dictionary at 373 offers the following definitions:

"employ...to make use of...to occupy...advantageously...to use or engage the services of...to provide with a job that pays wages or a salary...to devote to or direct toward a particular activity or person....

employ...USE...OCCUPATION...the state of being employed esp. for wages or a salary...."

Black's Law Dictionary 471 (5th ed. 1979) defines the word as:

"Employ. To engage in one's service; to hire; to use as an agent or substitute in transacting business; to commission and intrust with the performance of certain acts or functions or with the management of one's affairs; and, when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation....To make use of, to keep at work, to entrust with some duty."}

In absence of a clear legislative meaning, I must resort to the standard rules of statutory construction to ascertain the meaning of the language of the statute. The primary object in statutory construction is to ascertain and give effect to the intention of the General Assembly. Vollin v. Arlington County Electoral Board, 216 Va. 674, 222 S.E.2d 793 (1976). In order to ascertain that intention, one must consider the statute as a whole and the purpose sought to be obtained. See 1982-1983 Report of the Attorney General at 187; 17 M.J. Statutes §§ 37, 38, 39 (1979 Repl. Vol.).

Sections 54-281.4 through 54-281.9 represent a departure from the traditional practice of medicine, in that the legislature has permitted the use of non-licensed persons to perform certain acts which are delegated to them by licensed practitioners. The acts delegated by such licensed practitioners are those which constitute the practice of medicine. Stringent safeguards are provided in the statutes, not only to limit the types of acts which may be performed, but to require the practitioner to be annually approved to supervise the assistants who are to be employed. The extent and manner in which the services are used are controlled by regulations of the Board of Medicine. Section 54-281.4 does not require that the medical assistant be the "employee" of the licensed practitioner. The emphasis is on supervision and control by the practitioner,
clearly mandated by § 54-281.5, which reads as follows:

"No licensee shall be allowed to supervise more than two such assistants at any one time; provided, however, that in order to insure adequate and proper medical treatment for inmates within correctional institutions and facilities licensees employed by the Department of Corrections may supervise more than two assistants under such terms and conditions of supervision and control as the Board may, in its discretion, approve."

Consequently, I conclude that the General Assembly did not intend that the medical assistant to be utilized by a licensed practitioner necessarily be the practitioner's "employee," but rather it intended to place the burden of supervision and control in the practitioner if he is to use such assistants.

In answer to your first question, I am of the opinion that the word "employ" in § 54-281.4 is not limited to an employer-employee relationship so as to require that a licensed practitioner "pay the salary of" a medical assistant; nor does it mean simply "to utilize." The statute, when read with all companion statutes, means the licensed practitioner may be licensed by the Board of Medicine to use or engage the services of not more than two non-licensed persons to whom he may delegate certain acts which constitute the practice of medicine, so long as such delegation is carried out under the personal supervision and control of the licensed practitioner. The source of payment is irrelevant to the principal area of concern; namely, the control over the person to whom the acts are delegated.

I next turn to your second question. As emphasized in my first answer, the legislative mandate for personal supervision of medical assistants by the licensed practitioner is clear. Nothing in § 54-281.5 indicates that the "time of licensure" has any relevance to the time when supervision is required. The assistants must be under the supervision of the practitioner at all times they are acting, not simply at the time of the granting of the license to use the assistants. The only time limitation is provided by § 54-281.8, which requires an annual renewal of the approval of the Board of Medicine for the utilization of an assistant.

I am, therefore, of the opinion that the phrase "at any one time," as used in § 54-281.5, refers to the time when the medical services are being performed by the medical assistant.

In response to your third question, I am of the opinion that two or more physicians may jointly make application to the Board of Medicine to employ an assistant, provided they are jointly and severally liable for the acts of such assistant, and no one physician supervises more than two assistants at any one time. Although the statute is written in the singular, stating that a medical physician, an osteopath, or a podiatrist may be allowed to make application to the Board to employ assistants, § 1-13.15 provides that a statutory word appearing to denote the singular may also include the plural. I am aware of no valid objection to two or more licensed practitioners using the same medical assistant, so long as the practitioners are licensed by the Board to supervise such person or persons.

MEDICINE. MEDICAL EXAMINERS. COMMENTING ON CAUSE OF DEATH OF DECEDEENT PRIOR TO FILING CERTIFICATE OF DEATH.

March 21, 1985

The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates
You have asked whether a medical examiner is precluded from making public or informal comments or speculating upon the cause of death of a decedent prior to the filing of the death certificate described in § 32.1-263 of the Code of Virginia. Further, you have asked whether physicians and employees of hospitals, nursing homes, ambulance services, and rescue squads are similarly precluded from publicly or privately commenting or speculating on the cause of death of a decedent prior to the filing of such a certificate.

Section 32.1-263 requires that a death certificate be filed with the appropriate district registrar for each death which occurs in the Commonwealth. A death certificate is considered to be a vital record. See § 32.1-249(12). The confidentiality of vital records is protected by § 32.1-271(A), which reads:

"To protect the integrity of vital records and to ensure the efficient and proper administration of the system of vital records, it shall be unlawful, notwithstanding the provisions of §§ 2.1-340.1 through 2.1-346.1, for any person to permit inspection of or to disclose information contained in vital records or to copy or issue a copy of all or part of any such vital records except as authorized by regulation of the Board or when so ordered by a circuit court of this Commonwealth." (Emphasis added.)

Sections 2.1-340 through 2.1-346.1 embrace the Freedom of Information Act, which permits public access to official records, unless otherwise provided by law. Section 32.1-271(A) provides such an exclusion. There are no regulations of the Board of Health which provide an exception to the prohibition against disclosure.

Disclosure of information contained in vital records is prohibited only when the vital records are the source of the information. If a person has the same information derived from an independent source, such as personal experience or participation in an incident, then the confidentiality provisions of § 32.1-271(A) would not preclude his discussion or speculation on related topics.

It is, therefore, my opinion that § 32.1-271(A) does not preclude a medical examiner, or any of the other parties with whom you are concerned, from commenting on a decedent's cause of death prior to the filing of the death certificate required by § 32.1-263.1

I express no opinion as to possible civil liability which may exist for false or unfounded statements made by such individuals.

MEDICINE. MEDICAL EXAMINERS. SPECULATING OR HYPOTHEORIZING ON CAUSE OF DEATH IN DEATH CERTIFICATE, BASED ON MEDICAL JUDGMENT, EVEN THOUGH ACTUAL CAUSE OF DEATH CANNOT BE PROVEN. LIABILITY FOR STATEMENTS ON CAUSE OF DEATH NOT SUPPORTED BY EVIDENCE.

May 31, 1985

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

You have asked whether a medical examiner may speculate or hypothesize on the cause of death in a death certificate, even though the cause cannot be proven. You have also asked whether a medical examiner could be held civilly liable for statements as to the cause of death which are unfounded or not supported by any of the laboratory or
physical evidence which he considered.

Section 32.1-283(B) of the Code of Virginia states, in part, that "[u]pon being notified of a death as provided in subsection A, the medical examiner shall take charge of the dead body, make an investigation into the cause and manner of death, reduce his findings to writing, and promptly make a full report to the Chief Medical Examiner." That section provides for the Chief Medical Examiner to provide direction on the nature, character and extent of the investigation, together with instructions for use of the appropriate forms. Section 32.1-263(D) states "[w]hen inquiry or investigation by a medical examiner is required by § 32.1-283, the medical examiner shall investigate the cause of death and shall complete and sign the medical certification portion of the death certificate." In addition, § 32.1-282(B) requires each medical examiner to be licensed to practice medicine in the Commonwealth.

The foregoing statutes indicate that the responsibility of the medical examiner is to investigate and report his conclusion as to the cause and manner of death, and sign the death certificate. The statutes contain no requirement that the medical examiner do more to establish the actual cause of death. Further, I am unaware of any case which prohibits a medical examiner from rendering a medical judgment as to the cause of death, even though it be equivocal. Finally, I am also unaware of any legal prohibition against a medical examiner hypothesizing as to the cause of death, based on his examination, even though the cause is undetermined.

Your second question cannot be answered dispositively. Personal liability for damages resulting from actions of the medical examiner depends on the actual facts and circumstances of the case. A medical examiner is a State employee. Under the doctrine of sovereign immunity, personal liability does not attach for simple negligence when such an employee, acting in his/her official capacity, performs a discretionary function within the scope of his/her employment. Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984). The Supreme Court of Virginia has developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

"1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;
3. the degree of control and direction exercised by the state over the employee; and
4. whether the act complained of involved the use of judgment and discretion."

228 Va. at 313, 321 S.E.2d at 663.

I am, therefore, of the opinion that, based on the existing statutes, a medical examiner may speculate or hypothesize his view as to the cause of death, based on his medical judgment, even though it cannot be proven. Whether a medical examiner could be held civilly liable for statements as to the cause of death which are false, unfounded or not supported by any of the evidence he considered would depend on the actual facts of the case.
You have asked whether the performance of an electromyography test constitutes the practice of medicine or the practice of physical therapy. If the latter, licensed physical therapists could perform the test at the referral and direction of a physician who need not be present. You have defined electromyography as "the study and recording of electrical activity invoked in a muscle by electrical stimulation of its nerve by means of surface or insertion of needle electrodes. It is a procedure useful for the study of several aspects of neuromuscular functions, neuromuscular conduction, extent of nerve lesions, and reflex responses."

The practice of medicine is defined in § 54-273(3) of the Code of Virginia as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method." The practice of physical therapy, on the other hand, is defined, in pertinent part: "[U]pon medical referral and direction, the evaluation, testing, treatment, reeducation and rehabilitation by physical, mechanical or electronic measures and procedures of individuals who because of trauma, disease or birth defect present physical and/or emotional disorders." See § 54-273(9). The question, then, is whether electromyography constitutes "diagnosis and treatment," which would be the practice of medicine, or "evaluation and testing," which would be the practice of physical therapy.

Your definition of electromyography clearly indicates that electromyography is not treatment. Another definition of electromyography, found at 2 Attorneys' Dictionary of Medicine E-26 (1984), is helpful in reaching a determination regarding whether it is "diagnosis" (which would constitute the practice of medicine) or merely "evaluation and testing" (which would constitute the practice of physical therapy). That reference defines electromyography, in pertinent part, as:

"1. The production and interpretation of tracings (i.e., visual recordings) of the electrical changes in active muscles. 2. The production and interpretation of tracings which represent the response of a muscle to stimulation by electricity."

(Emphasis added.)

Both definitions clearly state that a portion of the test is interpretation, thereby strongly suggesting that diagnosis, requiring the exercise of independent medical judgment rather than mere evaluation and testing, is included.

Additional materials regarding the mechanics of the procedure, which were provided to my Office through the Board of Medicine, further support this conclusion. I am informed that electromyography is a two-part test, the first being nerve conduction studies, and the second being the actual insertion of a needle electrode into the patient. The first portion consists of the placement of external electrodes followed by electrical stimulation of the tested area, from which inferences regarding the potential diagnosis are made by the electromyographer. The second portion of the test is invasive and, because of that, the electromyographer must possess a knowledge of coagulation and anatomy. Additionally, although the "report" of the first part of the test is reduced to writing, the second part of the test is reported as results, rather than a tape or tracing, such as that produced by an electrocardiogram. Also, the electromyographer is diagnosing as he stimulates the muscle with the needle electrode in order to determine what portion of the muscle to stimulate next. The "report" is not a simple, numerical value which can be compared to normal ranges by the physician, nor is it similar to an x-ray or tracing, which is then "read" by a physician and a diagnosis obtained. Rather, the test consists of reading an oscilloscope during the needle insertion and determining
what muscles and nerves are abnormal and why.

Accordingly, I am of the opinion that electromyography is the practice of medicine and may only be performed by a physician.

MENTAL HEALTH. AUTHORITY OF SPECIAL JUSTICE TO COMMIT TO FACILITY OUTSIDE JUDICIAL DISTRICT.

March 21, 1985

The Honorable Samuel T. Patterson, Jr.
Substitute Judge and Special Justice, Eleventh Judicial District

You ask whether you have the authority under § 37.1-67.3 of the Code of Virginia to commit a person located in the Eleventh Judicial District to a mental health facility located outside that district. Section 37.1-67.3 provides, in pertinent part, that if the judge finds that the person who is subject to the involuntary civil commitment procedure meets the commitment criteria, the judge "shall by written order and specific findings so certify and order such person removed to a hospital or other facility designated by the Commissioner for a period of hospitalization and treatment not to exceed 180 days from the date of the court order." (Emphasis added.)

The only limitation on your authority as a special justice to commit a person to a specific mental health facility is that the facility must have been designated by the Commissioner of Mental Health and Mental Retardation (the "Commissioner") as an appropriate facility for the treatment of persons with a mental illness. This could include commitment to a willing private hospital or facility, as well as to a State facility.

It is, therefore, my opinion that you may commit a person to a mental health facility outside the Eleventh Judicial District if such a hospital or other facility be designated by the Commissioner as appropriate for the treatment of persons with a mental illness.

1Several observations are appropriate here. For administrative purposes, the Commissioner has designed regional areas which each of the State hospitals serve. Normally, commitments to public facilities are made to the hospital designated to serve the area from which the commitment is made. This procedure does not constitute a legal limitation on a special justice's authority, however.

Once a commitment has been made and the person has been received at the hospital, then it becomes the Commissioner's responsibility, as part of his management responsibilities, to transfer the patient from one hospital to another as the needs of the patient and the space and programs of the various hospitals may dictate. See §§ 37.1-48 and 37.1-78.1.
1984-1985 REPORT OF THE ATTORNEY GENERAL

February 14, 1985

The Honorable Robert F. Ward
Judge, Pittsylvania Juvenile and Domestic Relations District Court

This is in reply to your request for my opinion whether an employee of a local Community Mental Health Center, which is funded under the provisions of Ch. 10 of Title 37.1 of the Code of Virginia, § 37.1-194 et seq. (commonly referred to as "Chapter Ten Boards"), is an employee of the Commonwealth of Virginia as referred to in § 19.2-175. The phrase to which you refer is emphasized in the following quotation from § 19.2-175:

"Each expert or physician or clinical psychologist skilled in the diagnosis of insanity or mental retardation or other physician appointed by the court to render professional service pursuant to §§ 19.2-168.1, 19.2-169.1, 19.2-169.5 or paragraphs (1) and (2) of § 19.2-181, who is not regularly employed by the Commonwealth of Virginia except by the University of Virginia School of Medicine and the Medical College of Virginia, shall receive a reasonable fee for each such examination and report thereof to the court." (Emphasis added.)

Prior Opinions of this Office consistently have held Chapter Ten Boards to be local boards rather than State boards, and their employees to be local rather than State employees. See, e.g., Reports of the Attorney General: 1977-1978 at 246; 1975-1976 at 150; 1974-1975 at 338; 1971-1972 at 17; cf. 1981-1982 Report of the Attorney General at 298(2). Although the statutes comprising Ch. 10 of Title 37.1 have been amended repeatedly subsequent to publication of each of the above-cited Opinions, none of the amendments has had the effect of overruling this interpretation of legislative intent, and it therefore may be considered correct. See Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603, 605 (1983); Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

There is nothing in § 19.2-175 which would work a change in this interpretation of the employment status of Chapter Ten Board employees, and, manifestly, if they are local employees, they cannot at the same time be considered to be "regularly employed by the Commonwealth." Accordingly, in my opinion your inquiry should be answered in the negative.

1This view is consistent with position stated in joint memorandum by the Office of the Executive Secretary of the Supreme Court of Virginia, Office of the Attorney General of Virginia, and the Department of Mental Health and Mental Retardation, establishing a fee schedule for local mental evaluations of criminal defendants.

MENTAL HEALTH. CIRCUIT COURT IN LOCALITY WHERE PERSON RESIDES OR WHERE INCAPACITATED PERSON HOSPITALIZED HAS JURISDICTION WHEN PETITION FILED PURSUANT TO § 37.1-132 FOR APPOINTMENT OF GUARDIAN.

February 7, 1985

The Honorable Lillie M. Hart
Clerk, Circuit Court for the City of Chesapeake

You have asked whether a circuit court in a city has jurisdiction under § 37.1-132 of the Code of Virginia to consider a petition requesting appointment of a guardian for an
incapacitated person who is temporarily staying in a hospital which is located in the city and that city is not the person's legal residence.

The relevant provisions of § 37.1-132 state:

"On petition of any person to the circuit court of the county or the city, in which resides or is located any person who by reason of advanced age or impaired health, or physical disability, has become mentally or physically incapable of taking care of himself or his estate, the court...shall hold a hearing to determine whether a guardian shall be appointed." (Emphasis added.)

As a general rule, words in a statute should be given their usual and commonly understood meaning. The term "reside" is defined generally as "to dwell permanently or continuously: occupy a place as one's legal domicile;" while the term "locate" is defined generally as "to determine or indicate the place, site, or limits of...to set or establish in a particular spot." The term "locate" connotes a temporary time frame in contrast to the permanency or continuance implicit in the term "reside."

The primary objective in the interpretation of a statute is to give effect to the legislative intent. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). In construing the statutory language, I conclude that the legislative intent was to provide jurisdiction under § 37.1-132 in either the circuit court of the city or county where the person permanently resides, or in the circuit court of the city or county where the person is temporarily located. I am, therefore, of the opinion that the circuit court, where the incapacitated person is hospitalized, has jurisdiction when a petition is filed pursuant to § 37.1-132.

MENTAL HEALTH. OUTPATIENT TREATMENT. PAYMENT FROM STATE TREASURY TO PRIVATE PHYSICIAN FOR OUTPATIENT MENTAL HEALTH TREATMENT NOT AVAILABLE.

August 29, 1984

The Honorable Andrew G. Conlyn
Judge, Fifteenth Judicial District

You have asked for my opinion whether payment may be made from the State Treasury to a private physician for outpatient mental health services which he has provided pursuant to § 37.1-67.3 of the Code of Virginia. You advise that an indigent person was the subject of involuntary civil commitment proceedings. The physician appointed by the court concluded the person did not require involuntary hospitalization but recommended that the person receive outpatient treatment. Because the local mental health clinic could not furnish such services, the court ordered the patient to be treated by the physician who made the earlier examination. That physician now is seeking payment for his services.

Section 37.1-67.4 provides that any institution caring for a person who is the subject of involuntary commitment proceedings and who has been placed with it pursuant to a temporary detention order is authorized to provide emergency medical and
psychiatric services and that the costs of such hearings and the costs of such services during the period of temporary detention shall be paid as provided in § 37.1-89. Section 37.1-89 provides, in pertinent part:

"Every physician...who is not regularly employed by the Commonwealth of Virginia who is required to serve as a witness...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....Except as hereinafter provided, all expenses incurred, including the fees, attendance and mileage aforesaid, shall be paid by the Commonwealth."

Physicians' fees for provision of treatment at a willing institution during the period of temporary detention, as well as fees for the examination of the person subject to involuntary commitment proceedings and attendance at such hearings, would therefore be paid pursuant to §§ 37.1-67.4 and 37.1-89 by submission of an appropriate bill to the Supreme Court of Virginia. There is no provision in either of the foregoing sections for payment for long-term treatment.¹

It is, therefore, my opinion that the Commonwealth is responsible only for the costs of treatment covered by §§ 37.1-67.4 and 37.1-89 which are associated with the period of temporary detention and the civil commitment hearing itself, not for the costs of treatment rendered by private practitioners thereafter.²

¹In future cases, it might be appropriate to refer such patients to the local board to explore the possibility of contracting for such service pursuant to § 37.1-197.
²Because no statutorily authorized method for payment exists, you may wish to suggest to the physician in this case that he explore with a member of the General Assembly the possibility of a relief bill. This suggestion should not be construed as a comment on whether such a bill should be passed which is a policy decision for the General Assembly.

MENTAL HEALTH. REGULATIONS. BOARD HAS AUTHORITY TO PROMULGATE REGULATIONS PERTAINING TO HUMAN RIGHTS PROGRAMS FOR BOTH RESIDENTIAL AND NONRESIDENTIAL PATIENTS.

June 26, 1985

The Honorable Joseph J. Bevilacqua
Commissioner, Department of Mental Health and Mental Retardation

Section 37.1-84.1 of the Code of Virginia contains provisions pertaining to the rights of patients and residents of hospitals and facilities "operated, funded, or licensed by the Department of Mental Health and Mental Retardation" (the "Department"), and further provides that the State Board of Mental Health and Mental Retardation (the "State Board") shall promulgate rules and regulations to implement the provisions of the section.¹ Section 37.1-199 provides that the Department may allocate available funds to the various community services boards, and further provides that the Department may withdraw funds from any community services board whose program is not being administered in compliance with the standards for such a program as promulgated by the State Board.

You advise that in April of this year, the State Board began processing for public hearing draft regulations governing the rights of clients participating in community
residential and nonresidential programs operated or funded by the community services boards. You ask whether, under the two statutes referenced above, the State Board "has the authority to regulate human rights programs in community settings for both residential and nonresidential programs."

The State Board's responsibility to adopt rules and regulations implementing the client rights provisions of § 37.1-84.1 is to the patients or residents of hospitals and other facilities operated, funded, or licensed by the Department. Your question primarily focuses upon the meaning of the term "facility" in § 37.1-84.1. That term is defined in § 37.1-1 as

"a state or private hospital, training center for the mentally retarded, psychiatric hospital, or other type of residential and ambulatory mental health or mental retardation facility and when modified by the word 'state' it means a facility under the supervision and management of the Commissioner...."

The meaning of the phrase "and ambulatory" in the above definition is not entirely clear. It must have meaning separate and apart from the term "residential," however; otherwise, its use would be redundant, and the General Assembly would have committed a vain act in enacting it. See, e.g., Jones v. Conwell, 227 Va. 178, 314 S.E.2d 61 (1984); Williams v. Commonwealth, 190 Va. 280, 56 S.E.2d 537 (1949); Cooper v. Tazewell Square Apartments, Ltd., 577 F.Supp. 1483 (W.D. Va. 1984).

In this particular situation, I believe the phrase should be construed as a synonym for "outpatient." Certainly, there is no reason to believe the General Assembly intended to confirm the existence of legal rights only to residents of residential facilities, but to ignore the same rights in patients receiving outpatient services. Moreover, because the section is remedial in nature, it should be broadly construed to achieve its purpose. See, e.g., Woodson v. Commonwealth Util., Inc., 209 Va. 72, 161 S.E.2d 669 (1968).

It is, therefore, my opinion that the term "facility" includes services rendered on an outpatient basis. Section 37.1-84.1 does not exclude facilities operated by community services boards, and the State Board has the authority to promulgate the proposed regulations. Authority may also exist to promulgate the regulations under § 37.1-199, but it is not necessary to reach that question in light of the foregoing conclusion.

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1The pertinent portion of the statute, which was last amended in 1976, provides:

"Each person who is a patient or resident in a hospital or other facility operated, funded, or licensed by the Department of Mental Health and Mental Retardation shall be assured his legal rights and care consistent with basic human dignity insofar as it is within the reasonable capabilities and limitations of the Department or licensee and is consistent with sound therapeutic treatment...."

The State Board of Mental Health and Mental Retardation shall promulgate rules and regulations relative to the implementation of the above after due notice and public hearing as provided for in the Administrative Process Act, Chapter 1.1:1 of Title 9 (§ 9-6.14:1 et seq.) of this Code.

The Board shall also promulgate rules and regulations delineating the rights of patients and residents with respect to nutritionally adequate diet, safe and sanitary housing, participation in nontherapeutic labor, attendance or nonattendance at religious services, use of telephones, suitable clothing, and possession of money and valuables and related matters. Such latter rules and regulations shall be applicable to all hospitals and other
facilities operated, funded, or licensed by the Department of Mental Health and Mental Retardation but such hospitals or facilities may be classified as to patient or resident population, size, type of services, or other reasonable classification."

2Use of the term "patient," in conjunction with the term "resident," supports this conclusion.

MENTAL HEALTH. TEMPORARY DETENTION ORDERS. TIME FRAME FOR HOLDING HEARING RUNS FROM EXECUTION OF ORDER.

July 19, 1984

The Honorable J. R. Zepkin
Judge, General District Court, Ninth Judicial District

You have asked whether the requirement of § 37.1-67.1 of the Code of Virginia to hold a detention hearing within a specific time period is measured from the date and time of the issuance of the order of the temporary detention or from the actual detention of the patient.

Section 37.1-67.1 provides, in pertinent part:

"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...." (Emphasis added.)

Section 37.1-67.3 also provides, in pertinent part:

"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; 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." (Emphasis added.)

Both sections state that the person may not be "detained" for longer than seventy-two hours before a hearing must be held. Section 37.1-67.3 also provides that the hearing must be held within forty-eight hours of the "execution" of the detention order. I am, therefore, of the opinion that the forty-eight or seventy-two hour time period begins to run when the temporary order is executed by the actual detention of the patient rather than when the order is issued.

MENTAL HEALTH. VOLUNTARY ADMISSION PURSUANT TO § 37.1-67.2. HOSPITAL'S AUTHORITY TO DETAIN.

April 9, 1985

The Honorable S. Lee Morris
Judge, Portsmouth General District Court
You ask whether a hospital may hold a person, who was the subject of a commitment proceeding, when that person revokes his consent to receive a minimum period of treatment and gives notice of his intent to leave. You also ask whether the judge's execution of the Application for Voluntary Admission to a State Hospital or Other Facility in Virginia, DMH Form 1006-B (1-78) (hereinafter the "Form"), is sufficient to satisfy the language of § 37.1-67.2 of the Code of Virginia that the judge require the individual to accept a minimum period of treatment and to give notice of intent to leave.

Section 37.1-67.2 provides, in pertinent part:

"If the person is capable and willingly accepts voluntary admission and treatment, the judge shall require the person to accept voluntary admission for a minimum period of treatment and after such minimum period not to exceed seventy-two hours to give the hospital forty-eight hours' notice prior to leaving the hospital...."

Although the Form does not become an order of the court requiring the respondent to receive a minimum period of treatment (see 1983-1984 Report of the Attorney General at 237), the Form is sufficient to meet the requirements of the statute. Section 37.1-67.2 requires the judge to hold a preliminary hearing to ascertain whether the person is at that time willing and capable of seeking voluntary admission and treatment. If so, the judge requires the person to accept admission for a minimum period of treatment not to exceed seventy-two hours and to give forty-eight hours' notice of intent to leave by executing the Form. The Form need not, however, be in the form of a court order to meet the requirements of the statute. The person may, at anytime thereafter, revoke his consent to hospitalization. See 1975-1976 Report of the Attorney General at 222. The requirement remains, however, that the person give the hospital forty-eight hours' notice of his intent to leave. As stated by the Supreme Court of Virginia in Schmidt v. Goddin, 224 Va. 474, 481, 297 S.E.2d 701, 705 (1982), "[u]nder this statutory provision...the patient, after he has given 48 hours notice, to the hospital, may leave unless sooner discharged...."

Section 37.1-67.1 authorizes the judge, or magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, to issue an order of temporary detention upon the sworn petition of any responsible person or upon his own motion. Accordingly, pursuant to that section, if the patient revokes his consent to voluntary admission and gives notice of intent to leave, the judge or magistrate, if he makes the proper findings, may immediately issue within the 48-hour period an order of temporary detention based on the sworn petition of hospital staff. See 1975-1976 Report of the Attorney General, supra. The statutorily prescribed procedure and the patient's voluntary agreement to accept treatment as an alternative to the involuntary procedures constitute the basis upon which the hospital is authorized to hold the patient. See 1983-1984 Report of the Attorney General, supra.

It is, therefore, my opinion that execution of the Form is sufficient to satisfy the language of § 37.1-67.2, and that the hospital may detain the person in accordance with his agreement which is binding upon him.

MINES AND MINING. REGULATION REQUIRING CERTIFICATION OF FINANCIAL ABILITY IN CASE OF "SELF-BONDING" UNDER VIRGINIA COAL SURFACE MINING CONTROL AND RECLAMATION ACT GOES BEYOND STATUTORY AUTHORITY OF BOARD OF CONSERVATION AND ECONOMIC DEVELOPMENT.

October 18, 1984

The Honorable John C. Buchanan
Member, Senate of Virginia
You have asked whether, in adopting section V809.13(a)(2) of the Virginia Coal Surface Mining Regulations, the Board of Conservation and Economic Development (the "Board") has exceeded its statutory authority under § 45.1-270.3 of the Code of Virginia.

Section 45.1-270.3 reads, in part, as follows:

"C. 1. Notwithstanding the above, the Director may accept the bond of an operator of an underground mining operation without separate surety as provided in § 45.1-241 C of this Code and in any case upon a showing by such operator of a net worth, total assets minus total liabilities, certified by an independent certified public accountant equivalent to $1,000,000. Such net worth figure shall thereafter during the existence of the permit be certified annually on the anniversary date of such permit by an independent certified public accountant."

(The "Director" is the Director of Conservation and Economic Development.)

In implementing this statute, the Board first adopted a regulation in 1983 (section V809.13(a)(2)) which reads, in pertinent part:

"The applicant, or the applicant's parent organization in the event the applicant is a subsidiary corporation, must have a net worth, certified by an independent Certified Public Accountant in the form of an unqualified opinion of no less than one million dollars. The certification shall include a final determination by the independent Certified Public Accountant regarding the applicant's ability to satisfactorily meet all obligations and costs under the proposed reclamation plan for the life of the mine. Where the Division has a valid reason to believe that the permittee's net worth is less than required by this subsection, it may require a new Certified Public Accountant statement." (Emphasis added.)

("Division," of course, refers to the Division of Mined Land Reclamation.)

The Board has authority to adopt regulations as may be necessary to carry out the purposes and provisions of Ch. 19 of Title 45.1. See §§ 45.1-230, 45.1-241(C) and 45.1-270.5(B). The legislature may delegate to the administrative agency, or the Director, the power to determine if the statutory requirements for accepting a bond without separate surety have been met before permitting an operator to follow the alternative to providing an assurance of ability to meet reclamation obligations. The Supreme Court of Virginia adheres to the rule that considerable freedom to exercise discretion and judgment must be accorded those who administer legislation. See Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).

It is well-settled, however, that the General Assembly may not delegate unlimited discretion to an administrative agency or official. York v. City of Danville, 207 Va. 865, 162 S.E.2d 259 (1968); Thompson v. Smith, supra. Equally well established is the rule that the power to make rules and regulations must be consistent with law, and subject to the implied constitutional limitation that administrative agencies must not legislate. See Chapel v. Commonwealth, 197 Va. 408, 99 S.E.2d 337 (1955); Marcet v. Board of Plumbers, E. & R. of Alabama, 249 Ala. 48, 29 So.2d 333 (1947); 1 Am.Jur.2d Administrative Law § 126 (1962).

In this case, the question is whether the administrative agency has extended its power beyond that delegated to it to carry out the legislative provisions of § 45.1-270.3. In my judgment, the agency has extended the power beyond permissible limits.

In § 45.1-270.3(C), the General Assembly has specified the conditions which must be met before the Director is permitted to grant to the applicant an alternative to
complying with the bonding requirements of § 45.1-241(C). Those conditions are clear and unequivocal. It only remains for the Director to determine when such conditions have been met before he exercises his discretion. Such is the true function of delegating to an administrative agency or official. See Thompson v. Smith, supra, 155 Va. at 381.

By adopting regulation V809.13(a)(2), the Board would require the certification contemplated by § 45.1-270.3(C) to contain more than a mere statement of net worth equivalent to one million dollars. It also requires an accountant to provide a determination of the applicant's ability to satisfactorily meet all obligations and costs under the proposed reclamation plan for the life of the mine. The plain language of the statute does not admit of such a requirement which necessarily involves engineering calculations and predictions in addition to financial calculations.

In my opinion, if the additional conditions are to be imposed, it can be accomplished only by statute, not through agency regulations. Accordingly, I am of the opinion that the regulation of the Board exceeds the statutory authority, expressed or implied, in §§ 45.1-130, 45.1-241(C) and 45.1-270.5(B).

I note that the statute does not obligate the Director to accept such a bond even if the conditions are met; rather, it provides that he "may accept the bond...."

It is also noteworthy that the regulation permits the assets of the applicant's parent organization to be included in determining the net worth of the applicant. The statute speaks only of the net worth of the operator.

The facts of this situation compel a different result from that which I reached in my Opinion to Commissioner Lukhard dated October 18, 1984, on a similar question. There, the facts disclosed a continuous, nearly twenty-year administrative interpretation of an ambiguous statute. Moreover, the General Assembly presumably had knowledge of that administrative interpretation and did not restrain the agency from its interpretation.

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MOTOR VEHICLES. ABANDONED, INOPERATIVE OR IMPROPERLY PARKED. REMOVAL, STORAGE.

October 18, 1984

The Honorable Frederick H. Creekmore
Member, House of Delegates

You have asked a number of questions concerning the removal and storage of inoperative, abandoned, and improperly parked motor vehicles. I will address your queries seriatim.

Your first inquiry concerns the relationship of § 15.1-11.1 of the Code of Virginia to the general zoning authority granted to Virginia localities under Ch. 11 of Title 15.1. You ask whether § 15.1-11.1 preempts or otherwise controls local authority over the keeping of inoperative vehicles, or whether stricter provisions might be enacted pursuant to a locality's general zoning authority.

I can find nothing in Ch. 11 of Title 15.1 which grants authority to localities to restrict the keeping of inoperative vehicles. Even if such authority might be implied from the provisions of Ch. 11, it would appear that the specific provisions of § 15.1-11.1 necessarily would be construed as limiting any such implied general authority. Accordingly, it is my opinion that § 15.1-11.1 governs the authority of localities to
restrict the keeping of inoperative vehicles.

Because of the response to your first question, your further questions concerning nonconforming zoning uses need not be answered. Section 15.1-11.1 has a specific provision relating to nonconforming use.

Your next inquiry concerns an apparent inconsistency in the language of two subsections of § 15.1-11.1. As you point out, subsection (a) of § 15.1-11.1 permits localities to provide that it is unlawful to keep an inoperative vehicle on property zoned for residential, commercial or agricultural purposes unless the vehicle is "within a fully enclosed building or structure or otherwise shielded or screened from public view...." (Emphasis added.) Subsection (b), however, provides that localities may require owners of property zoned residential, commercial or agricultural to remove inoperative vehicles not kept within a "fully enclosed building or structure...." That subsection makes no mention of vehicles "shielded or screened from public view."

The language "or otherwise shielded or screened from public view" was added to subsection (a) by Ch. 368, Acts of Assembly of 1982, which rewrote most of subsection (a) but made no changes in subsection (b). While the absence of that phrase in subsection (b) might be interpreted to mean that a locality could force removal of inoperative vehicles which are shielded from public view but are not in a building or structure, such an interpretation was not intended by the General Assembly, in my opinion.

Subsection (a) generally states what a locality may make unlawful with respect to inoperable vehicles. Subsection (b) generally prescribes the remedy of forced removal of such vehicles which subsection (a) prescribes and further prescribes the procedure for such removal. In my opinion, the 1982 amendment to subsection (a) should be read as being applicable to subsection (b) so that a locality may only require removal of those vehicles which it has authority under subsection (a) to prohibit.

Your next inquiry concerns vehicles abandoned on public or private property and the authority of localities to deal with such vehicles. You first ask what difference the General Assembly intended in the manner in which §§ 46.1-3, 46.1-3.2 and § 46.1-555.1 et seq. deal with abandoned vehicles.

Sections 46.1-555.1 through 46.1-555.10 make up Ch. 10 of Title 46.1, and deal with abandoned motor vehicles. This chapter, inter alia, permits localities, by ordinance, to take certain steps with regard to such abandoned vehicles. Section 46.1-555.2 specifically provides that the provisions of Ch. 10 are "in addition to any other provisions of law...."

On the other hand, §§ 46.1-3 and 46.1-3.2 are not limited to abandoned vehicles, but provide for removal of vehicles which are found unattended in certain situations, such as where they create a hazard or are parked illegally. Although abandoned vehicles are among the vehicles which may be removed pursuant to ordinances enacted in accordance with §§ 46.1-3 and 46.1-3.2, many vehicles removed pursuant to those sections may not be abandoned, but may merely be unattended.

You have also asked whether a locality might adopt a comprehensive ordinance which combines the most "beneficial" provisions of §§ 46.1-3, 46.1-3.2 and § 46.1-555.1 et seq. In my opinion, such an ordinance would be permissible; however, care must be exercised to retain all of the safeguards provided in these statutes for the owners and lien holders of the vehicles involved, and to retain the distinction between vehicles which have been abandoned and those which are merely unattended. For example, in reading these sections in pari materia, at least to the extent that they apply to abandoned vehicles, I believe that an ordinance could require that a property owner, who requested
With respect to the definition of abandoned vehicles in § 46.1-555.1, you have asked what factual standard must be met to establish that a vehicle is "inoperable," and whether the definition of "inoperable" in § 15.1-11.1 may be used. While there is nothing that would prevent a locality from adopting the definition of "inoperable" as used in § 46.1-555.1, in my opinion a less restrictive definition of the term would be permissible. In order to be inoperative under § 15.1-11.1, a vehicle must meet several tests, including the requirement that there is no valid license plate and inspection sticker. I do not believe that the legislature intended that the term "inoperable" in § 46.1-555.1 be construed so restrictively. A vehicle may become inoperable long before its license plates and inspection sticker have expired. The General Assembly may have determined that the restricted definition of § 15.1-11.1 is necessary in a statute which permits the removal of a vehicle from the owner's own property, but, in my opinion, a less restrictive definition would be permissible where the vehicle is left on public property.

In the absence of a statutory definition, a statutory term is to be given its ordinary meaning, given the context in which it is used. Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532 (1980). Accordingly, it is my opinion that the ordinary definition of inoperable, i.e., not operable, should be used.

Your final questions relate to the procedures required of a private property owner who wishes to remove vehicles which have been improperly parked in spaces reserved for tenants of the property owner as in apartment complexes and commercial centers. Your questions are:

"What visible notice must the property owner provide that cars improperly parked on the owner's property will be towed away? What, if any, additional notice must such an owner attempt to give to the vehicle operator or any other party before towing the vehicle away, and how quickly may the owner remove an improperly parked vehicle? What steps, if any, must the property owner take to ensure the protection of the towed vehicle and to provide notice to the car operator after towing has occurred? What control may a municipality exercise over situations of this kind?"

There are several sections in Ch. 10 of Title 46.1 which may be utilized, but the provision which is most convenient to the owners of such lots is § 46.1-551 in Ch. 8, which also provides property owners with the general authority to remove or immobilize vehicles parked on their property without permission.

I note, however, that because the type of parking lot you have described may appear to be open to the general public, a warning that use of the lot is restricted and that vehicles not parked in accordance with those restrictions will be removed probably would be necessary to protect the owner and vehicle operators. The extent of the warning necessary is not clear from the statute and would probably depend on the facts of each case. I believe the test should be whether a reasonable man would have seen and understood the statute. In my opinion, however, once the initial notice is given, no additional notice would be required before towing the vehicle. It is my further opinion that the statute does not require that notice be given to the operator after the vehicle is towed, but that the property owner must exercise reasonable care to protect the vehicle towed and provide the operator with information, when called for, as to the location of the vehicle in storage.

As to your last question on the control a municipality may exercise over situations of this kind, it appears that the General Assembly has granted specific authority in
$46.1-551 to adopt ordinances only to the County of Arlington. Under the maxim "expressio unius est exclusio alterius" (expression of one thing is the exclusion of another), it is my opinion that a municipality may not exercise further control over such situations.

Section 46.1-551 provides that:

"It shall be lawful for any owner, operator or lessee of any parking lot or parking area or space therein or part thereof, or of any other lot or building, including any town, city, county or authorized agent of the person having control of such premises to have any motor or other vehicle, occupying such lot, area, space or building or part thereof without the permission of such owner, operator, lessee, or authorized agent of the one having the control of such premises, removed by towing or otherwise to a licensed garage for storage until called for by the owner or his agent, provided notice of such action shall be first or simultaneously therewith given to at least one of the local law-enforcement officers. In the event of such removal and storage the owner of the vehicle involved shall be chargeable with and the said vehicle may be held for a reasonable charge for its removal and storage.

In lieu of having such vehicle removed by towing or otherwise, it shall be lawful for such owner, operator, lessee or authorized agent to cause the vehicle to be immobilized by a boot or other device that prevents a vehicle from being moved by preventing a wheel from turning provided such boot or other device is of a design that does no damage to the vehicle or wheel; and provided further that the charge for the removal of such boot or device shall not exceed twenty-five dollars. In lieu of having such vehicle removed by towing or otherwise, or in lieu of causing the vehicle to be immobilized, it shall be lawful for such owner, operator, lessee or authorized agent to cause to have a duly authorized official or officer issue, on such premises, a notice of the violation of a parking ordinance, regulation, or rule created pursuant to § 46.1-252.1 to the registered owner of such vehicle.

This section shall not apply to police, fire or public health vehicles or where a vehicle shall, because of a wreck or other emergency, be parked or left temporarily upon the property of another. The governing body of Arlington County shall have the authority to enact ordinances concerning the removal or immobilization of trespassing vehicles occupying such lot, area, space or building or part thereof." (Emphasis added.)

MOTOR VEHICLES. ALTERATION OF SUSPENSION SYSTEM ON PASSENGER VEHICLE.

July 19, 1984

The Honorable Thomas W. Lawson
Commonwealth's Attorney for Appomattox County

You have asked whether a Chevrolet Blazer or a Ford Bronco is a "passenger vehicle" within the meaning of § 46.1-282.1 of the Code of Virginia.

"Passenger car" has been defined in § 46.1-1(18a) as follows:

"Every motor vehicle designed and used primarily for the transportation of not more than ten persons including the driver, except motorcycles."

Conversely, the General Assembly has also provided for a separate definition of "pickup or panel truck" as follows:
"Every motor vehicle designed for the transportation of property with a registered gross weight of 7,500 pounds or less."

Section 46.1-1(20a).

Accordingly, the linchpin determining applicability of the statute is whether a particular vehicle is "designed and used primarily for the transportation" of passengers. You have advised me that a Blazer is classified by the manufacturer, General Motors Corporation, as a utility vehicle. You also advise that the back seat in a Blazer is optional and that it has the same frame and suspension as a pickup. Finally you advise that the Blazer is listed in the pickup section of the National Automobile Dealers Association ("NADA") Official Used Car Guide.

You did not provide any information concerning the above characteristics as they relate to the Bronco. My staff has researched the matter, and I have been advised that a Bronco is classified by the manufacturer, Ford Motor Company, as a truck. I also have been advised that the back seat in a Bronco is standard equipment; however, a back seat delete option is available. I have been further advised that a Bronco and a Ford 150 pickup have the same frame and suspension. Finally, I have been advised that the Bronco is listed in the truck section of the NADA Official Used Car Guide.

It appears that a Blazer and a Bronco are designed in such a manner that either can perform primarily as a passenger vehicle or, in the alternative, primarily as a carrier of other commodities in much the same manner as a pickup truck. Accordingly, I am unable to answer your inquiry in a categorized manner. The answer will necessarily require a case-by-case analysis to see how the vehicle is being principally used.

A significant aid in making this case-by-case review would be to see how the vehicle in question is registered. It is clear that the General Assembly has made only passenger vehicles subject to the provisions of § 46.1-282.1. Every motor vehicle, which is intended to be operated upon the public highways of this Commonwealth, is subject to registration with the Division of Motor Vehicles. See § 46.1-41. The registration fee for a motor vehicle is dependent upon its classification and its weight. See §§ 46.1-149 through 46.1-157. Passenger cars are registered with only one weight noted on the registration card. See § 46.1-149(a)(1). Any other motor vehicle, including a pickup truck, will be registered with two weights noted on the registration card. See § 46.1-154. The purpose of the dual weight registration is, of course, to distinguish between those vehicles designed and used for the transportation of persons and those vehicles designed and used for the transportation of property.

In light of the foregoing, I am of the opinion that if a Chevrolet Blazer or a Ford Bronco is used primarily as a passenger carrier and is registered with the Division of Motor Vehicles as a passenger car with only one weight noted on the registration card, such vehicle would be a "passenger vehicle" within the meaning of § 46.1-282.1. If, however, it is used primarily as a pickup truck and is so registered, then it will not have to comply with § 46.1-282.1, unless and until the General Assembly amends that section to apply to pickup trucks.

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1Section 46.1-282.1(1) provides: "No person shall operate a passenger vehicle of a type required to be registered under the laws of this Commonwealth upon a public highway or street modified by reason of alteration of its altitude from the ground if its bumpers, measured to any point on the lower edge of the main horizontal bumper bar, exclusive of any bumper guards, are not within the range of fourteen inches to twenty-two inches above the ground, except that no vehicle shall be modified to cause the vehicle body or chassis to come in contact with the ground or expose the fuel tank to
damage from collision or cause the wheels to come in contact with the body under normal operation and that no part of the original suspension system be disconnected to defeat the safe operation of the suspension system; provided, that nothing contained in this section shall prevent the installation of heavy duty equipment to include shock absorbers and overload springs; and provided further, that nothing contained in this section shall prevent a person from operating a motor vehicle on a public highway with normal wear of the suspension system if normal wear does not affect the control of the vehicle." (Emphasis added.)

The statutory purpose of this section is to promote highway safety, but even with this most important goal in mind, one must read the section in accordance with the clear terms used by the General Assembly when it adopted the section.

MOTOR VEHICLES. APPLICABILITY OF EXEMPTION FROM REGISTRATION AND LICENSING FOR FARM VEHICLES AND EQUIPMENT USED FOR SPREADING FERTILIZER.

March 20, 1985

The Honorable C. Jeffers Schmidt, Jr.,
Commonwealth's Attorney for Lancaster County

You have asked whether various farm vehicles and equipment used to spread fertilizer are exempt from the vehicle registration and licensing requirements of § 46.1-41 of the Code of Virginia. You inquire specifically about the following types of equipment and vehicles: (1) liquid fertilizer distribution machinery which may be mounted on the bed of a four-wheel truck body; (2) a four-wheel truck equipped with a hopper which distributes solid fertilizer; (3) trailer-type spreaders drawn by either a farm tractor or truck; and (4) a specialized piece of farm equipment which moves on three large flotation type tires and is used to apply liquid fertilizer.

Initially, I note that § 46.1-41 requires only that persons register motor vehicles, trailers or semitrailers intended to be operated on any highway in the Commonwealth. Thus, if the owner does not intend to operate a motor vehicle or trailer upon the highway and, in fact, does not operate them upon the highway, then there is no obligation to obtain the registration as required by § 46.1-41. Each of the vehicles and pieces of machinery must be viewed to determine type and intended use.

With respect to machinery, § 46.1-41 requires only registration of motor vehicles and trailers. Thus, the piece of equipment referenced in number (1), which is designed to be mounted on the bed of a truck, need not be registered. Of course, the truck, as a motor vehicle, would have to be registered in accordance with the applicable requirements, unless exempted under § 46.1-45.

The other vehicles and equipment described above could be exempted from registration, depending upon the manner in which they are used. The General Assembly has enacted specific exemptions for many types and uses in § 46.1-45.

Subsection (a) of § 46.1-45, in pertinent part, exempts from the registration requirements "any truck upon which is securely attached a machine for spraying...plants of the owner or lessee of the truck or...any motor vehicle...which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner...." Among the applicable conditions to the exemption is the requirement that the vehicle not be operated on a highway, except for the purpose of (1) going from one point of the owner's land to another point of the owner's land, and then the distance may not exceed ten miles, or (2) taking the vehicle to a repair shop.
While it is not entirely clear from your letter, it appears that the vehicles and trailers referenced in numbers (2), (3), and (4) above are designed for the purpose of distributing fertilizer directly on plants or the ground, and that the vehicles and trailers are used exclusively for agricultural or horticultural purposes. Consequently, such vehicles and equipment may qualify for exemption under subsections (a), (b) or (h) of §46.1-45, depending upon the use factors, such as exclusive nature of the use and if used on lands owned or leased by the owner of the vehicles and trailers. Of course, the vehicles must comply with the limitations of the section, which are conditions to obtaining the exemption.

MOTOR VEHICLES. CHAUFFEUR’S LICENSE. OPERATION OF VEHICLE WITH “FOR-HIRE” TAGS AND STATE CORPORATION COMMISSION CONTRACT CARRIER PERMIT DOES NOT NECESSARILY REQUIRE LICENSE WITH CHAUFFEUR ENDORSEMENT.

April 24, 1985

The Honorable Paul Whitehead, Jr.
Judge, General District Court, Twenty-Fourth Judicial District

You have asked whether it is a violation of §46.1-373 of the Code of Virginia for an individual without a chauffeur's license to operate a truck which displays "for hire" tags and which has a State Corporation Commission ("S.C.C.") permit for operation as a contract carrier. According to additional information, the owner of the vehicle had contracted to deliver merchandise for only two customers.

Section 46.1-1(2) defines "chauffeur" as:

"Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property."

From the language quoted and given the requirements of §46.1-373, an individual must have a chauffeur's endorsement on his driver's license if (1) he is employed for the principal purpose of operating a motor vehicle, or (2) he drives a vehicle while it is in use as a public or common carrier.

Your inquiry does not state whether the individual is employed for the principal purpose of operating a motor vehicle. Accordingly, I assume from the tenor of your inquiry that you are concerned with whether the operation of a vehicle as a "contract carrier" constitutes an operation of a motor vehicle "while in use as a public or common carrier of persons or property" under §46.1-1(2).

The term "public or common carrier" is not defined in Title 46.1. "Common carrier by motor vehicle" is, however, defined in §56-273(d) as:

"[A]ny 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, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water and of express or forwarding companies under this chapter." (Emphasis added.)

By contrast, the term "contract carrier by motor vehicle" is defined in §56-273(f) as:
"[A]ny person, not included under subsections (d) and (e) of this section, who under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports property by motor vehicle for compensation."

From the foregoing, it can be seen that operation as a "contract carrier" and operation as a "public or common carrier" are different. The chauffeur's license requirement of § 46.1-373 is applicable to operation as a "public or common carrier," but not to operation as a "contract carrier." Thus, the fact that the person is operating as a "contract carrier" does not, in and of itself, require a chauffeur's license.

It is, therefore, my opinion that if the operator of the truck was not employed for the principal purpose of operating a motor vehicle but was operating the vehicle on a casual basis, the fact that the vehicle has "for hire" tags and an S.C.C. permit to operate as a contract carrier would not, standing alone, require the driver to have a chauffeur's license.

InFor hire" tags are issued to vehicles which are operated in such a way as to fit the definition of § 46.1-1(35), which provides: "The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this Commonwealth who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' as defined herein." Vehicles may be operated "for hire" when operated as common carriers, contract carriers, or even as carriers of the operator's own property. See Browning-Fergus v. Commonwealth, 225 Va. 157, 300 S.E.2d 603 (1983).

By statutory definition, if the person in question is employed for the "principal purpose" of operating a truck, he would be required to have a chauffeur's license, regardless of whether the vehicle is a common carrier or a contract carrier. Section 46.1-373.

As indicated above, employment "for the principal purpose of operating a motor vehicle" requires a chauffeur's license, and this is true, regardless of whether the vehicle is a common carrier or a contract carrier. Obviously, evidence that an individual was driving a vehicle with "for hire" tags and that the individual was operating as a contract carrier may be considered in determining whether the individual had been employed for the principal purpose of operating a motor vehicle.

MOTOR VEHICLES. DRIVING UNDER INFLUENCE. ACCUSED MAY BE HELD IN CUSTODY UNTIL NO LONGER CONSTITUTES UNREASONABLE DANGER TO HIMSELF OR PUBLIC.

April 9, 1985

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

In light of the tragic event which recently occurred in Clarksville, you have asked whether it is legally permissible to hold in custody an individual charged with driving under the influence of alcohol ("DUI") until that individual's blood alcohol concentration ("BAC") has dropped below the 0.15 percent level.

An individual who has been charged with, but not convicted of, a criminal charge, such as DUI, can be detained in police custody briefly during the arrest process.
Section 19.2-120 of the Code of Virginia provides, however, that:

"An accused...who is held in custody pending trial or hearing for an offense...shall be admitted to bail by a judicial officer...unless there is probable cause to believe that:

(1) He will not appear for trial or hearing or at such other time and place as may be directed, or

(2) His liberty will constitute an unreasonable danger to himself or the public."  

Accordingly, as required by statute, it appears that an individual charged with DUI must be released on bail unless it appears that he will not appear for trial, or that he constitutes an unreasonable danger to himself or the public.

Whether the release of an individual arrested for DUI constitutes an unreasonable danger to the accused or the public must be judged by the judicial officer from all the facts available to him concerning the accused's physical and mental condition. While the BAC of the accused is relevant, it is not the only factor to be considered. For example, if the accused is under the influence of drugs other than, or in addition to, alcohol, his BAC level may be irrelevant in judging his dangerousness.

Moreover, assuming that the BAC level of an accused can be monitored over a period of time (there is no statutory provision requiring that an accused submit to continuous breath testing to ascertain when his BAC level has reached a certain point), it is not clear what percent level should be considered a "safe" level for purposes of release. While 0.15 percent is the BAC level used in Virginia's "per se" DUI provision (§ 18.2-266(i)), § 18.2-269(3) provides that an 0.10 percent BAC gives rise to a rebuttable presumption that the accused in a DUI case is under the influence of alcohol. In addition, § 18.2-269(2) provides that a BAC level exceeding 0.05 percent may be considered as competent evidence of guilt in a DUI prosecution.

It must be remembered, however, that when the judicial officer determines whether the accused constitutes an unreasonable danger, he is not limited to a determination of the accused's ability to operate a motor vehicle. An individual with a BAC level greater than 0.05 percent may be incapable of safely operating a motor vehicle, but he may be able to summon a friend or a family member to take him home, or perhaps walk a short distance, or catch a taxi or other public transportation home.

If a judicial officer determines that an intoxicated person constitutes an unreasonable danger, a prediction that the intoxicated person will regain his ability to care for himself at a specified time in the future is not an adequate basis for release. Such a prediction is inadequate to safeguard the interest of the public and the accused. The decision to release must necessarily be made at the time of release, and each case must be judged on its own merits.

Accordingly, it is my opinion that a judicial officer may hold the accused in a DUI case if, as specified by § 19.2-120, the officer has probable cause to believe the accused constitutes an unreasonable danger to himself or others. Each case must be judged on its own merits. While the BAC is certainly relevant, it is not the sole factor to be considered. The correct inquiry, however, is not whether the BAC of the accused has reached below 0.15 percent (or any other predetermined level), but whether his release would constitute an unreasonable danger to himself or the public.
The term "judicial officer" is defined in § 19.2-119 as follows: "As used in this article the term 'judicial officer' means, unless otherwise indicated, any magistrate within his jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court or circuit court within their respective cities and counties, any judge of a circuit court, any judge of the Court of Appeals and any justice of the Supreme Court of Virginia."


MOTOR VEHICLES. DRIVING UNDER INFLUENCE. IMPLIED CONSENT LAW. UNCONSCIOUS DUI SUSPECT.

November 27, 1984

The Honorable Everett P. Shockley
Commonwealth's Attorney for Pulaski County

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

"I am writing to request an opinion concerning the propriety of withdrawing blood from an unconscious DUI suspect. This question has confronted the law enforcement officers twice recently in my jurisdiction. In one case the suspect passed out, ostensibly because of intoxication, after stopped by the officer and in the other case, involving an accident, the suspect was thrown from the vehicle and apparently knocked unconscious. In both cases ample probable cause existed to believe that the drivers were intoxicated.

The case of Breithaupt v. Abram, 352 U.S. 432 (1957), seems to answer my question. However, my question is whether or not the legislature, in enacting § 18.2-268 of the Code, intended for an arresting officer to obtain a clear consent before a blood or breath sample is obtained. Furthermore, is the implied consent law even invoked if the suspect remains unconscious, i.e., can an unconscious suspect be arrested and to what extent does the law require the arresting officer to communicate the suspect's obligation under the implied consent law?"

Under the factual situations posited by you, the suspects were unconscious, either from excessive drinking or by accident occurring under circumstances involving alcohol consumption. Under those conditions, I think it clear that an officer may place a suspect under arrest. For the reasons which follow, I am of the opinion that the "implied consent," § 18.2-268, is invoked in such cases, even though the suspect is not capable of objecting to such test. To hold otherwise would mean that a drinking motorist could avoid the application of the law simply by drinking himself into an unconscious state. By virtue of § 18.2-268(b), one arrested for DUI is deemed to have consented to either a blood or breath test. The arresting officer has the right to elect which of the two tests to administer. Thus, in its present form, § 18.2-268(b) first deems the accused to have consented to one of the tests. The section next provides that the arresting officer has the right to elect which test will be administered. Accordingly, in answer to your first question, the arresting officer need not obtain consent prior to the test.

Your second inquiry is (a) whether an unconscious suspect can be arrested, and (b) to what extent the law requires the arresting officer to communicate to the suspect his obligation under the implied consent statute.

You are correct in your assumption that the Supreme Court of the United States has concluded that an unconscious person can be arrested on a DUI charge, provided there is probable cause to believe the suspect was driving or operating a motor vehicle
while under the influence of alcohol or drugs. See Breithaupt v. Abram, supra. Probable cause "is to be viewed from the vantage point of a prudent, reasonable, cautious police officer...guided by his experience and training." United States v. Davis, 458 F.2d 819 (D.C. Cir. 1972). Consequently, if probable cause exists, an unconscious suspect can be arrested for a DUI offense.

In view of § 18.2-268(b), giving the arresting officer the right to elect which of the two tests to administer, I am of the opinion that an arresting officer would have no statutory obligation to communicate to the DUI suspect his implied consent to have a blood or breath sample taken for a chemical test when the suspect is unconscious.

In reaching this conclusion, I am aware of the exception to the implied consent law found in § 18.2-268(c). The exception is applicable only when the driver refuses to participate in administration of the test. The exception cannot be read as requiring the driver's express consent, because that would effectively nullify the implied consent provision in § 18.2-268(b).

While this is an issue of first impression in Virginia, the Supreme Court of Kansas was faced with this question in the case of State v. Garner, 608 P.2d 1321 (1980). In that case, the implied consent statute in Kansas established a driver's implied consent to a blood or breath test and required that no test be given if the person arrested refuses a request to submit to either of such tests. The Kansas Court applied the statute to an unconscious or incapacitated driver who was unable to make a knowing, intelligent, free and voluntary response to a request to submit to either of such tests. The Court stressed the fact that under the implied consent statute the operator of a motor vehicle on the highway is deemed to have consented to the blood or breath test for the privilege of driving. The Court concluded that "the unconscious driver is included in this classification and has consented to the test." Id. at 1325.

The Supreme Court of Kansas also recognized that while the statute permitted the operator to refuse the test, thereby revoking his implied consent, such a provision did not confer a right of refusal. The Court noted that the only reason the statute permits an operator to refuse is "to avoid the violence which would often attend forcible tests upon a rebellious drunk, and the operator may withdraw that consent by expressly refusing the test. If he fails to expressly refuse, the consent remains in force and the test may be made." Id. at 1325. "To hold otherwise would permit the worst offender, the passed-out drunk, to escape the provision of the statute by his own voluntary act." (Emphasis added.) I agree with the Court's rationale.

A blood test is the only test that can be elected by an arresting officer when the DUI suspect is unconscious. Inasmuch as the accused is afforded the right to have a blood test performed at his own expense under § 18.2-268(b), an unconscious suspect has not been deprived of his rights under the statute when the blood test is elected by the arresting officer.5

Accordingly, I am of the opinion that an unconscious DUI suspect may be arrested, provided probable cause exists. It is also my opinion than an arresting officer would have no statutory obligation to communicate to the DUI suspect his implied consent to have a blood or breath sample taken for a chemical test when the suspect is unconscious.

1Section 18.2-268(b), in pertinent part, provides: "Any person...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...within two hours of the
alleged offense. Any person so arrested 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."

2If the suspect objects to the test, his license is subject to being revoked. See
§ 18.2-268(c).

Section 18.2-268(c), in pertinent part, provides: "If a person after being arrested for
a violation of § 18.2-266...and after having been advised by the arresting officer that a
person who operates a motor vehicle upon a public highway in this Commonwealth shall
be deemed thereby, as a condition of such operation, to have consented to have a sample
of his blood or breath taken for a chemical test to determine the alcoholic content of his
blood, and that the unreasonable refusal to do so constitutes grounds for the revocation
of the privilege of operating a motor vehicle upon the highways of this Commonwealth,
then refuses to permit the taking of a sample of his blood or breath for such tests, the
arresting officer shall take the person arrested before a committing magistrate. If he
again so refuses after having been further advised by such magistrate of the law
requiring a blood or breath test to be taken and the penalty for refusal, and so declares
again his refusal in writing upon a form provided by the Division of Consolidated
Laboratory Services...or refuses or fails to so declare in writing and such fact is certified
as prescribed in paragraph (j), then no blood or breath sample shall be taken even though
he may thereafter request same."

4A similar interpretation of the implied consent statute in New York was given

5Moreover, the Supreme Court of the United States recently observed in South Dakota
v. Neville, 459 U.S. 553 (1983), that "a person suspected of drunk driving has no
constitutional right to refuse to take a blood-alcohol test."

MOTOR VEHICLES. DRIVING UNDER INFLUENCE. LICENSE. COMMISSIONER
SHOULD NOT REVOKE FOR VIOLATION OF NORTH CAROLINA DUI LAW.

December 21, 1984

The Honorable E. Carter Nettles, Jr.
Commonwealth's Attorney for Sussex County

You have asked whether, in light of Shinault v. Commonwealth, 228 Va. 269,
321 S.E.2d 652 (1984), the Commissioner of the Division of Motor Vehicles ("DMV") may
revoke the operator's license of a Virginia driver, pursuant to § 46.1-417 of the Code of

North Carolina Gen. Stat. § 20-138.1 provides, in pertinent part:

"§ 20-138.1. Impaired Driving
(a) Offense - A person commits the offense of impaired driving if he drives any
vehicle upon any highway, any street or any vehicular area within this State:

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(2) After having consumed sufficient alcohol that he has, at any relevant time
after the driving, an alcohol concentration of 0.10 or more."

The relevant portion of § 46.1-417 of the Code of Virginia provides:
"The Commissioner shall forthwith revoke, and not thereafter reissue during the period of one year, except as provided in § 18.2-271 or § 18.2-271.1, the license of any person, resident or nonresident, upon receiving a record of his conviction or a record of his having been found guilty in the case of a juvenile of any of the following crimes, committed in violation of either a state law or a valid town, city or county ordinance paralleling and substantially conforming to a like state law and to all changes and amendments of it:

* * *

(b) Violation of the provisions of § 18.2-266 or § 18.2-272 or violation of a valid town, city or county ordinance paralleling and substantially conforming to §§ 18.2-266 to 18.2-273...."

Note that § 46.1-417 does not refer to a conviction under a law of another state. It is only when § 46.1-417 is read in conjunction with § 46.1-466 that the authority of the Commissioner of DMV to revoke for an out-of-state drunk driving conviction becomes apparent.

Section 46.1-466 provides, in pertinent part:

"(a) The Commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this State upon receiving notice of his conviction, in a court of competent jurisdiction of this State, any other state of the United States, the United States, the Dominion of Canada or its provinces or any territorial subdivision of such state or country, of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license granted to him or registration of any motor vehicle registered in his name."

The operative language of § 46.1-466 is "an offense therein which, if committed in this State, would be grounds for the suspension or revocation...." North Carolina Gen. Stat. § 20-138.1(a)(2) provides that it is a violation of law to operate a motor vehicle after having consumed sufficient alcohol to register a blood alcohol concentration of 0.10 percent. It is what is sometimes called a "per se" law. Virginia also has a statutory "per se" provision, but that provision, § 18.2-266(i), provides that it is unlawful to operate a motor vehicle with a blood alcohol concentration of "0.15 percent or more." While a person with a blood alcohol concentration of 0.10 percent or less may, in fact, be drunk, mere operation of a motor vehicle with a blood alcohol concentration of 0.10 percent, without more, is not, in and of itself, an offense if committed in Virginia, even though such a concentration creates a presumption, pursuant to § 18.2-269, that the person was under the influence of alcohol.

The General Assembly of Virginia has thus expressly limited the authority of the Commissioner to suspend or revoke a license if the conviction occurs in some other state. Accordingly, it is my opinion that a conviction under N.C. Gen. Stat. § 20-138.1(a)(2) is not an offense which "if committed in this State, would be grounds for the suspension or revocation." Section 46.1-466, therefore, would not apply to such a conviction, and the Commissioner would have no authority to revoke for such a conviction.

1In Shinault v. Commonwealth, supra, the Court had before it § 18.2-270, which provides that a conviction under "the laws of any other state substantially similar to the provisions of [Virginia's driving under the influence statutes]" shall be considered a prior conviction.
October 10, 1984

The Honorable Raymond C. Robertson
Commonwealth's Attorney for the City of Staunton

You have asked two questions related to Virginia's drunk driving statutes.

Your first inquiry is whether the results of a preliminary breath test, administered pursuant to the provisions of § 18.2-267 of the Code of Virginia, are admissible in the trial of a person unreasonably refusing to take an evidentiary blood or breath test pursuant to Virginia's implied consent law (§ 18.2-268). It appears from your letter that the purpose for introducing such evidence would be to counter a defendant's argument as to why he refused to take the breath or blood test selected by the arresting officer under § 18.2-268. The introduction of the preliminary breath test would allow the prosecutor to argue that the preliminary test results indicated a high blood alcohol content and that such result was the real reason for the defendant's refusal to take the evidentiary test.

Section 18.2-267(e) provides that the results of a preliminary breath test "shall not be admitted into evidence in any prosecution under § 18.2-266...." Section 18.2-266 relates to the crime of driving under the influence of alcohol. There is no provision which would preclude admission of such results in a proceeding brought for a refusal to take a test prosecuted pursuant to § 18.2-268. Moreover, § 18.2-267(c) provides, *inter alia*, that "nothing in this section shall be construed as limiting in any manner the provisions of § 18.2-268." This clause could well be construed to mean that the prohibition from admitting preliminary breath test results into evidence does not apply to a proceeding under § 18.2-268.

The Supreme Court of Virginia has made clear that proceedings under § 18.2-268 are separate and distinct and proceed independently from actions under § 18.2-266. *Deaner v. Commonwealth*, 210 Va. 285, 170 S.E.2d 199 (1969). In addition, in *Deaner* the Court held that a proceeding under § 18.2-268 is a civil proceeding and not a criminal action. Accordingly, it is my opinion that the results of a preliminary breath test administered pursuant to § 18.2-267 are admissible in a proceeding brought pursuant to § 18.2-268, even though these results are inadmissible in a proceeding brought in accordance with § 18.2-268, provided that such evidence is relevant to the inquiry at hand.

Your second question is whether a restricted license issued pursuant to § 18.2-271.1(b1a) may be issued for a period of time longer than the defendant's VASAP participation.

Section 18.2-271.1(b1a) provides:

"Whenever a person enters a program pursuant to this section, and such person's license to operate a motor vehicle, engine or train in the Commonwealth has been suspended or revoked, the court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any or all of the following purposes: (i) travel to and from his place of employment; or (ii) travel to an alcohol rehabilitation program entered pursuant to this paragraph; or (iii) travel during the hours of such person's employment if the
operation of a motor vehicle is a necessary incident of such employment. The court shall order the surrender of such person's license to operate a motor vehicle to be disposed of in accordance with the provisions of § 46.1-425 and shall forward a copy of its order entered pursuant to this paragraph, which shall specifically enumerate the restrictions imposed and contain such information regarding the person to whom such a permit is issued as is reasonably necessary to identify such person, to the Commissioner of the Division of Motor Vehicles. The court shall also provide a copy of its order to the person so convicted who may operate a motor vehicle on the order until receipt from the Commissioner of the Division of Motor Vehicles of a restricted license. A copy of such order or, after receipt thereof, the restricted license shall be carried at all times while operating a motor vehicle. Any person who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be guilty of a violation of § 46.1-350. A restricted license shall not be provided during any period for which the revocation or suspension of the person's license has been suspended pursuant to § 18.2-271 or this section."

This language makes it clear that a restricted license may be issued only to an individual who "enters" an alcohol rehabilitation program, but it does not state whether the life of the restricted license is limited to the period of participation in such program.

In my opinion, the legislature's intent in this regard may be ascertained from the fact that a restricted license may be issued to permit an individual to drive to and from his place of employment and during the hours of his employment, purposes wholly unrelated to participation in an alcohol rehabilitation program. Accordingly, it appears that the General Assembly intended that the restricted license be used to reduce the impact that a license revocation might have on an individual's life and livelihood, as well as permitting the individual to drive to and from the alcohol rehabilitation program.

If permitting the individual to continue working is one of the purposes of a restricted license, then it would appear illogical to limit the duration of such license to the period of participation in the program. Participation in an alcohol rehabilitation program may last only a few weeks, while a license suspension pursuant to § 18.2-271 can last for up to three years. Permitting an individual to continue driving to and during his employment for a few weeks and then providing that such privilege must automatically end when the individual successfully completes the alcohol rehabilitation program would be an illogical result.

In my opinion, § 18.2-271.1(b1a) must be read in para materia with the provisions of § 18.2-271 and the other provisions of § 18.2-271.1. Those provisions permit the court to suspend a portion of the license revocation imposed upon individuals convicted of DUI, provided that the individual enters and successfully completes an alcohol rehabilitation program. (Note that § 18.2-271.1(b1a) specifically refers to such provision by stating that a restricted license shall not be provided during any period for which the license revocation has been suspended.)

If the provisions of §§ 18.2-271 and 18.2-271.1 are read together, it becomes clear that the legislature intended that courts have wide discretion in determining how long an individual convicted of DUI should be deprived of his operator's license and under what circumstances, provided that individual enters and successfully completes an alcohol rehabilitation program. For example, an individual convicted of a second offense of DUI must have his license revoked for three years. If the individual successfully completes an alcohol rehabilitation program, however, the court may suspend two years of the revocation. I believe that it was the intent of the General Assembly that the court might also, rather than suspend two years of the revocation, simply provide the individual with a restricted license for those two years, or even for the full three years of license revocation. This would be a middle ground between a complete revocation for the two years and complete suspension of the revocation for two years, a middle ground I believe
the legislature intended to be available to the courts.

It is, therefore, my opinion that a restricted license issued pursuant to § 18.2-271.1 need not be limited in duration to the period of participation in an alcohol rehabilitation program, although a court would have such authority to limit the duration of the license if it so chose.

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MOTOR VEHICLES. DRIVING UNDER INFLUENCE. SECTION 18.2-266(ii) VIOLATION NOT LESSER INCLUDED OFFENSE OF § 18.2-266(i) VIOLATION (DRIVING WITH BLOOD ALCOHOL CONCENTRATION OF 0.15 PERCENT OR GREATER).

August 1, 1984

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

You have asked two questions relating to § 18.2-266 of the Code of Virginia as amended by Ch. 666, Acts of Assembly of 1984.

Your first question is whether the offense of driving under the influence of alcohol ("DUI"), as prohibited in § 18.2-266(ii), is a lesser included offense of driving with a blood alcohol concentration ("BAC") of 0.15 percent or greater, as provided in § 18.2-266(i). For reasons hereinafter discussed, this question is answered in the negative.

In order for an offense to be considered as a lesser included offense, all of the elements of the lesser offense must also be elements of the primary offense. Ashby v. Commonwealth, 208 Va. 443, 444, 158 S.E.2d 657, 658 (1968), cert. denied, 393 U.S. 1111 (1969). In the statute under consideration, there is a difference in the elements necessary to convict under subparagraphs (i) and (ii) of § 18.2-266.1

Under subparagraph (ii), a conviction may be had upon proving the accused was driving a motor vehicle while under the influence of alcohol. On the other hand, under (i) the accused may be convicted upon proving he was driving a motor vehicle while he had a BAC of 0.15 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-268. It is my opinion that this difference in elements prevents the offense set out under subparagraph (ii) from being lesser included within the offense set out in subparagraph (i).

Moreover, in a recent decision styled Edenton v. Commonwealth, 227 Va. 413, 417 (1984), 316 S.E.2d 736, 738, the Supreme Court of Virginia, after discussing the concept of lesser included offenses, held that:

"Just as indecent exposure 'is not a fact that must be charged or proved to sustain a conviction of sodomy,' Ashby, 208 Va. at 445, 158 S.E.2d at 658, the act of driving without a valid operator's license proscribed by Code § 46.1-349 is not a fact that must be charged or proved to sustain a conviction of the felony defined in Code § 46.1-387.8 [driving after having been declared an habitual offender]."

Applying that language to your question further confirms my opinion that DUI is not a lesser included offense of driving with a BAC of 0.15 percent or greater, because driving under the influence "is not a fact that must be charged or proved to sustain a conviction" of driving with a BAC of 0.15 percent or greater. While a person driving with a BAC of 0.15 percent or greater, in fact, may be under the influence of alcohol, it is the BAC level and not the fact of being under the influence which is the key element to be proven for a conviction of driving with a BAC of 0.15 percent or greater.
Your second question is whether, pursuant to § 19.2-294, a conviction under subparagraph (i) of § 18.2-266 will bar prosecution under subparagraph (ii) of that same statute and vice versa. I answer this question in the affirmative.

Section 19.2-294 provides, in pertinent part:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others." (Emphasis added.)

It is manifest that § 18.2-266(i) and § 18.2-266(ii) are not found in "two or more statutes," but are, in fact, part of the same statute. Thus, on its face, it is arguable that § 19.2-294 is inapposite. I do not find this to be persuasive, however. While § 19.2-294 discusses the violation of two or more statutes, it is apparent that the General Assembly intended to prevent additional prosecution where there has been a prior conviction for the "same act" arising in the same unified transaction. Accordingly, it first must be determined whether the "same act" violates both subsections for purposes of § 19.2-294.

While it appears the act of driving a motor vehicle is the only common element in each of the three offenses, it is my opinion that the inquiry cannot stop at this point. One must also look at the overall purpose of the statute. Section 18.2-266 is aimed at eliminating from our highways the dangers posed by drivers impaired by alcohol, drugs or other intoxicants. Thus, it is my opinion that in construing § 19.2-294, the "act" to which § 19.2-294 is directed in the present case is not the individual offenses set out under § 18.2-266 but the act which each of those proscriptions is attempting to prevent—driving while under the influence of an intoxicant. Thus, there is only a "single act" for purposes of interpreting § 19.2-294.

While this is an issue of first impression to Virginia, the Supreme Court of Washington was faced with this question in the case of State v. Franco, 639 P.2d 1320 (1982). In that case, the defendant was convicted of driving under the influence. The Court stressed the fact that the Washington legislature had "not stated that one could be convicted with a BAC of 0.1 percent and concurrently, or additionally, be convicted while driving while under the influence of intoxicants; that is, driving affected in any appreciable degree, and thus, be subject to two penalties." 639 P.2d at 1323.

The Washington Court also placed significant weight on "the fact that the subsections describing the manner of committing the crime were joined in the disjunctive by 'or.'" Id. at 1323. In the Virginia statute, all three proscriptions, stated in the disjunctive, are aimed at preventing driving while intoxicated. They merely establish different actions that a driver might take to commit the unlawful act of driving while intoxicated.

Under the Virginia statutory scheme, the General Assembly has provided different punishments for first and subsequent violations of § 18.2-266. Subsequent convictions invoke harsher punishments. Consequently, while under § 18.2-270 a person convicted for a first offense is guilty of a Class 1 misdemeanor and punished accordingly, a second offense and subsequent offenses, draw increasing punishments. In addition, under § 18.2-271 a person convicted for the first time may lose his license for a period of six months, while a person convicted of a second offense within ten years of the first offense may lose his license up to three years. Thus, under §§ 18.2-270 and 18.2-271, the penalties and forfeiture of license are significantly harsher for a second and subsequent offense than they are for a first offense. I am aware of no evidence that the General Assembly intended to subject a driver to revocation of license based on multiple convictions under § 18.2-266, arising from a single incidence of operating a vehicle.
Although Virginia does not record the debates on legislation or maintain a history of an act, as does Congress, the report of the Governor's Task Force To Combat Drunk Driving submitted to the 1984 Session of the General Assembly reflects that the Task Force's goal was to provide a simpler manner in which to enforce § 18.2-266 in order to provide safer traveling for the general public. The purpose for making it unlawful to drive with a BAC of a certain percent or greater was to provide an easier method of obtaining a conviction when those elements were satisfied. To my knowledge, there was no public argument advanced that a person could be convicted of multiple offenses which would lead to the administration of dual punishments based upon a single incidence of driving.

In summary, it is my opinion that a person convicted under any one of the subparagraphs set out in § 18.2-266 cannot thereafter be retried for a violation under any of the remaining subparagraphs if the violation arises out of the same transaction.

1Section 18.2-266 reads as follows: "It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.15 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-266, or (ii) while such person is under the influence of alcohol, or (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term 'motor vehicle' shall include mopeds, while operated on the public highways of this Commonwealth."

2Section 46.61.502 of the Washington Code states, in pertinent part, as follows: "Driving while under influence of intoxicating liquor or drug--What constitutes. A person is guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while: (1) He has 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance made under RCW 46.61.506 as now or hereafter amended; or (2) He is under the influence of or affected by intoxicating liquor or any drug; or (3) He is under the combined influence of or affected by intoxicating liquor and any drug."

MOTOR VEHICLES. DRIVING WHLE INTOXICATED. ACCUSED NOT ENTITLED TO BLOOD TEST AT HIS EXPENSE WHERE ARRESTING OFFICER, IN HIS DISCRETION, PERMITS ACCUSED TO CHOOSE WHICH TEST TO BE ADMINISTERED.

October 16, 1984

The Honorable John Alexander
Judge, General District Court of Fauquier County

You make several inquiries regarding § 18.2-268(b) of the Code of Virginia.1 I respond to your inquiries seriatim.

First, you ask:

"If the officer, in his discretion, permits the accused to choose blood or breath, and the accused elects breath, is he thereafter entitled to a blood test at his own expense or has he, by making the initial election, waived his right to the additional test?"

Before responding to your question, it is necessary to test the assumption implicit in your inquiry that an officer may, consistent with the statute, permit the accused to
make the initial election between blood or breath tests. Prior to its amendment in 1984 by Ch. 666, Acts of Assembly of 1984, § 18.2-268(b) initially gave the accused the right to elect which test he desired. The General Assembly was concerned, however, that that provision might unnecessarily inconvenience law enforcement officers and remove them from the road for unnecessary periods of time. Accordingly, in 1984, the General Assembly reversed the initial option and vested the decision concerning which test to take "in the discretion of the arresting officer." Given this background, I do not believe that the officer may divest himself of the responsibility which the General Assembly has placed in him or otherwise effect a modification of the statutorily prescribed procedure. Thus, if the officer permits the accused to state a preference and the officer then acquiesces in that preference, the decision must still be regarded as that of the arresting officer for purposes of analyzing your inquiry.

With this understanding, your inquiry can be addressed more easily. In your question, for purposes of the statute, the officer has elected the breath test even though it was also the preference of the accused. Thus, because the decision must be regarded as that of the officer's, the officer is obligated by the statute to advise the accused in writing of his right to have a blood test at his own expense.

You next ask whether the reference to subsection (d) in § 18.2-268(b) also incorporates subsections (d1) through (d4). I answer this inquiry in the affirmative.

Prior to the 1984 amendment, the accused had the right under the statute to elect between a breath test and a blood test. For the convenience of law enforcement officers, the 1984 amendment gave the option to the arresting officer but provided that, as described above, in some circumstances the accused still had the right to have a blood test. On those occasions in which the accused desires a blood test following the officer's election of the breath test, it is apparent that the blood test should be administered in the same fashion as if the officer had elected the blood test or as it would have been administered prior to the 1984 amendment. Similarly, the blood should be analyzed and the test results should be admissible in evidence in the same manner. This particular change in the law focused upon taking the initial option of election which, prior to 1984 lay with the accused, and giving it to the officer. Certainly, the change was not intended to free the accused to have his blood tested by unconventional means which might result in questionable accuracy of the results depending upon the testing method; nor was the intent to deny the accused the important benefit of the provisions permitting the admissibility of test results without the presence of the testing officials and without having to establish a chain of custody.

Turning to the statute, subsection (b), quoted in footnote 1, supra, provides that under certain circumstances the accused may have a blood test performed at his own expense "in accordance with the provisions of subsection (d)." Subsection (d) only identifies the classes of individuals who may withdraw blood samples, describes in summary form the type of procedure for the withdrawal, and provides a limited shield from civil liability for persons making the withdrawal. Significantly, and of critical importance in analyzing this question, subsection (d) does not prescribe the method of handling and testing the blood sample; nor does it provide for the admissibility of the results of the test. Subsection (d1) describes the procedure for handling the vials of blood and the results of the test analysis. Subsection (d2) provides that the second vial, which is available to be tested in a laboratory of the accused's own choosing, shall be tested in the same manner as the first vial, and the results shall similarly be admissible.

A statute should be construed in a manner to give effect to its obvious intent and purpose if possible. Southern Railway v. Commonwealth, 205 Va. 114, 119, 135 S.E.2d 160, 166 (1964). Consequently, I am of the opinion that the reference in § 18.2-268(b) to subsection (d) should be read in such a manner to include subsections (d1) through (d4).
You next ask whether the accused is required to pay the expense of a blood test in advance where, in accordance with § 18.2-268(b), the accused subsequently exercises his right to have a blood test. Beyond permitting a blood test "at his own expense," § 18.2-268 does not provide for the manner of payment of the expense by the accused. Although subsections (d3) and (h) provide for the payment of the expenses of analyzing and withdrawing the blood sample and for the taxing of such expenses as costs upon conviction of the accused, as indicated in footnote 3, supra, I am of the opinion that those provisions pertain to the expenses of a blood test where the arresting officer has elected to have the blood test administered.

Because no provision is made for payment of such expenses by the Commonwealth where the accused requests a blood test after the arresting officer's election of the breath test, I am of the opinion that the accused must either pay the expense in advance or must make appropriate financial arrangements satisfactory to both the person withdrawing the blood sample and the approved laboratory analyzing that sample.

1 Section 18.2-268(b), in pertinent part, provides: "Any person...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...within two hours of the alleged offense. Any person so arrested 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 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 breath test is not available."

2 See that portion of § 18.2-268(b) which states: "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."

3 I do note that this results in one superficial inconsistency in that § 18.2-268(d3) refers to a portion of the expense of the blood test being initially paid by the Commonwealth, while § 18.2-268(b) requires the test, if requested by the accused after the officer's breath test, to be at the expense of the accused. I resolve this difference by recognizing that subsection (d3) must be read as pertaining only to those situations in which the officer initially chooses the blood test.

MOTOR VEHICLES. DRIVING WHILE INTOXICATED. ARRESTING OFFICER WHO HAS CHOSEN BREATH TEST MUST ADVISE ACCUSED IN WRITING OF RIGHT TO HAVE BLOOD TEST AT HIS EXPENSE AND MUST TRANSPORT ACCUSED TO FACILITY TO HAVE BLOOD TEST, IF AVAILABLE.

October 16, 1984

The Honorable James H. Harvell, III
Judge, General District Court for the City of Newport News

You inquire as to the scope of the requirement of subsection (b) of § 18.2-268 of the Code of Virginia1 ("the implied consent statute") that one arrested for a violation of § 18.2-266 be advised in writing of his right to have a blood test performed at his expense where the arresting officer has elected to have the accused submit to a breath test. Specifically, you first ask whether the provisions of § 18.2-268(b) impose an affirmative
duty upon the arresting authority to transport the accused to a facility in order to have a blood sample taken when a blood test is properly requested following the election of the breath test. Secondly, assuming there is a duty, you ask whether the breach of that duty, either through the failure of the arresting officer to advise the accused in writing of his right to a blood test or through the failure of the arresting officer to transport the accused to such a facility, should result in the inadmissibility of the breath test results or in the dismissal of the charge against the accused.

I answer your first inquiry in the affirmative. In enacting the amendments to § 18.2-268, the 1984 General Assembly could not have intended that the arresting officer advise the accused of "his right to have a blood test" and yet deny the accused a means of exercising that right. (Emphasis added.) As a practical matter, it is common knowledge that most arrests for violation of § 18.2-266 result in detention of the accused until he is released into another person's custody or until such time as the accused may safely operate a motor vehicle. See, e.g., McHons v. Commonwealth, 190 Va. 435, 57 S.E.2d 109 (1950); Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611 (1948). Because the probative value of a blood test diminishes with the passage of time, the arresting authority's failure to transport the accused to a facility that can administer a blood test, if such facility is available, may prejudice the accused's statutorily prescribed right to obtain this evidence. See Winston v. Commonwealth, supra. Accordingly, I am of the opinion that the arresting officer does have an affirmative duty under § 18.2-268(b), not only to advise the accused in writing of his right to have a blood test performed at his own expense, but also to transport him to a facility where the test can be performed if such a test is available. This duty would compare with the officer's duty prior to the 1984 amendments to transport the accused to such a facility when such a test was requested. The 1984 amendment to § 18.2-268(b) does not affect that duty.

In answer to your second inquiry, I am of the opinion that, absent a showing by the accused that (1) he has been deprived of material evidence which could have resulted in his acquittal and (2) his rights were thereby prejudiced as a result of noncompliance with the prescribed statutory procedure, the breath test result is admissible and the charge should not be dismissed. To reach this conclusion, it is necessary to examine the purpose and scope of the defendant's right to have a blood test, as set forth in the implied consent statute as well as prior enactments of that law.

Prior to the enactment of the 1984 amendments to § 18.2-268, one arrested for driving while intoxicated was deemed to have consented to either the blood or breath test, and the right to elect between the two belonged to the accused. See § 18.2-268(b) (1983 Cum. Supp.). The amendments enacted by Ch. 666, Acts of Assembly of 1984, changed this section by giving the arresting officer the right to elect which of the two tests to administer. Thus, in its present form, § 18.2-268(b) first deems the accused to have consented to one of the tests. The section next provides that the arresting officer has the right to elect which test will be administered. It then states that "[t]his provision," granting the arresting officer the right to select the test, does not prevent the accused "from having a blood test performed at his own expense...". It is apparent that it is only the exercise of the officer's election of a breath test which gives rise to the accused's right under the statute to have a blood test at his own expense. That this was the legislature's intent is emphasized by the next sentence in § 18.2-268(b) which provides that, if the arresting officer elects the breath test, then he must advise the accused in writing of his right to have a blood test at his own expense. See Opinion to the Honorable John Alexander, dated October 16, 1984.

The foregoing analysis leads to the conclusion that the right of the accused to have a blood test at his expense is wholly dependent upon the arresting officer's right to elect the test and his election of the breath test. Thus, it is evident that the legislature intended that the accused have the right to a blood test solely for the purpose of rebutting the results of the breath test. As such, the legislature must have intended to
afford the accused a "check" against the breath test much in the same way that the implied consent statute requires that, where the blood test is elected, two vials of blood be withdrawn, one to be tested by the Division of Consolidated Laboratory Services and the other "check" sample to be tested by an approved independent laboratory at the option of the accused. See § 18.2-268(d1) through (d4).

The current statute, insofar as it expressly gives the accused the right to have a blood test in the limited situation discussed above, is analogous to statutes considered in earlier Opinions found in the Reports of the Attorney General: 1962-1963 at 159; 1956-1957 at 169. In both Opinions the inquiry involved the failure of the arresting officer to follow the specific directive of the statutes there considered which provided that the accused "shall be entitled" to a blood test if arrested for driving while intoxicated. Although neither of those earlier Opinions involved the complete failure of the arresting officer to accord the accused his right to a blood test, the same principles relied upon by my predecessors lead me to the conclusion that the test to be applied by the courts is whether the officer's "wrongful act has in fact invaded the defendant's constitutional rights and deprived him of evidence material to his defense...." McHone, supra at 444, 57 S.E.2d at 114. As noted in McHone, the wrongful act of the arresting officer should not bar the Commonwealth of its right to enforce penal laws "unless it is made reasonably clear that such wrongful act has in fact invaded the defendant's constitutional rights and deprived him of evidence material to his defense which he would otherwise have obtained." ibid.

Consequently, where the arresting officer fails to follow the provisions of § 18.2-268(b), the prosecution of the charge may proceed unless the defendant can show that his rights were prejudiced.

These same considerations also lead me to conclude that the failure of the arresting officer to advise the accused in writing of his right to have a blood test, if available, or to afford the accused the opportunity to have such test should not result in the inadmissibility of the breath test results. Thus, a defendant who was not advised of his right or not afforded the blood test must show by admissible evidence that he has been prejudiced in his ability to defend the charge against him.

Such decisions must necessarily be made on a case-by-case basis. That this approach is clearly favored by the Supreme Court of Virginia is demonstrated by its analysis of the facts in Winston, supra, and McHone, supra. Each case involved a charge of driving while intoxicated and in each the accused was not timely brought before a magistrate. Based upon the facts in Winston, the Court held that the accused had been deprived of his right to call for evidence which was no longer available and, accordingly, dismissed the case. In McHone, however, the Court found that the failure did not prejudice the accused and affirmed his conviction.

Significantly, the guilt or innocence of the accused is to be determined from all of the evidence of his condition at the time of the offense, with or without corroborative evidence such as the blood or breath test. Brooks v. City of Newport News, 224 Va. 311, 295 S.E.2d 801 (1982). See also § 18.2-268(i), (r) and (s). Consequently, I am of the opinion that, absent evidence establishing that the accused has been deprived of evidence material in his defense, the court should neither exclude the results of the breath test nor dismiss the charges against the accused.

1Section 18.2-268(b), in pertinent part, provides: "Any person...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 § 18.6-266...within two hours of the alleged offense. Any person so arrested 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."

Because the availability of the blood test is central to this issue, consideration must be given on a case-by-case basis as to "whether the facts demonstrate such a test is 'present or ready for immediate use.'" See 1983-1984 Report of the Attorney General at 245.

The mere fact that the blood test results may have helped the defense does not establish "materiality" in the constitutional sense. See Simopoulos v. Commonwealth, 221 Va. 1059, 1071, n.5, 227 S.E.2d 194, 201, n.5 (1981), aff'd 462 U.S. 506 (1983).

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**MOTOR VEHICLES. DRIVING WHILE INTOXICATED. PROVISIONS OF § 18.2-268(b), WHICH PERMIT ACCUSED TO HAVE BLOOD TEST AT OWN EXPENSE WHERE ARRESTING OFFICER ELECTS TO ADMINISTER BREATH TEST, DO NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS REQUIREMENTS.**

December 17, 1984

The Honorable J. R. Zepkin
Judge, General District Court, Ninth Judicial District

You inquire about the provisions of § 18.2-268(b) of the Code of Virginia which provide that, where the arresting officer elects to have a person accused of violating § 18.2-266 submit to a breath test, such accused may have "a blood test performed at his own expense." You note that in a prior Opinion (found in the 1984-1985 Report of the Attorney General at 201), I opined that the amendments to § 18.2-268, enacted by the 1984 General Assembly, require the arresting officer not only to advise the accused of his right to have a blood test at his own expense, as specifically mandated by that section, but also to transport the accused to a facility for such test, if such facilities are available. Specifically, you ask whether this provision violates due process and equal protection requirements because the optional blood test is "facially and expressly conditioned on ability to pay."

For reasons hereinafter discussed, I am of the opinion that the statute can withstand a constitutional attack.

Preliminarily, I should clarify the position stated in the Harvell Opinion in which I stated that the arresting authorities' failure to transport the accused to a facility that can administer a blood test, if such facility is available, may prejudice the accused's statutorily prescribed right to obtain this evidence. The emphasized language was inappropriate to that Opinion, inasmuch as the 1984 amendments to § 18.2-268 granted no new or additional right to the accused that he did not have previously, but merely preserved any right the accused might have to obtain evidence in his favor as it formerly existed under due process principles. See Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611 (1948). The General Assembly's intent merely to preserve whatever right to a blood test the accused previously had is clear from the express language of the statute which provides that "[t]his provision [giving the arresting officer the right to choose between the blood or breath test] shall not serve to prevent such person from having a blood test performed at his own expense." The 1984 amendments now require that the arresting officer advise the accused of his opportunity to obtain this additional
evidence, and that the accused be afforded a means of exercising that opportunity in a sufficiently timely manner to preserve its probative value.

The equal protection clause focuses upon "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." Ross v. Moffitt, 417 U.S. 600, 609 (1974). It does not require a state to accord absolute equality or precisely equal advantages to all individuals. San Antonio School District v. Rodriguez, 411 U.S. 1, 24 (1973). As I interpret these decisions, the state is not required to make available to an indigent defendant in a criminal prosecution every service available at the election of a non-indigent defendant. Equal protection considerations arise only where a right or service is provided by the state and the defendant is unable to obtain that right or service merely because of his inability to pay.\textsuperscript{2} For example, the United States Court of Appeals for the Fourth Circuit has concluded that equal protection requirements are not violated where an indigent defendant is denied a preliminary hearing transcript where such proceedings are not officially transcribed by the state. Faison v. Zahradnick, 563 F.2d 1135 (4th Cir. 1977), cert. denied sub nom., Faison v. Mitchell, 436 U.S. 908 (1978). Accord Phagley v. Creer, 691 F.2d 306 (7th Cir. 1982), affg 497 F.Supp. 519 (C.D. Ill. 1980); Britt v. McKenney, 529 F.2d 44 (1st Cir. 1976), cert. denied sub nom., Burden v. McKenney, 429 U.S. 854 (1976).

Under the statute, one suspected of driving under the influence is required to submit to a test, the arresting officer being the person to decide which test is to be administered. The statute requires, however, that regardless of the test elected by the arresting officer, the defendant is entitled to receive the results of the test administered by the officer without the payment of a fee.\textsuperscript{3}

It is only where the officer has elected the breath test that the blood test is then an optional test which the defendant may request at his expense. Because an accused receives the results of the actual test administered at the election of the arresting officer, the fact that § 18.2-268(b) also permits an additional test for defense purposes at the expense of the accused does not deny the defendants who forego the additional test an adequate opportunity to present their claims fairly.

I am also of the opinion that due process requirements are not violated by § 18.2-268(b). Those requirements emphasize "fairness between the...individual dealing with the State, regardless of how other individuals in the same situation may be treated." Ross v. Moffitt, supra, at 609. This conclusion is not altered by the fact that the arresting officer transports the accused to the place for obtaining the independent blood test. It would be a hollow privilege if the accused could not be transported to get the test. Surely, it would be contrary to public policy to permit the accused to drive to the place where such a test is available. Such transportation cannot be classified as a constitutional right, however, inasmuch as it is part of the privilege extended by the General Assembly to an accused to obtain additional evidence if he so desires. Compare 1981-1982 Report of the Attorney General at 128 (court-appointed interpreter for every deaf defendant not a constitutional right).

To summarize, the General Assembly has codified the previously recognized right of an accused to obtain evidence at his own expense when the arresting officer elects to have a breath test administered. I am of the opinion that such a practice does not violate the constitutional rights of an accused under the circumstances described in your question.

\textsuperscript{1}Section 18.2-268(b), in pertinent part, provides: "Any person...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...within two hours of the
alleged offense. Any person so arrested 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."

In this regard, the service provided here by the state, the transportation to the
testing site, is provided regardless of ability to pay. The test itself is not a service
provided by the state. The test is analogous to other services that have been denied to
indigents. See United States v. Baldi, 344 U.S. 561 (1953) (appointment of psychiatrist at
state expense); Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) (appointment of an expert);

Where the breath test is elected, the results must be provided to the defendant.
Section 18.2-268(rl). Where the blood test is elected, the defendant is entitled to have a
second vial of blood tested by an independent laboratory without payment of any fee and,
upon request, may obtain the results of such tests. Section 18.2-268(d1)-(g). Only upon
conviction may the fee be taxed as costs.

MOTOR VEHICLES. DRIVING WHILE LICENSE SUSPENDED OR REVOKED. NOTICE
WHICH SUFFICIENTLY AND ADEQUATELY APPRISES DRIVER OF SUSPENSION OR
REVOCATION SATISFIES DUE PROCESS PROVIDED NOTICE EMANATES FROM
DIVISION OF MOTOR VEHICLES OR PERSON WITH LAW ENFORCEMENT
OBLIGATIONS.

January 29, 1985

The Honorable J. Gregory Mooney
Commonwealth's Attorney for the City of Covington and Alleghany County

This is in reply to your request for my opinion on the following question:

"In cases where the Division of Motor Vehicles has not effected good service on a
motor vehicle operator so as to advise him that he is suspended, is oral notice from
a police officer sufficient or is the driver entitled to official notice according to
statute?"

The statute applicable to your question is § 46.1-441.2 of the Code of Virginia.\(^1\)
Under the provisions of this section, when a license is revoked or suspended (whether by
the court or the Commissioner of the Division of Motor Vehicles), notice of the
suspension or revocation may be sent by the Division by certified mail to the last known
address supplied by the driver and on file at the Division. The statute also creates a
presumption that the notice has been sent and delivered to the driver upon the
Commissioner's certificate that such notice has been sent. The statute further provides
for service in accordance with § 8.01-296 in the event that the Division's records indicate
that (1) someone other than the driver has signed the postal service return receipt for the
order, or (2) such return receipt is returned unsigned. If service is made as provided in
§ 8.01-296 by the sheriff or deputy sheriff of the jurisdiction where the address is
located, the statute also creates a rebuttable presumption that service was made.

The foregoing are the sole references in the Code to service of notice upon the
holder of the suspended or revoked license. As can be seen, neither reference makes a
particular type of service mandatory. Even more impressive is the absence of any statutory requirement for the courts to provide any written notice when a license is suspended or revoked. When the court takes the action, the defendant is generally before the court and, thus, has actual notice. Nonetheless, it is apparent that the General Assembly desired that reasonable steps be taken to provide notice of the revocation or suspension to the license holder. This is in keeping with the general concept of due process.

In Bibb v. Commonwealth, 212 Va. 249, 250, 183 S.E.2d 732, 733, (1971), in a trial for a violation of § 46.1-350, driving on a suspended or revoked license, the defendant attacked his conviction on the ground that he did not know of the suspension. The Supreme Court of Virginia held that the Commonwealth cannot rely on the presumption of notice afforded by § 46.1-441.2 when its evidence expressly shows that the accused did not receive the notice mailed to him. Nor did the evidence show that the accused knew his license had been suspended. The Court did not indicate the result in the event actual notice had been given. I assume that proof of actual notice would have been sufficient.

When the State seeks to terminate an interest of an individual, whether that interest is characterized as a "right" or a "privilege," certain due process procedures must be honored. See Bell v. Burson, 402 U.S. 535 (1971). In this context, due process does not specify a particular type of notice.

Accordingly, in answer to your question, I am of the opinion that oral notice of suspension or revocation of a driver's license by a police officer is an effective means of notice, even though the written notice provided in § 46.1-441.2 is not received by the driver.

Section 46.1-441.2 provides, in part, as follows: "Whenever it is provided in this title that a driver's license may or shall be suspended or revoked either by the Commissioner of the Division of Motor Vehicles or by a court, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Division by certified mail to the last known address supplied by such driver and on file at the Division, and the certificate of the Commissioner or someone designated by him for that purpose that such notice or copy has been so sent shall be deemed prima facie evidence that such notice or copy has been so sent and delivered to such driver for all purposes involving the application of the provisions of this title, including § 46.1-435. In the event the Division's records indicate that someone other than such driver has signed the return receipt or that the return receipt is unsigned, then service may be made as provided in § 8.01-296. Such service shall be made by a sheriff or deputy thereof in the county or city wherein is such address, who shall, as directed by the Commissioner, take possession of any suspended or revoked license, registration certificate or set of registration plates or decals and return them to the office of the Commissioner. In any such case, return shall be made to the Commissioner, and a rebuttable presumption that service was made shall arise." (Emphasis added.)

MOTOR VEHICLES. EMERGENCY LIGHTS. PORTABLE RED FLASHING LIGHTS MAY BE PLACED ON DASHBOARD OF EMERGENCY VEHICLE.

September 17, 1984

The Honorable William T. Burch
Commonwealth's Attorney for Loudoun County
You have asked whether the provisions of § 46.1-267 of the Code of Virginia prohibit the use of a portable red flashing emergency light on the dashboard of a police, fire or rescue vehicle.

Section 46.1-267 provides, in pertinent part, that:

"Any motor vehicle may be equipped with not to exceed two fog lamps, one passing lamp, one driving lamp, two side lamps of not more than six candlepower; interior light of not more than fifteen candlepower...."

Only those vehicles listed in paragraph (a) of § 46.1-226 and paragraph (a) or paragraph (a1) of § 46.1-267 and school buses may be equipped with flashing, blinking or alternating red or red and white emergency lights of a type approved by the Superintendent.

* * *

No motor vehicle shall be operated on any highway which is equipped with any lighting device other than lamps required or permitted in this article or required or approved by the Superintendent or required by the federal Department of Transportation." (Emphasis added.)

Section 46.1-226(a) lists law enforcement vehicles, fire fighting vehicles, rescue vehicles and ambulances as vehicles which may be equipped with flashing red lights. In addition, paragraphs (a) and (a1) of § 46.1-267 provide as follows:

"(a) A member of any fire department, volunteer fire company or volunteer rescue squad may equip one vehicle owned by the member with no more than two flashing or steady-burning red or red and white lights of a type approved by the Superintendent, for use by members only in answering emergency calls.

(a1) The Newport News Shipbuilding and Drydock Company may equip vehicles used by security personnel with flashing, blinking, or alternating red or red and white emergency lights of a type approved by the Superintendent."

While these provisions of §§ 46.1-226 and 46.1-267 clearly permit the use of red flashing lights on police, fire and rescue vehicles, there is no provision as to where such lights may be placed on the vehicles. Previous Opinions of this Office have stated that such lights may be placed on top of the vehicle or in or on the grill of the vehicle. See 1976-1977 Report of the Attorney General at 171, 172. The question of placing emergency lights in the interior of the vehicle has not been addressed.

It would appear that the limitation on the brightness of interior lights is designed to prevent interference with the vision of the driver that a brighter light might produce. As you state in your letter, however, the portable red flashing lights designed to be placed on the dashboard of emergency vehicles are covered on the back to prevent such interference. Moreover, as you have suggested in your letter, it appears that the fifteen candlepower limitation is a general provision which refers to lights intended for interior illumination and not to emergency lighting designed to be visible outside the vehicle.

The provision that limits interior lighting is found among the general provisions which limit exterior lighting. Accordingly, it is apparent that the exceptions provided in §§ 46.1-226 and 46.1-267 for emergency lights apply equally to both interior and exterior lights.

In view of the foregoing, it is my opinion that the use of portable red flashing emergency lights on the dashboard of a police, fire or rescue vehicle is permissible.
Nevertheless, the General Assembly's intent that interior lights not interfere with the driver's vision should be recognized. Accordingly, the lights should be shielded in a manner approved by the Superintendent of State Police under the authority of § 46.1-267.

MOTOR VEHICLES. FAILURE TO NOTIFY DIVISION OF MOTOR VEHICLES OF CHANGE OF ADDRESS NOT CRIME.

February 7, 1985

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

You ask whether a violation of § 46.1-368.1 of the Code of Virginia is a crime, and if so, what penalty may be imposed.

Section 46.1-368.1, a part of Ch. 5 of Title 46.1 (the Operators' and Chauffeurs' License Act), reads as follows:

"Whenever any person after making application for or obtaining a license to operate a motor vehicle shall move from the address shown in the application or upon the license, such person shall within thirty days thereafter notify the Division in writing of his change of address.

There may be imposed upon anyone failing to comply with this section a fee of five dollars, which fee shall be used to defray the expenses incurred by the Division."

By virtue of § 46.1-387, the violation of any of the provisions of Ch. 5 of Title 46.1 shall be a misdemeanor, unless such violation is otherwise declared to be a felony. The probative question here is whether a failure to comply with a requirement to notify the Division of Motor Vehicles is a "violation" of the provisions of Ch. 5. It is, of course, arguable that any failure to comply with a requirement of a statute constitutes a violation of that statute and, thus, is a misdemeanor. For the reasons which follow, the rules of strict construction against the Commonwealth in applying criminal statutes, however, lead me to reject such an argument in this instance.

Since the receipt of your inquiry, the General Assembly has had an opportunity to consider a proposed amendment to § 46.1-52.1, a part of Ch. 3 of Title 46.1 (Registration and Licensing). That section, like § 46.1-368.1, requires an owner to notify the Division upon a change of address, and also provides for the imposition of a fee of five dollars for a failure to comply. Indeed, these two provisions are nearly identical. House Bill No. 1423, introduced in the 1985 Session of the General Assembly, had as its purpose the amendment of § 46.1-52.1 to provide that a violation of the section constitutes a "traffic infraction." That bill was passed by indefinitely in the House Committee on Roads and Internal Navigation. Such action indicates the legislative intent to be opposed to making it a criminal offense to fail to report a change of address. Apparently, the General Assembly intended that the imposition of a fee for failure to comply would constitute the sole penalty.

The same rationale applies in the interpretation of § 46.1-368.1. While there is merit in the argument that the fee penalty was in addition to a criminal penalty for violation, the validity of that position is seriously challenged by the action of the General Assembly in rejecting an express criminal penalty to an identical provision in § 46.1-52.1.

I am not unmindful of the problems confronted by law enforcement officials when persons who have been convicted for traffic violations move without notice before the
Division of Motor Vehicles can notify them of a license revocation or suspension. In such circumstances, it is often difficult to prosecute such individuals for driving after license revocation or suspension. That administrative problem should be addressed by clear legislative enactment.

In view of the foregoing and bearing in mind the requirement for strict construction, I am constrained to conclude that failure to comply with § 46.1-368.1 is not a crime, the sole penalty being the permissive imposition of a fee of five dollars.

MOTOR VEHICLES. HABITUAL OFFENDERS. NORTH CAROLINA DUI CONVICTIONS OBTAINED AFTER JANUARY 1, 1975, NOT INCLUDED WITHIN DEFINITION OF HABITUAL OFFENDER.

November 9, 1984

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

You have asked whether a person may be adjudged an habitual offender where one of the three convictions relied upon by the Commonwealth is a North Carolina conviction for driving under the influence ("DUI"), in light of the recent decision by the Supreme Court of Virginia in Shinault v. Commonwealth, 228 Va. 269, 321 S.E.2d 652 (1984).

In Shinault, the Court held that the North Carolina DUI laws are not "substantially similar" to Virginia's DUI laws. The Court reasoned that, although the two State statutes are similar in many respects, one difference was readily apparent. The North Carolina statute, which became effective on January 1, 1975, creates a conclusive presumption of intoxication when a person's blood alcohol concentration ("BAC") is 0.10 percent or more. The Virginia statutes, on the other hand, provide that a BAC of 0.10 percent or more merely gives rise to a rebuttable presumption that a person is under the influence of alcohol. The Court concluded that the differing effect of the two presumptions on one accused of driving while intoxicated is substantial.

Under the provisions of the Virginia Habitual Offender Act, § 46.1-387.1 et seq. of the Code of Virginia, an out-of-State DUI conviction can be treated as a conviction within the definition of an habitual offender only if it is obtained under a law that is "substantially conforming" to § 18.2-266. See § 46.1-387.2(a)(2) and (c). The crux of the question raised by your inquiry is whether the term "substantially conforming" is synonymous with the term "substantially similar."

The term "substantially conforming" is not defined within the provisions of the Code that relate to habitual offenders. 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 employs are to be given their usual and ordinary meanings. Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206 (1972); Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938); 17 M.J. Statutes § 34 (1951). The word "conform" is defined in The American Heritage Dictionary of the English Language as follows: "To make similar...[t]o bring into agreement or correspondence." Comparable definitions also are given in Webster's New Collegiate Dictionary at 237 (1976).

In light of the foregoing, it is my opinion that the term "substantially conforming," as used in § 46.1-387.2(c), is synonymous with the term "substantially similar," as used in § 18.2-270. Accordingly, I am of the opinion that the Supreme Court's decision in Shinault requires the conclusion that a person cannot be adjudged an habitual offender in
Virginia where one of the convictions relied upon is a North Carolina DUI conviction, unless that conviction occurred prior to January 1, 1975, when the 0.10 percent BAC presumption of intoxication in North Carolina was rebuttable rather than conclusive.\footnote{It should be noted that the convictions for offenses included within the definition of an habitual offender must occur within a ten-year period.}

MOTOR VEHICLES. HABITUAL OFFENDERS. PERSON SENTENCED TO JAIL TERM MAY BE PLACED ON WORK RELEASE.

January 15, 1985

The Honorable T. C. Bowen, III
Commonwealth's Attorney for Tazewell County

You have asked whether a defendant convicted under § 46.1-387.8\footnote{} of the Code of Virginia of having driven an automobile after having been adjudicated an habitual offender can be placed on work release from a jail sentence without violating a prohibition within that section against suspension of any portion of the sentence.

Work release from local jails is governed by §§ 53.1-131 and 53.1-132. In such cases, the defendant is, in fact, confined to the local jail and allowed to leave only for work purposes. Under § 53.1-131, leaving a work area or the return route to the jail without proper authority constitutes a Class 2 misdemeanor, and leaving the Commonwealth while on work release constitutes an escape. Because work release is, in fact, a form of confinement, § 53.1-132 authorizes furloughs for persons on local work release.

Helpful to an understanding of the nature of work release is the parallel provision of § 53.1-60, controlling work release from State institutions. That section reads, in pertinent part:

"Any prisoner who has been placed in any of the programs authorized herein shall, while outside the state correctional facility or approved local or community correctional facility to which he is assigned, be deemed to be in custody whether or not he is under the supervision of a correctional officer. If the prisoner, without proper authority or without just cause, leaves the area in which he has been directed to work or to attend educational or community activity programs, or the vehicle or route involved in his traveling to or from such place or program, he may be found guilty of escape as provided for in § 18.2-477 as though he had left the state, local or community correctional facility itself...."

The person assigned to work release remains in custody. His sentence has not been suspended. In accordance with a legislatively created program, the inmate is merely serving a part of his sentence outside the walls of the correctional facility. Section 46.1-387.8 requires the judge to impose a penitentiary or jail sentence. It does not limit the manner of service of such sentence. In my opinion, the placement of the defendant upon work release after imposition of a jail sentence does not violate § 46.1-387.8.
In pertinent part, § 46.1-387.8 reads as follows: "Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended, except that in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended."

MOTOR VEHICLES. HABITUAL OFFENDERS. PETITION PURSUANT TO § 46.1-387.9:3 NOT AVAILABLE UNLESS UNDERLYING CONVICTION FOR DRIVING AFTER LICENSE SUSPENSION RESULTED ENTIRELY PURSUANT TO § 46.1-423.3 FOR FAILURE TO PAY FINES.

March 4, 1985

The Honorable Ralph E. Turpin, Jr.
Commonwealth's Attorney for Nelson County

You have asked whether a particular individual who was declared an habitual offender in 1979 is eligible to petition for restoration of his driver's license pursuant to § 46.1-387.9:3 of the Code of Virginia.1

The individual with whom you are concerned was declared an habitual offender because he had been convicted of three separate "major" offenses. The facts demonstrate the following information. The individual's license had been suspended indefinitely in 1970, pursuant to § 46.1-442, for failure to pay a judgment arising out of an automobile accident.

In 1972, he was convicted for driving while his license had been suspended. This conviction was pursuant to § 46.1-350, and constituted the first major conviction for purposes of the habitual offender statute. The suspension order that he had violated was the order issued in 1970 pursuant to § 46.1-442.

In 1974, while his license remained suspended because of the 1970 order, the individual was again arrested and convicted of driving while his license had been suspended. This conviction was also pursuant to § 46.1-350, and constituted the second major offense.

As a result of the individual's failure to pay his fines, imposed as a result of the 1974 conviction, the court also entered, in 1974, an order suspending the individual's license pursuant to § 46.1-423.3. This order of suspension, in effect, paralleled the 1970 suspension which still continued. Thus, after the 1974 order, the individual's license had been suspended for two separate and independent reasons, each of which, standing alone, had resulted in suspension.

Later in 1974, the individual sought to arrange for payment of his 1970 judgment in installments so that the 1970 suspension order could be lifted. Because he subsequently defaulted on his payments, the 1970 suspension was reimposed in 1975. Thus, again the license was suspended pursuant to §§ 46.1-442 and 46.1-477 for failure to pay a judgment, although the court's 1974 suspension order, entered pursuant to § 46.1-423.3, continued as well.

Finally, in 1978, the individual was again convicted, this being the third major
conviction, of driving while his license had been suspended. As indicated above, the suspension which existed in 1978 was based on two separate and independent orders, each of which could stand alone.

The provisions of 5 46.1-387.9:3, which permit a petition to restore an habitual offender's license after five years, are satisfied when one of the three major convictions is for the offense of driving while the license is suspended for failure to pay a fine. In this case, the suspension underlying the third conviction rested on two separate bases, the continuing 1970 suspension for failure to pay a judgment and the 1974 suspension for failure to pay a fine. Thus, it cannot be said that the third conviction was for the offense of driving while the license was suspended merely for failure to pay a fine.

Because the individual is the petitioner, the burden is upon him to demonstrate that at least one of the three offenses was for driving while his license had been suspended merely for failure to pay a fine. Under the facts outlined above, I am of the opinion that the individual cannot satisfy the requirements of 5 46.1-387.9:3, which are necessary to trigger the five-year provision.

Section 46.1-387.9:3 provides:
"Any person who has been found to be an habitual offender, where such adjudication was based in part and dependent upon a conviction as set out in 5 46.1-387.2(a)(4), may, after the expiration of five years from the date of such adjudication, petition the court in which he was found to be an habitual offender, or the circuit court in the political subdivision in which such person then resides, for restoration of his privilege to operate a motor vehicle in this Commonwealth. However, this section shall apply only where the conviction set out in 5 46.1-387.2(a)(4) resulted from a suspension or revocation ordered pursuant to 5 46.1-423.3 for failure to pay fines and costs [assessed against him for violations of the motor vehicle laws].

Upon such petition, the court, in its discretion, may restore to such person his privilege to operate a motor vehicle, upon such terms and conditions as the court may prescribe, if the court is satisfied from the evidence presented that the petitioner does not constitute a threat to the safety and welfare of himself or others with respect to the operation of a motor vehicle." (Emphasis added.)

A conviction as set out in 5 46.1-387.2(a)(4) is a conviction for "[d]riving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.2-272, 46.1-350 or 5 46.1-351." Note that 5 46.1-387.9 provides generally that an habitual offender must wait ten years before becoming eligible to petition for restoration. Accordingly, eligibility for restoration under 5 46.1-387.9:3 is a significant benefit for a person who has been declared an habitual offender.

MOTOR VEHICLES. HABITUAL OFFENDERS. SEPARATE ACTS.

July 24, 1984

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

You have asked what constitutes a separate and distinct offense for purposes of a habitual offender adjudication. Your question involves a determination of whether the convictions for offenses occurring at the same time and arising out of the same incident would count as second and third convictions within the meaning of 5 46.1-387.2 of the Code of Virginia.
This issue has been addressed by the Supreme Court of Virginia in *Estes v. Commonwealth*, 212 Va. 23, 181 S.E.2d 622 (1971). In *Estes*, the Court noted that one occasion of driving an automobile may give rise to several acts and offenses and that the test of whether there are separate acts sustaining several offenses is "whether the same evidence is required to sustain them," citing the earlier decision of *Hundley v. Commonwealth*, 193 Va. 449, 451, 69 S.E.2d 336, 337 (1952). (Emphasis added.) Applying the *Hundley* test to *Estes*’ situation, the Court in *Estes* determined that the "same act" did not give rise to a violation of the two statutes under which Estes had been convicted. Rather, the two convictions arose "out of separate acts"—one being the act of driving under the influence and the other out of the act of driving on a suspended license. Thus, the Court concluded that the convictions must be counted individually as second and third convictions within the meaning of § 46.1-387.2.

In view of the foregoing, I am of the opinion that, although offenses may be related to or grow out of a single act of driving a motor vehicle, unless the same evidence is required to sustain them, each offense will be considered a separate and distinct offense for purposes of § 46.1-387.2. In cases in which the person has no record of prior offenses chargeable under the habitual offender article, multiple offenses committed within a six-hour period shall be treated as one offense for purposes of applying the statute.

1 Section 46.1-387.2 (effective until January 1, 1985) reads, in pertinent part: "An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsections (a), (b) and (c) of this section, committed within a ten-year period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of separate acts..."

MOTOR VEHICLES. LICENSE. FAILURE TO PAY FINES. COURT MAY WITHHOLD DRIVER’S LICENSE EVEN IF PAYMENT ON DEFERRED OR INSTALLMENT BASIS ORDERED.

April 9, 1985

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

You have requested an Opinion on the following question, which I quote:

"Can a General District Criminal Court withhold an individual's driver's license when the individual files a 'To Pay' form when money is owed the Court for a traffic fine and/or costs?"

A district court has authority, pursuant to § 46.1-423.3 of the Code of Virginia to revoke the privilege to operate a motor vehicle of an individual who fails to pay fines and
costs assessed against him for a violation of any law pertaining to the operation of a motor vehicle. Assuming that a court has taken such action against an individual, there appears to be nothing in § 46.1-423.3, or in § 19.2-354, which would require that the court restore the individual's operator's privilege upon an order requiring that his fines and costs be paid on a deferred or installment basis. On the contrary, the language of § 46.1-423.3 seems to contemplate restoration only upon payment in full. Accordingly, it is my opinion that a court may "withhold" an individual's driver's license when the individual files a "To Pay" form for traffic fines and costs.

It appears that a "To Pay" form is the term used in some district courts for an order to pay fines and costs on a deferred or installment basis. The district courts have authority to require payment of fines and costs on such basis pursuant to § 19.2-354.

Section 46.1-423.3 provides as follows:

(a) Any person, whether licensed by Virginia or not, who operates a motor vehicle in this Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to pay all lawful fines and court costs assessed against him for violations of the motor vehicle laws of this Commonwealth, or of any county, city or town.

(b) In addition to any other penalty provided by law, when any person shall be convicted of any violation of this title, or any other law of the Commonwealth pertaining to the operator or operation of a motor vehicle or of any valid ordinance of any county, city or town adopted pursuant to § 46.1-180, and shall fail or refuse to provide for payment of any fine and costs lawfully assessed against him, the court after expiration of the ten-day period specified in subsection (c) or the Commissioner upon receipt of a record of such failure or refusal, shall forthwith revoke the privilege of such person to operate a motor vehicle upon the highways of the Commonwealth. The driver's license of such person shall continue revoked until such time as such fine and costs shall have been paid. If such person has not obtained a license as required by Chapter 5 (§ 46.1-348 et seq.) of this title, or is a nonresident, the court may direct in the judgment of conviction that such person shall not drive or operate any motor vehicle in Virginia for a period to coincide with the nonpayment of such fine and costs.

(c) Before transmitting a record of such person's failure or refusal to pay any fine and costs to the Commissioner, the clerk of the court that convicted such person shall send such person written notice that his license or privilege to drive or operate a motor vehicle in Virginia will be suspended if such fine and costs are not paid within ten days. A record of such person's failure or refusal shall be sent to the Commissioner if the fine and costs remain unpaid at the termination of the ten-day period specified in the notice.

(d) In the event such person shall pay the fine and costs assessed against him subsequent to the time the license has been transmitted to the Division of Motor Vehicles, and his license is not under suspension or revocation for any other lawful reason, except pursuant to this section, then the Commissioner shall return such license to such person forthwith upon presentation of the official receipt of the court evidencing the payment of such fine and costs.

(e) In the event the court has suspended or revoked the driver's license for any lawful reason other than this section, or the conviction is one for which revocation or suspension is required under any provision of this title, except for this section, then the suspension permitted under the provisions of this section shall be in addition to, and run consecutively with, such revocation or suspension. The period of such suspension shall be calculated from the date of the assessment of such fine and costs until the date the same shall have been paid."

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MOTOR VEHICLES. LICENSE. REVOCATION. OPERATION OF MOPED BY INDIVIDUAL WHOSE LICENSE HAS BEEN SUSPENDED OR REVOKED CONSTITUTES VIOLATION OF § 46.1-350.
October 26, 1984

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

You have asked whether operation of a moped on the highways of Virginia by an individual whose driver's license has been suspended or revoked constitutes a violation of § 46.1-350 of the Code of Virginia.

This question has been addressed previously by this Office in Opinions found in the Reports of the Attorney General: 1977-1978 at 265 and 1975-1976 at 251. Those Opinions, in determining that such operation is a violation of § 46.1-350, rely on the emphasized portion of the following language in § 46.1-350:

"[N]o person, resident or nonresident, whose driver's license or instruction permit or privilege to drive a motor vehicle has been suspended or revoked...shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in this Commonwealth unless and until the period of such suspension or revocation shall have terminated." (Emphasis added.)

The definition of "[miotor vehicle" in § 46.1-1(15) was amended by Ch. 585, Acts of Assembly of 1981, to expressly exclude mopeds. The offense in § 46.1-350, however, involves the operation of motor vehicles or self-propelled machinery or equipment. Although the language of § 46.1-350 has been amended somewhat since the 1975 and 1977 Opinions were rendered, there has been no change in the statutory prohibition against operating "self-propelled machinery or equipment." I concur in the earlier Opinions. Accordingly, your inquiry is answered in the affirmative.

MOTOR VEHICLES. LOCAL LICENSES. MORE THAN ONE LOCAL LICENSE DECAL MAY BE DISPLAYED ON WINDSHIELD.

June 24, 1985

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

This is in reply to your request for my opinion whether the display of more than one local license decal on the front window of a motor vehicle would violate any provisions of State law or regulations of the Department of State Police (the "Department"). You state that Scott County requires a local license decal, as do several towns within the county. The county and towns have been unable to reach agreement to limit the number of decals required to be displayed.

When one reads the authorizing legislation pertaining to local license decals, it is clear that in certain situations the General Assembly has permitted both towns and counties to impose upon motor vehicles a local license requirement. Section 46.1-66(b) of the Code of Virginia, in part, prohibits a county from imposing such a local license requirement upon vehicles normally garaged, stored or parked in an incorporated town within the county when such town imposes a license fee "[e]xcept as provided in § 46.1-65." Section 46.1-65(d) has the effect of permitting both a county and a town to impose a local license decal requirement upon the same vehicle, provided that the county gives the owner credit for the amount of fees paid to the town. The last sentence of § 46.1-65(d) provides that the governing bodies of the county and town where "each impose the license tax herein provided may provide mutual agreements so that not more than one license tax in addition to the state tag shall be required." (Emphasis added.)
As you can see from the foregoing summary, the General Assembly has not mandated such agreements limiting the number of decals to be displayed on a motor vehicle, but has made them permissive. Thus, with respect to the Code, there is no prohibition in the number of decals which may be displayed.

Turning to the regulations of the Department, § 46.1-291(A) provides, in pertinent part, as follows:

"The size of stickers or decals used by counties, cities, and towns in lieu of license plates shall be in compliance with regulations promulgated by the Superintendent; at the option of the motor vehicle's owner, such stickers shall be affixed either at the upper edge of the center of the windshield or at some other place which may be designated by the Superintendent."

The applicable regulations promulgated by the Superintendent pursuant to § 46.1-291(A) provide as follows:

"2.0 SIZE

The size of the sticker or decal shall not exceed three inches in height and three inches in length. The shape of the sticker or decal is optional.

3.0 PLACEMENT

The sticker or decal shall be placed on the windshield adjacent to the left or right side of the official inspection sticker. The top edge of the sticker or decal shall not extend upwards more than three inches from the bottom of the windshield. The side edge adjacent to the official inspection sticker shall not be more than 1/4 inch from the edge of the official inspection sticker."

Regulations Relating to Standards and Specifications for the Stickers or Decals Used by Counties, Cities and Towns in Lieu of License Plates.

The Official Inspection Manual Glazing § 16, at 16-2 (Rev. July 1, 1982), issued by the Superintendent, contains the following provision concerning local license decals:

"11. Stickers or decals used by Counties, Cities and Towns in lieu of license plates may be placed on the windshield without further authority. The sticker or decal shall be placed on the windshield adjacent to the left or right side of the Official Inspection Sticker. The top edge of the sticker or decal shall not extend upwards more than 3-inches from the bottom of the windshield. The side edge adjacent to the Official Inspection Sticker shall not be more than 1/4-inch from the edge of the Official Inspection Sticker. However, at the option of the motor vehicle owner, the sticker or decal shall be affixed at the upper edge of the center of the windshield. (Any expired sticker or decal present on the windshield at the time of inspection shall be removed.)" (Emphasis in original.)

I note that neither § 46.1-291(A) nor any of the applicable regulations issued by the Superintendent prohibit the display of more than one local license decal on a vehicle windshield. Accordingly, it is my opinion that both a county and a town license decal may be displayed on the windshield of a vehicle if both decals are required by local ordinances for that vehicle pursuant to § 46.1-65.

1These regulations were adopted May 21, 1976, to become effective July 1, 1977. Accordingly, they were adopted prior to the enactment of Ch. 626, Acts of Assembly of
1981, which added the provision permitting placement of the decal at the upper edge of the center of the windshield. It appears that the regulations are still in effect, however, except to the extent that the statute now supersedes them as to placement of the decal.

MOTOR VEHICLES. LOCAL LICENSES. SECTION 46.1-66(a)(6) EXEMPTION NOT LIMITED TO VEHICLES OPERATED EXCLUSIVELY INTRASTATE.

April 24, 1985

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

You have asked whether § 46.1-66(a)(6) of the Code of Virginia, which exempts certain vehicles from local motor vehicle licensing requirements, is limited in application to vehicles used by common carriers exclusively in intrastate (but not intracity) operations, or whether the exemption also includes vehicles engaged in interstate operations.

This Office has addressed similar questions on several prior occasions, and I note that the Opinions have not been entirely consistent. See Reports of the Attorney General: 1976-1977 at 168; 1974-1975 at 466; 1958-1959 at 188; 1957-1958 at 180; and 1955-1956 at 137.

It appears that the 1974-1975 Opinion is the one which comes closest to addressing the precise question you have posed. In that Opinion the question posed was whether a county "may require the owners of tractor-trailers to purchase county license tags when...the owners are common carriers who operate intrastate and interstate...." The Opinion concluded that

"the county may not levy a license fee upon trailers and semitrailers which are operated by a common carrier of persons or property which is not operating in intracity transportation. Although this office has determined that the license tax imposed by § 48.1-65 is not an impermissible burden on interstate commerce, Report of the Attorney General (1958-1959), p. 188, § 48.1-66(a)(6) specifically exempts common carriers which are not operating in intracity transportation from local licensing requirements. Accordingly, unless the vehicles described in your first inquiry are operating exclusively in intracity transportation, Greensville County may not license them." (Emphasis added.)

It is thus apparent that the key to licensing exemption depends on the intercity operation, not interstate or intrastate. In this regard, it is well to note that, while the first clause of § 46.1-66(a)(6) is limited to transportation between cities and towns "in this Commonwealth," the second clause is not so limited. Rather, that portion of the statute underscored in footnote 1, supra, is not limited at all, save that it be transportation between a city or town and a point without the city or town.

While the 1974-1975 Opinion is not entirely consistent with earlier Opinions of this Office, it is consistent with the only later Opinion on the subject, issued in 1977. Inasmuch as both the 1974-1975 and 1976-1977 Opinions have now been published for several years and the legislature has done nothing to indicate disagreement with that interpretation of the statute, it appears that the General Assembly approves of that interpretation. See Browning-Ferris v. Commonwealth, 225 Va. 157, 300 S.E.2d 603 (1983). Accordingly, it is my opinion that the exemption provided by § 46.1-66(a)(6) is not limited to vehicles used exclusively in intrastate operations, although it is limited to vehicles not used in intracity operations.
Section 46.1-66 reads, in part, as follows: "(a) No county, city or town shall impose any motor vehicle license tax or license fee upon any motor vehicle, trailer or semitrailer when:

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(6) The motor vehicle, trailer or semitrailer is operated by a common carrier of persons or property operating between cities and towns in this Commonwealth and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation."

(Emphasis added.)

MOTOR VEHICLES. LOCAL LIENS. MOVING FROM ONE COUNTY OR CITY TO ANOTHER DOES NOT SUBJECT VEHICLE TO REQUIREMENT OF NEW LICENSE DURING CURRENT LICENSE YEAR.

October 15, 1984

The Honorable G. M. Weems
Treasurer for Hanover County

You have asked whether the earlier Opinion of this Office, found in the 1972-1973 Report of the Attorney General at 279, interpreting § 46.1-65(f) of the Code of Virginia, is still valid. The 1973 Opinion held that a person who purchased a city or county license for a vehicle in one jurisdiction of the Commonwealth and then moved to another jurisdiction was not required to purchase another license from the new jurisdiction until the expiration date of the previously purchased license. That Opinion was grounded in the language of § 46.1-65(f) which states, in relevant part, that "no vehicle shall be subject to [local license] taxation under the provisions of [§ 46.1-65]...in more than one jurisdiction."

There have been no material changes to § 46.1-65(f) since the issuance of the 1973 Opinion. Although an exclusion provision was incorporated in § 46.1-65(f) in 1984, the exclusion addresses the allocation of license fees between a consolidated county and a tier-city and does not bear on the issue you have raised.

I concur in the finding of the 1973 Opinion. Accordingly, I am of the opinion that citizens of the Commonwealth who, pursuant to § 46.1-65, pay license fees in one county or city are not required to purchase another such license when they move to another jurisdiction prior to the license expiration date.

1My Opinion is not only consistent with the 1973 Opinion on this subject but also concurs with an Opinion found in the 1964-1965 Report of the Attorney General at 203.

MOTOR VEHICLES. NONTRANSPARENT SUNSHADING MATERIAL PERMISSIBLE ON REAR SIDE WINDOWS OF MOTOR VEHICLES UNDER PRESENT LAW.

February 18, 1985

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake
You have asked for an interpretation of § 46.1-291 of the Code of Virginia as it applies to the rear side windows of motor vehicles operated on Virginia highways. As you point out, § 16-13 of the Virginia Motor Vehicle Inspection Manual, published by the Department of State Police, provides that "[n]ontransparent sun shading material may be attached to any side glass in a vehicle located to the rear of the driver's seat." Your question is whether that provision contravenes § 46.1-291.

Section 46.1-291 provides, in pertinent part:

"A. It shall be unlawful for any person to operate any motor vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, sideshields or rear windows of such motor vehicle other than a certificate or other paper required to be placed by law or which may be permitted by the Superintendent [of State Police]....

B. Notwithstanding the provisions of subsection A of this section, whenever a motor vehicle is equipped with a mirror on each side of such vehicle, so located as to reflect to the operator of such vehicle a view of the highway for a distance of not less than two hundred feet to the rear of such vehicle, any or all of the following shall be lawful:

* * *

3. To have affixed to the rear window or windows of a motor vehicle any sunshading material...." (Emphasis added.)

None of the emphasized terms is defined in the Code. The fact that "sunshading material" is an exception to the prohibition against use of "nontransparent material" in certain instances indicates that sunshading material may be one form of nontransparent material.

Neither are the terms "sideshields" and "rear windows" defined in the Code. A definition of "sideshields," however, appears in a prior Opinion of this Office found in the 1976-1977 Report of the Attorney General at 184. In that Opinion, the term "sideshields" was held to be limited to the "front side glass or glazing" on a motor vehicle.

I believe the prior Opinion of this Office and the long-standing administrative interpretation of the Department of State Police correctly interpret the law as it presently exists.

I note, however, that at the present Session of the General Assembly, Delegate Ball introduced H.B. No. 407 to amend § 46.1-291. On this date, the Senate approved the bill. The House had previously done so. If the Governor signs the bill into law, its effect would be to overturn the prior interpretations referred to above.

Because a bill pending in the General Assembly bears upon this question, I have delayed my response until the Assembly completed action upon the bill. See discussion in the Opinion which follows.

MOTOR VEHICLES. PARKING VIOLATIONS. HANDICAPPED. DISABLED VETERANS. LICENSE PLATES. CLASS OF PERSONS ACCORDED SPECIAL PARKING PRIVILEGES UNDER §§ 46.1-104.1, 46.1-181.4:1, 46.1-254.2.
You have asked whether it is a violation of current Virginia law for motor vehicles bearing Disabled Veteran plates to park in spaces reserved for the handicapped.

Section 46.1-149.1 of the Code of Virginia authorizes the issuance of special license plates to disabled veterans. Automobiles bearing disabled veteran plates issued under § 46.1-149.1 are included in the various sections of the Code that provide for special parking privileges for the handicapped. Section 46.1-104.1(b) reads, in relevant part:

"The disabled person...to whom special plates have been issued under § 46.1-149.1 shall be allowed to park the vehicle upon which such plates are displayed for unlimited periods of time in parking zones restricted as to length of parking time permitted and shall be exempted from paying parking meter fees of any county, city or town. The provisions of this subsection shall take precedence over any county, city or town ordinance...." (Emphasis added.)

A related statute, § 46.1-181.4:1, reads, in relevant part:

"The governing body of any county, city or town may adopt an ordinance making it unlawful for a vehicle not displaying a license plate...issued under...§ 46.1-149.1...to be parked in a parking space reserved for the handicapped on public property or at privately owned parking areas...." (Emphasis added.)

Section 46.1-254.2(E) also provides:

"The owner or duly authorized agent of an owner of a private parking space...which space is properly designated and clearly marked for parking by handicapped persons, shall have the authority to have any vehicle not displaying...special license plates under...§ 46.1-149.1 removed from such parking place and stored. (Emphasis added.)

In light of these Code provisions, it is my opinion that disabled veterans who display the special license plates authorized by § 46.1-149.1 are included within the class of persons who are accorded special parking privileges under Virginia law.

In light of these Code provisions, it is my opinion that disabled veterans who display the special license plates authorized by § 46.1-149.1 are included within the class of persons who are accorded special parking privileges under Virginia law.

You have asked several questions concerning § 46.1-254.1 of the Code of Virginia. First, you inquire whether that section establishes a different procedure for processing parking tickets that are nondelinquent and contested than for those that are simply delinquent. You state:

MOTOR VEHICLES. PARKING VIOLATIONS. SECTION 46.1-254.1(a)(2), (3) PERMITS DIFFERING PRETRIAL NOTICE PROCEDURES BETWEEN LOCAL ADMINISTRATORS AND COURTS, BUT DOES NOT DIFFERENTIATE BETWEEN REQUIREMENTS OF SERVICE TO VIOLATORS NOR ADJUDICATION PROCESS FOR DELINQUENT AND NONDELINQUENT PARKING VIOLATIONS.
"It appears that the options of a person who has received a parking ticket might be:

(a) Before becoming delinquent, that is allowing the time for prepaying it administratively to pass, he may contest the ticket by notifying the administrative official so designated by the local ordinance. This official must then certify the contest to the general district court; or

(b) After becoming delinquent, the official causes a summons, etc. to be issued and the case is returnable to the general district court as any other traffic case."

I concur with your analysis. As you have noted, on its face, § 46.1-254.1(a)\(^1\) appears to establish two different pretrial procedures for handling parking violations. Subparagraph (a)(2) requires that a "contest by any person of any parking citation shall be certified in writing, on an appropriate form, to the appropriate district court" by a city or county administrative official or officials. Subparagraph (a)(3) requires that "such administrative official or officials shall cause complaints, summons or warrants to be issued for delinquent parking citations." (Emphasis added.)

In the event that I concurred with your initial analysis, you pose three additional questions. First, you ask "what type of process or other paper, if any, is required to be issued for the contest to be decided by the general district court." As you are aware, the Code does not specifically establish any provisions for notifying the defendant once the case has been certified to the general district court. Once certified to the court, it is apparent the General Assembly meant the case to be ripe for hearing. It is further obvious, however, that due process requires that the defendant obtain notice of the date of the hearing in order that he may present his defense. Because of the nature of the action, it is my opinion that either mailing notice to the defendant, in accordance with § 19.2-76.2, or serving defendant with a summons would be an appropriate means by which to notify the defendant."

You next inquire "if the decision of the general district court is against the person who received the ticket, is the authorized penalty the same as if a summons had been issued or the amount set for prepayment administratively." The Code does not provide a differentiation between the penalties imposed upon those found guilty who were nondelinquent and contested the action and those who were delinquent and had not contested the citation. Accordingly, it is my opinion that the range of penalties should be the same. See § 46.1-16.01 and §§ 46.1-252 through 46.1-254.

Finally, you inquire "does the general district court, upon a finding against the person who received the ticket, have to assess any court costs and if so, in what amount." The provisions of § 46.1-254.1(a) do not address and, therefore, do not affect the manner in which parking violations are adjudicated. Thus, it is my opinion that both nondelinquent and delinquent contestants, whose case is tried by the general district court and who are found guilty of a parking violation, must pay court costs in accordance with the provisions of § 14.1-123.

\(^1\)Section 46.1-254.1(a) reads as follows: "Any ordinance regulating parking by a city or county under the provisions of §§ 46.1-252, 46.1-253, 46.1-254 shall contain provisions that require: (1) that uncontested payment of parking citation penalties be collected and accounted for by a city or county administrative official or officials who shall be compensated by the city or county; (2) that contest by any person of any parking citation shall be certified in writing, on an appropriate form, to the appropriate district court, by such administrative official or officials; and (3) that such administrative official or officials shall cause complaints, summons or warrants to be issued for delinquent parking citations."
Section 19.2-76.2 provides that a summons for certain parking violations may be executed by mailing a copy thereof by first-class mail. If the defendant fails to appear, however, the summons must be personally served upon the person cited before the trial may be held. See 1982-1983 Report of the Attorney General at 358.

MOTOR VEHICLES. REGISTRATION. TEMPORARY ONE-TRIP PERMIT MAY BE ISSUED FOR VEHICLE OPERATED FROM OUTSIDE VIRGINIA TO DESTINATION WITHIN VIRGINIA.

May 2, 1985

The Honorable Donald E. Williams
Commissioner, Division of Motor Vehicles

You have asked whether a "temporary one-trip permit," authorized by § 46.1-42.1 of the Code of Virginia, may be issued for a vehicle which is to be operated from a location outside of Virginia to a location within Virginia.

Section 46.1-42.1 provides:

"The Division [of Motor Vehicles] may, upon proper application on forms provided by the Division, issue a temporary one-trip permit to any owner of a motor vehicle, trailer or semitrailer which would otherwise be subject to registration plates but is not currently registered. If the vehicle operating on such a permit is a vehicle designed as a property-carrying vehicle it shall be unladen at the time of operation on such permit. Such permit shall be valid for three days, and shall show the registration or permit number, the date of issue, the date of expiration, the make of vehicle, the vehicle identification number, the beginning point and the point of destination. Any vehicle so operated shall only operate between the beginning and destination points. The fee for such a permit shall be five dollars."

I note first that a permit issued by a State agency would ordinarily have no effect outside of this State, so that this section would appear at first blush to have application only to trips within Virginia, or at least to that portion of a trip which is in Virginia. Virginia is, however, a party to reciprocity agreements with the other forty-nine states, the District of Columbia and the Canadian Provinces which provide, inter alia, that "proper...temporary registration or permits issued by [any]...one of the reciprocating jurisdictions shall be mutually recognized in accordance with the legal purposes of such plates in the jurisdiction of issuance."

Accordingly, it appears that a temporary one-trip permit issued by Virginia would be recognized outside the territorial limits of the State, provided that the issuance of the permit was "proper." According to the reciprocity agreements, a vehicle is "properly registered" if it is registered in the "jurisdiction where the person registering the vehicle has his legal residence...." Reading § 46.1-42.1 together with the reciprocity agreements, then, it is my opinion that temporary one-trip permits may be issued by the Division for vehicles which will be operated from outside the State to a location within the State, provided that the legal residence of the person registering the vehicle is in Virginia, and provided that the vehicle would otherwise be subject to Virginia registration but is not currently registered.

MOTOR VEHICLES. SALES AND USE TAX. NO EXEMPTION FOR PURCHASE BY RELIGIOUS ORGANIZATION FOR USE BY CHURCH OFFICIAL.
You have asked whether the Virginia motor vehicle sales and use tax must be paid on a motor vehicle purchased by, and to be titled in the name of, the trustees of a church diocese for use by a church official.

Chapter 12.1, Title 58 (§ 58-685.10 et seq.) of the Code of Virginia imposes a tax upon the sale price of each motor vehicle sold in Virginia. The tax is collected by the Division of Motor Vehicles at the time the purchaser applies for a title certificate for the vehicle, and it is, therefore, sometimes referred to as a "titling tax." In fact, however, it is a sales and use tax imposed by a separate chapter on motor vehicles in lieu of the retail sales and use tax which applies to virtually all other retail sales in Virginia.

Exemptions from the motor vehicles sales and use tax are listed in §§ 58-685.13 through 58-685.13:2 of the Code. There is nothing in any of those Code provisions which would exempt from taxation the purchase of a vehicle by a religious organization for church related activities.

The general rule in Virginia is that taxation is the rule and not the exception. Jefferson v. Tax Comm., 217 Va. 988, 234 S.E.2d 297 (1977). Accordingly, because there is no express exemption in the Motor Vehicles Sales and Use Tax Act for religious organizations or church related activities, I am of the opinion that the tax must be paid in the circumstances you describe, and I answer your inquiry in the affirmative.

1 At its 1984 Session, the General Assembly adopted § 58-441.6(gg), which provides an exemption from the Virginia Retail Sales and Use Tax for certain purchases by religious organizations. That section is not applicable to your inquiry because the sales tax on motor vehicles is imposed under a separate chapter which pertains only to sales tax on motor vehicles.

2 The provision in § 6(a)(2) of Art. X of the Constitution of Virginia (1971) relates to exemption from ad valorem taxes and not from sales taxes.

MOTOR VEHICLES. TAXATION. LEASING COMPANY LIABLE TO JURISDICTION WHERE VEHICLE LOCATED AND USED AS DAILY RENTAL FOR MERCHANTS' CAPITAL TAX. DAILY RENTAL COMPANY LIABLE FOR TWO PERCENT GROSS RECEIPTS TAX ON VEHICLES RENTED, EVEN THOUGH MERCHANTS' CAPITAL TAX PAID.

September 4, 1984

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

This is in reply to your request for my opinion on the following matter:

"When a vehicle is owned by a leasing company, leased to a daily rental company and then used for daily rentals:

a. Is the leasing company liable to the jurisdiction in which the vehicle is located for the personal property tax?"
b. Is the daily rental company liable for the 2% gross receipts tax on the vehicles rented [even though] a personal property tax has been paid?  

In 1981, the General Assembly enacted amendments to Title 58 of the Code of Virginia that reclassified "daily rental passenger cars" for the purpose of local taxation. See Ch. 145, Acts of Assembly of 1981. The amendments removed "daily rental passenger cars" from the ambit of local taxation as tangible personal property and reclassified them as merchants' capital, a classification of intangible personal property. Thus, daily rental passenger cars are taxed to their owner not as tangible personal property but as merchants' capital. See §§ 58-20, 58-405 and 58-833. The legislation also imposed an additional two percent tax on the gross proceeds from the rental of daily rental passenger cars under the Virginia Motor Vehicle Sales and Use Tax Act, and provided for the distribution of this additional tax to the localities in which the vehicles were rented. See §§ 58-685.12:1(A) and 58-685.23(ii).

The General Assembly has divided persons or companies who lease automobiles to other parties into two distinct categories. One is referred to as a "rentor" and the other as a "lessor." Rentors lease cars to others for periods not to exceed twelve months. Section 58-685.11(7). By implication, lessors are those who lease to others for periods exceeding twelve months. Id. Section 58-685.17:1 requires all rentors of motor vehicles in Virginia to obtain a rentor's certificate of registration or license from the Commissioner of the Division of Motor Vehicles for each place of rental business within the Commonwealth. The special tax distribution provisions of § 58-685.23(ii) apply only to daily rental passenger cars that are "held for rental" by such licensed rentors engaged in the business of renting automobiles. See §§ 58-685.12:1(B) and 58-685.11(7).

In answer to your first question, because the automobiles owned and leased by the leasing company are daily rental passenger cars classified as merchants' capital within the meaning of §§ 58-685.12:1 and 58-833, I am of the opinion that the leasing company would be liable to the jurisdiction in which the vehicle is located for the merchants' capital tax but not the tangible personal property tax.

In answer to your second question, I am of the opinion that the daily rental company would be liable for the two percent gross receipts tax on the vehicles rented in addition to the merchants' capital tax which has been paid on the vehicles by the leasing company. Under the provisions of § 58-685.12:1, the additional two percent gross receipts tax is imposed on any daily rental passenger car that is "held for rental" by licensed rentors engaged in the business of renting automobiles. In view of the fact that the merchants' capital tax is separate and distinct from the tangible personal property tax, the credit which is authorized by § 58-685.20(B) for tangible personal property taxes assessed may not be claimed against the additional two percent gross receipts tax imposed by § 58-685.12:1.  

1 This Opinion later concludes that the owner to which the vehicles will be taxed as merchants' capital is the leasing company. The leasing company is not a merchant. This unusual result suggests that the General Assembly may not have contemplated the impact of Ch. 145, Acts of Assembly of 1981, on the type of factual situation presented by you. It would appear that the legislation assumes that the entity in the daily rental passenger car business is also the owner of the vehicles.

2 Of course, if Arlington County imposes a license tax on merchants, it may not also impose the merchants' capital tax. See § 58-266.1(A)(5). In that case, neither merchants' capital tax nor tangible personal property tax is owed by the leasing company.

3 The reference in § 58-685.20(B) to a credit for tangible personal property taxes assessed on a daily rental passenger car is principally a transitional provision for the 1981 tax year when daily rental passenger cars were reclassified by the General Assembly.
from tangible personal property to merchants' capital, effective July 1, 1981, but where tangible personal property tax may have been assessed against the vehicle before July 1, 1981.

MOTOR VEHICLES. WEIGHT LAWS. OVERWEIGHT PERMITS ISSUED PURSUANT TO § 46.1-339(f) APPLY TO AXLE WEIGHT AS WELL AS GROSS WEIGHT, EXCEPT ON FEDERAL INTERSTATE HIGHWAYS.

April 9, 1985

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked two questions concerning the use of overload permits which are available to the owners of certain motor vehicles pursuant to the provisions of § 46.1-339(f) of the Code of Virginia. ¹

Your first question is whether an overload permit applies to the permissible axle weights for the vehicle, as well as to its gross weight or registered weight. The answer to this inquiry is to be found in the regulations issued by the Division of Motor Vehicles, in cooperation with the State Corporation Commission, pursuant to the authority granted in § 46.1-339(f). Paragraph 6 of the "Permit Requirement" section of the regulations states:

"The Overload Permit applies to the registered gross weight of a power unit, the maximum allowable axle weights of each vehicle in the combination, or both. However, in no case shall the permit allow a vehicle or combination of vehicles to exceed a gross weight of 80,000 pounds. Overload permits will not be issued to vehicles which have a registered gross weight in excess of 76,000 pounds, or less than 7,500 pounds." ²

Accordingly, I answer your first inquiry in the affirmative.

Your second inquiry is as follows:

"If an owner of a three axle vehicle, with a distance of 19 feet between the extremes of the front and rear axles, with a legal gross weight of 50,000 pounds purchases an overload permit for 5% at a cost of $200, permitting a gross weight of 52,500 pounds, and thereafter accidentally receives a load causing a total weight of 54,700 pounds, how much overweight is the said vehicle?"

It appears that § 46.1-339(f), passed in 1982, was an effort by the General Assembly to end the State Police practice of permitting weight tolerances on all vehicles. ³ Thus, the permit provisions are intended as a statutorily authorized procedure by which an owner might lawfully obtain an extension or increase of the vehicle's registered weight limitations. As stated in the last sentence of § 46.1-339(f), the General Assembly provided that "[e]xcept as provided in this subsection, no weights in excess of those authorized by law shall be tolerated."

It is my opinion, therefore, that the legislature intended to permit an actual increase in the permissible weights. The legislature chose to use the language "extension of its registered weight limitations" in describing the effect of an overload permit in § 46.1-339(f). In my opinion such language contemplates more than a mere tolerance.

Thus, in your example, the permissible weight of this vehicle was increased from
50,000 pounds to 52,500 pounds. Therefore, the vehicle was 2,200 pounds overweight. As indicated in footnotes 2 and 4, however, this change does not supersede federal law prescribing weight limits for federal interstate highways.

1Section 46.1-339(f) provides that: "The owner of any vehicle registered to carry no more than 76,000 pounds gross weight, 20,000 pounds for a single axle, and 34,000 pounds for a tandem axle may obtain an extension of its registered weight limitations by purchasing an overload permit for such vehicle. Such permit shall not authorize any extension of the limitations provided in subsection (d1) for interstate highways, nor shall gross weight in excess of 80,000 pounds be allowed for any vehicle, whether registered in-state or out-of-state, except as provided in § 46.1-343. Such permit shall be purchased annually at the time the vehicle is registered, at the following fee:

<table>
<thead>
<tr>
<th>Percentage overload permitted</th>
<th>Fee for permit</th>
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<tbody>
<tr>
<td>1%</td>
<td>$ 35</td>
</tr>
<tr>
<td>2%</td>
<td>75</td>
</tr>
<tr>
<td>3%</td>
<td>115</td>
</tr>
<tr>
<td>4%</td>
<td>160</td>
</tr>
<tr>
<td>5%</td>
<td>200</td>
</tr>
</tbody>
</table>

The Commissioner [of the Division of Motor Vehicles], in cooperation with the State Corporation Commission, shall make the permit available to vehicles registered outside the Commonwealth, under the same conditions and restrictions which are applicable to vehicles registered within the Commonwealth. Any out-of-state vehicle which applies for such permit will be treated as if its registered weight is below the levels set by this subsection. The Commissioner shall promulgate regulations governing such permits in cooperation with the Commission. Except as provided in this subsection, no weights in excess of those authorized by law shall be tolerated."

2Note that the permits do not apply to extend the weight limitations, including permissible axle weights, on Federal Interstate Highways. Paragraph 7 of the regulations provides that: "No vehicle or combination of vehicles is presently authorized to travel upon a Federal Interstate Highway with a single axle weight in excess of 20,000 pounds, a tandem axle weight in excess of 34,000 pounds, or a gross weight in excess of 80,000 pounds or in excess of the federal bridge formula as shown on the chart included in these regulations. Overload permits do not allow vehicles to exceed those federal limitations, which remain in effect until modified by the proper authorities."

3Prior to 1982 (when § 46.1-339(f) was enacted), it was the practice of the Department of State Police to allow a 5% tolerance in weighing all vehicles. See 1969-1970 Report of the Attorney General at 202. Under that policy a vehicle which exceeded the weight limitations by less than 5% was considered in compliance and no citation was issued. However, if the vehicle exceeded the weight limitations by more than 5%, the vehicle was cited as overweight, and it was considered overweight by the difference between its actual weight and the weight permitted by statute. The tolerance, once exceeded, had no bearing on the determination of how much the vehicle was overweight. The practice was discontinued in 1982, resulting in strict application of the statutory weight limits, absent a percentage increase as permitted in § 46.1-339(f).

4Note that on a Federal Interstate Highway, where the permit does not have the effect of increasing the weight limits provided by federal law, the vehicle in your example would be overweight by the full 4,700 pounds. See supra note 2.

MOTOR VEHICLES. WIDTH EXEMPTION IN § 46.1-332 APPLIES TO TEN-FOOT WIDE HAY TRUCK.
You have asked whether the provisions of § 46.1-332 of the Code of Virginia "permit the transporting of 10 ft. wide loads of hay on the public highway."

Section 46.1-328 sets maximum width dimensions for vehicles (including any load carried by the vehicle) operated on public highways. Generally, vehicles are not to exceed 96 inches in width. Section 46.1-328(a)(3). The Code does provide a number of exceptions, however. See §§ 46.1-328 and 46.1-332. Pertinent to your question, § 46.1-332 exempts farm machinery from the 96-inch limitation if it is "temporarily propelled, hauled, transported or moved upon the highway...by a farmer in the ordinary course of business..." There are no width restrictions stated for such vehicles; however, the farm machinery must be in "temporary" use on the highways and must be equipped with safety lights if it exceeds the dimensions specified in § 46.1-328. Assuming the vehicle you describe meets these requirements, it is my opinion that a 10-ft. wide hay-carrying vehicle falls within the § 46.1-332 exemption.

NOTARIES. DISQUALIFICATION FROM ACTING. SECTION 47.1-30.

You have asked whether a notary would be violating § 47.1-30 of the Code of Virginia if she notarizes documents signed by her husband as president of the company which employs her as a bookkeeper.

Section 47.1-30 provides, in pertinent part:

"No notary shall perform any notarial act with respect to any document or writing to which the notary or his spouse shall be a party, or in which either of them shall have a direct beneficial interest."

Two questions must be answered to determine if there is a violation of § 47.1-30 in this case: First, whether the spouse is a "party" to the writing, and if not, second, whether either spouse has a "direct beneficial interest" in the writing.

Ordinarily, the president of a corporation is not personally bound by any writing he signs in his representative capacity. The corporation is bound by any such writing executed within the authority of the president. The corporation would have to sue in its corporate name to enforce any rights derived from such a writing. Starring v. Kemp, 167 Va. 429, 189 S.E. 174 (1936), 190 S.E. 163 (1937); Stewart & Palmer v. Thornton and als., 75 Va. 215 (1881). Therefore, the "party" to any writing, as contemplated by § 47.1-30, would be the corporation of which the husband is president. The president signs the writing as the agent through which the corporation is acting. Neff Trailer Sales v. Dellinger, 221 Va. 367, 269 S.E.2d 386 (1980). I am of the opinion that the "party" to writings within the ambit of § 47.1-30 is the signatory which is bound by the writing, not the agent.

I next turn to the question of "direct beneficial interest." The term is not defined in § 47.1-30, nor elsewhere in the Code. Standing alone, the phrase is ambiguous and,
therefore, subject to interpretation. The primary object in the interpretation of a statute is to give effect to the legislative intent behind its enactment. *Bott v. Hampton Roads San. Comm.*, 190 Va. 775, 783, 58 S.E.2d 306, 309 (1950). The manifest intent of the General Assembly in enacting § 47.1-30 was to prevent a notary from taking an acknowledgment with respect to a document when the notary has an interest in the document or its operation. In interpreting the phrase "direct beneficial interest," therefore, it is proper to rely on judicial decisions in cases pertaining to the disqualification of notaries. *Hannabass v. Ryan*, 164 Va. 519, 180 S.E. 416 (1935).

In Virginia, notaries have been disqualified for being the grantee of a deed, or the trustee of a deed of trust. On the other hand, the competence of a notary was affirmed in cases when the notary was an employee of the company executing the document, received token compensation for serving on the board of directors of an eleemosynary institution and the document secured a debt running to the institution, and a partner in an automobile sales firm who acknowledged the seller's signature.

Neither a stockholder nor a corporate officer is disqualified from acting as a notary with respect to corporate documents if he is not otherwise interested in the transaction. See § 55-121.

The guidelines provided by the above cases and rules of statutory construction indicate that the legislature intended a "direct beneficial interest," as used in § 47.1-30, to be profit, value, worth, advantage or use resulting from a transaction or derived from a writing that is certain. This construction excludes the indirect interest of employees, corporate officers and stockholders when the primary beneficiary of the transaction is the employer or corporation.

In the situation posited by you, both the notary and her husband are employees of the corporation, the husband being a corporate officer. While both may benefit from the documents or writings to which the company is a party, their interests are not a "direct beneficial interest," as contemplated by § 47.1-30. The notary or her husband, however, may have a "direct beneficial interest" in any documents directly related to either's employment status, compensation or working conditions. For example, the husband's salary may be dependent upon achievement of certain factors of which the document is evidence. In those circumstances, the notary would be disqualified under § 47.1-30.

I am, therefore, of the opinion that the notary may perform notarial acts with respect to writings signed by her husband in his representative capacity as president of the corporation, subject to the exceptions above discussed.

7 *Bird v. Newcomb*, 170 Va. 208, 216, 196 S.E. 605, 608 (1938) (defining benefit as used in will).

PHYSICIANS. DISPENSING OF MEDICATIONS TO OWN PATIENTS NOT UNPROFESSIONAL CONDUCT PROVIDING SALE NOT FOR SUPPLEMENTATION OF INCOME NOR FOR OWN CONVENIENCE.

June 11, 1985

The Honorable Warren G. Stambaugh
Member, House of Delegates

You ask whether § 54-317(12) of the Code of Virginia prohibits a physician who is not a registered pharmacist from dispensing medications to his own patients, solely for the convenience of those patients, and at a price which consists of the actual cost of the drug to the physician and an additional two or three dollar handling fee to cover the physician's overhead costs in providing such a service.

Section 54-317 provides, in pertinent part, as follows:

"Any practitioner of medicine, osteopathy, chiropractic, podiatry, physical therapy or clinical psychology or any physical therapy assistant shall be considered guilty of unprofessional conduct if he:

* * *

(12) Being a practitioner of the healing arts who may lawfully dispense, administer, or prescribe, medicines or drugs, and not being the holder of a certificate of registration to practice pharmacy, engages in selling medicine, drugs, eyeglasses, or medical appliances or devices to persons who are not his own patients, or sells such articles to his own patients either for his own convenience, or for the purpose of supplementing his income; provided, however, that the dispensing of contact lenses by a practitioner to his patients shall not be deemed to be for the practitioner's own convenience or for the purpose of supplementing his income...." (Emphasis added.)

A physician who violates § 54-317 is subject to professional discipline, including the revocation of his license, by the Board of Medicine. See § 54-316; 1982-1983 Report of the Attorney General at 269.

The dispensing of controlled substances in Virginia is regulated by the provisions of The Drug Control Act, § 54-524.1 et seq. That Act specifically addresses physicians supplying medications for patients at § 54-524.53, which states, in pertinent part, as follows:

"This chapter shall not be construed to interfere with any legally qualified practitioner of medicine...who is not the proprietor of a store for the dispensing or retailing of drugs, or who is not in the employ of such a proprietor, in the compounding of his own prescriptions or the purchase and possession of such drugs and medicines as he may require, or to prevent him from administering or supplying to his patients such medicines as he may deem proper, or from making a charge for such medicines as are not sold to his patients for his own convenience or for the
purpose of supplementing his income...provided that nothing herein shall be construed to exempt any such person from the registration requirements of §§ 54-524.47:2 or 54-524.47:3 or the record requirement of § 54-524.56."

It is apparent that the General Assembly has adopted a comprehensive plan which permits doctors, who are not licensed pharmacists, to dispense and charge for drugs under certain limited conditions.

According to the facts outlined in your letter, the physician in question would be selling the medications solely to his own patients and not for the physician’s convenience. Whether the imposition of a handling fee could be construed to be for the purpose of supplementing the physician’s income will, therefore, determine whether §§ 54-317(12) and 54-524.53 are violated.¹

As I opined in an earlier Opinion regarding the sale of eyeglasses by physicians:

"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 [of Medicine] 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."

1983-1984 Report of the Attorney General at 285, 286. The same reasoning would apply to the sale of medications by a physician. It is, therefore, my opinion that §§ 54-317(12) and 54-524.53 would not be violated by a physician who dispenses medications to his own patients solely for their convenience, unless such dispensing is done for supplementation of his income. The latter is a factual question which would have to be resolved by the Boards of Medicine and Pharmacy on an individual case basis.

¹Section 54-524.53 is not applicable to a physician who is the proprietor or in the employ of a proprietor of a store for the dispensing or retailing of drugs. Section 54-317(12) is not applicable to a physician who is the holder of a certificate of registration to practice pharmacy. Therefore, for purposes of this Opinion, I am assuming that the physician you describe is neither a proprietor, in the employ of such a proprietor, nor the holder of such a certificate.

PHYSICIANS. NERVE CONDUCTION STUDY PORTION OF ELECTROMYOGRAPHY EXAMINATION MAY BE DELEGATED TO NONPHYSICIAN UNDER § 54-274.

May 14, 1985

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

You have asked whether the nerve conduction study portion of an electromyography examination (hereinafter "EMG") is an activity or function that may be lawfully delegated by a physician-electromyographer to personnel subject to supervision as authorized by § 54-274 of the Code of Virginia. Your request noted that I had issued an
earlier Opinion to you dated November 8, 1984, in which I stated that the performance of an EMG constituted the practice of medicine.

In your letter, you have defined EMG as a test consisting of two parts. The first portion of an EMG is the nerve conduction study which is the subject of your inquiry. The nerve conduction study consists of the placement of external electrodes on the skin followed by electrical stimulation of nerves in the tested area. The information you provided in your request and its attachments indicates that physicians usually and customarily delegate the nerve conduction study portion of the EMG to technicians who are supervised by them. The tasks to be performed are clearly articulated by the supervising physician and involve neither the exercise of discretion nor any interpretation of the results by the technician.

Section 54-274 allows physicians to delegate certain tasks to nonphysicians provided certain criteria are met. That section provides, in pertinent part, that:

"Neither the provisions of this chapter nor the provisions of Chapters 28, Article 3 (§ 54-936 et seq.), 13.1 (§ 54-367.1 et seq.), 14 (§ 54-368 et seq.) or Chapter 15.1 (§ 54-524.1 et seq.) of this title shall be construed to prohibit or prevent a physician from delegating to personnel in his personal employ and supervised by him, such activities or functions as are nondiscretionary and do not require the exercise of professional judgment for their performance and which are usually or customarily delegated to such persons by physicians; provided, such activities or functions are authorized by and performed for such physicians; and provided further, that responsibility for such activities or functions is assumed by such physicians."

Based upon the information you provided in your request and its attachments, the statutory test for delegation appears to be met for the first portion of the EMG, that is, the nerve conduction test. You did not indicate whether the technicians are in the personal employ of the supervising physician, but for purposes of this Opinion, I shall assume that they are. You do state, however, that they are supervised by the physician. Your information further makes clear that the nerve conduction study portion of the EMG performed by technicians is nondiscretionary and does not require the exercise of professional judgment for its performance; that it is usually and customarily delegated to such persons by physicians; that it is in fact authorized and performed for said physicians; and that it is the supervising physician who assumes the responsibility for the test.

Accordingly, I am of the opinion that the nerve conduction study portion of the EMG may be delegated by a physician-electromyographer to personnel subject to supervision as authorized by § 54-274.

1 You explain that the second portion of the test is the needle electrode examination. This portion is invasive and involves the insertion of needles into the muscles. You report that "[t]he information obtained during the needle electrode examination of muscles cannot be adequately recorded by a technician for later interpretation by a physician. The physician must perform the test himself in order to make subjective and objective conclusions as electrical potential from muscles appear on an oscilloscope screen. The physician-electromyographer must make a diagnosis based on the results of the nerve conduction and needle electrode examination portions of the electromyogram in conjunction with information obtained from the history, physical examination, and laboratory data."

2 You advise that "[w]hen a technician assists in performing a nerve conduction examination the supervising physician first selects the specific nerves to be stimulated in order to arrive at a correct diagnosis for any given patient. Once the physician has
selected the appropriate nerves, the mechanical aspects of the study can be delegated to a technician. The technician's task involves taking measurements and translating data obtained into a numerical form. The results are photographed or printed out on paper for verification, quality control and permanent storage. Abnormalities detected in the initial studies are used by the physician in planning the remainder of the nerve conduction examination."

For discussion of the employment of medical assistants, see Opinion to the Honorable Frank Medico, Member, House of Delegates, dated January 7, 1985.

I reaffirm my previous Opinion to you that the performance of an EMG, when it consists of both portions of the test, or the needle electrode examination portion alone, constitutes the practice of medicine and may only be performed by a physician.

PLANNING DISTRICT COMMISSIONS. LIMITED TO PLANNING FUNCTIONS; MAY NOT CONTRACT TO ASSUME IMPLEMENTATION FUNCTIONS OF OTHER PUBLIC OR PRIVATE BODIES.

June 6, 1985

The Honorable Geraldine R. Keyes
County Attorney for Accomack County

You have asked whether the Accomack-Northampton Planning District Commission ("PDC") may contract with the Eastern Shore of Virginia Economic Development Commission ("EDC") and the Accomack-Northampton Housing and Redevelopment Corporation ("H&R") to provide staff personnel who, in turn, provide management and technical assistance and staff needs to EDC and H&R.

You do not cite any specific statutory authority for the creation of EDC. The purposes of EDC, as set out by resolutions of the local governing bodies, are "the promotion of the resources and advantages of the two Counties comprising the Eastern Shore of Virginia and securing and promoting of the economic development of said counties." Sections 15.1-10 and 15.1-10.1 of the Code of Virginia enable a locality to make appropriations for certain economic development purposes. Section 15.1-21 authorizes the joint exercise by local political subdivisions of such powers that they individually otherwise have. Furthermore, the localities may create and fund separate legal administrative entities for the exercise of these powers. Section 15.1-21(c) specifies what is to be included in any such agreement. See 1984-1985 Report of the Attorney General at 103. You state that EDC is funded by both counties, and its board of directors is appointed by the governing bodies of the counties. I assume, without deciding, for the purposes of this Opinion, that EDC was created pursuant to valid statutory authority.

You state that H&R is a nonprofit corporation with the following purposes:

"(a) To assist the private housing production sector to deliver adequate housing and related services and facilities to the market in the shortest possible time and at the lowest possible cost.

(b) To address housing needs which are not being met by the private sector.

(c) To develop an effective partnership involving close intergovernmental collaboration, official and voluntary efforts, and participation of individuals and organizations, appropriate for carrying out the foregoing purposes."
(d) To further the economic development of the community and its environs and to promote and assist the growth and development of small business concerns."

H&R is not funded by the counties. Its bylaws specifically authorize it to file applications for, receive and disburse federal, State and private grants.

The agreement contemplates that the staff of PDC would be enlarged by hiring four persons presently employed by H&R, and two other persons. The executive director of PDC would also become the executive director of H&R. PDC would, thereafter, provide management and technical assistance to the board of directors of the other two entities. The contract contemplates PDC providing:

1. All staff personnel to manage the operations of the other entities.
2. Current general marketing data.
3. Current data on available development sites.
4. An aggressive promotional program to develop an active prospect search effort.
5. Research and technical assistance.
6. Liaison with private and government industrial development officials.
7. Assistance in hosting prospective industrial development clients.
8. Analysis of the area's economy.

Planning district commissions are public bodies established pursuant to the Virginia Area Development Act, §§ 15.1-1400 through 15.1-1452. These commissions are creations of the legislature, not possessing inherent or common law powers. Statutes relating to such public bodies are interpreted strictly against the body. Any power provided to a commission, therefore, must be conferred expressly or by necessary implication. 1977-1978 Report of the Attorney General at 304. Section 15.1-1404 provides, in pertinent part:

"(b) Without in any manner limiting or restricting the general powers conferred by this chapter, the planning district commission shall have power:

* * *

(4) To make and enter into all contracts or agreements, as it may determine, which are necessary or incidental to the performance of its duties and to the execution of the powers granted under this chapter."

Section 15.1-1405(a) provides, in pertinent part:

"It shall be the purpose of the planning district commission to promote the orderly and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting governmental subdivisions to plan for the future. It shall not be the duty of the commission to perform the functions necessary to implement the plans and policies established by it or to furnish governmental services to the district." (Emphasis added.)

Your inquiry, therefore, requires the determination of whether the contemplated agreement is prohibited by the limitation of PDC activities to planning related functions. In other words, are the functions to be assumed by PDC authorized "planning,"
as opposed to prohibited "implementation"?

Prior Opinions of this Office provide examples of activities found to be outside the authorized scope of a commission's planning function. Prohibited activities include the creation of corporations to perform service functions,¹ to administer grants,² and to perform industrial development activities such as advertising the advantages of an area and negotiating agreements with business or industries.³ Furthermore, in the context of conflict of interests, it was found that a planning commission, by its nature and function, is an advisory agency. Reports of the Attorney General: 1981-1982 at 407; 1974-1975 at 562.

In your particular situation, a review of the purposes of EDC, H&R and the model contract establishes that some of the staff and management functions to be assumed by PDC clearly go beyond planning and into implementation or the providing of services.⁴ A structural analysis of the resulting entities supports this conclusion. The executive director of PDC will become the executive director of H&R. PDC will absorb four H&R staff members. The model contract states that PDC would "provide all staff personnel to manage the operation" of the other entity. It is difficult to see how the distinction between the planning and implementation stages of community development could be maintained in such circumstances.

In consideration of the foregoing, it is my opinion that the contemplated agreement requires PDC to assume nonplanning functions that are prohibited by § 15.1-1405(a). PDC could contract with EDC and H&R to assume those entities' planning functions. See § 15.1-1404(b)(4). The model contract, however, contemplates activities well outside the accepted scope of planning activities. Accordingly, I am of the opinion that the proposed contract with the two entities to provide management and technical assistance goes beyond the authority conferred upon PDC by the Virginia Area Development Act.

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³Id. at 308.
⁴For example, an aggressive promotional program to develop an active prospect search effort.

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PROCESS. POSTING. MAILING COMPLETED APPLICATION FOR WARRANT IN DEBT DOES NOT SATISFY MAILING REQUIREMENT OF § 8.01-296(2)(b).

July 11, 1984

The Honorable Edgar L. Turlington, Jr.
Judge, General District Court for the City of Richmond

This is in reply to your inquiry concerning the proper method of satisfying the mailing requirement of § 8.01-296(2)(b) of the Code of Virginia prior to obtaining a default judgment.

Section 8.01-296 establishes requirements for service of process upon natural persons. Section 8.01-296(2)(b) provides that where substituted service cannot be made by delivery to a responsible person at the defendant's usual place of abode, service may be effected by posting a copy of the process at the defendant's front door, "provided that
not less than ten days before judgment by default may be entered, the party causing
service mails to the party served a copy of the pleading and thereafter files in the office
of the clerk of the court a certificate of such mailing...." (Emphasis added.)

Your particular question concerns situations in which persons seek to initiate a civil
proceeding in a general district court by obtaining a civil warrant. See § 16.1-79. You
have informed me that in your court a civil warrant is typically obtained by submitting to
the clerk a preprinted form entitled "Application for Warrant in Debt or in Detinue." Upon receipt of a properly completed application, the clerk issues the warrant to an
officer for service on the defendant.

With this background, you have asked whether a party may comply with the mailing
requirement of § 8.01-296(2)(b) by mailing the defendant a copy of the preprinted
application or whether the party must mail a copy of the actual warrant as issued by the
clerk. Proper answer to your question requires consideration of the purpose of the
mailing requirement and further analysis of the procedure used in your court.

The purpose of the mailing requirement is to provide a reasonable, alternative
means of apprising an interested party of the pendency of the action. It is noteworthy
that the General Assembly required the party to mail a copy of the "pleading" and not a
copy of the "process." Thus, the inquiry is whether the completed application constitutes
a pleading which will fulfill the purpose of the mailing requirement.

"Pleading" is not defined in Title 8.01. I do note that Rule 3:16(a), Rules of
Supreme Court of Virginia, provides that all motions in writing are pleadings. Clearly, a
motion for judgment is a pleading and mailing of it would meet the mailing requirement
of § 8.01-296(2)(b). Section 16.1-81 provides that, in a court not of record, a motion for
judgment shall be in writing and must be signed by the plaintiff or his attorney. It shall
(1) contain a caption identifying the court and the title of the action, (2) include the
names of all parties and the address of each defendant, (3) clearly inform the defendant
of the true nature of the claim asserted, and (4) notify the defendant of the day on which
such motion shall be made. See § 16.1-81.

An examination of the preprinted application customarily used in your court
discloses that it closely resembles the form of a warrant, and it (1) identifies the court
and its address, (2) lists the names of all parties and their addresses, and (3) provides for
informing the defendant of the true nature of the claim asserted. You further inform me
that the party filing the application typically fills in the return date, that is, the date on
which the warrant is to be returned and the case tried, and that the court routinely
honors this date.

Based upon the foregoing analysis and assuming adherence to the understanding
pertaining to return dates, it is apparent that the completed application for a warrant
contains all of the information which § 16.1-81 states must be included in a motion for
judgment. Accordingly, I am of the opinion that a properly completed application on the
form used in your court, including designation of the return date, is a pleading for
purposes of § 8.01-296(2)(b). It is, in effect, a motion; it is obviously in writing; and, it
plainly apprises interested parties of the pendency of an action against them and provides
them with sufficient information to be able intelligently to respond.

Therefore, I believe that simultaneous mailing of the properly completed
application to the defendant will permit the party initiating the action to certify to the
clerk compliance with the mailing requirement of § 8.01-296(2)(b).

1 You note that by simultaneously mailing a copy of the application to the defendant,
the party is able to certify to the clerk the mailing at the same time the application is filed. This approach, if it meets the requirements of § 8.01-296(2)(b), eliminates the need for the clerk to mail back a copy of the completed warrant and then have the party mail that document to the defendant. As you note, when one considers that your court handled over 155,000 civil cases in 1983, the savings in mailing, paper and effort is considerable.

In Greene v. Lindsey, 456 U.S. 444, 449 (1982), the Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis in original.)

PROFESSIONS AND OCCUPATIONS. DENTISTRY. ACCEPTANCE BY DENTIST OF PAYMENT FROM INSURANCE CARRIER OF 80 PERCENT OF NORMAL FEE DOES NOT VIOLATE LAWS OR REGULATIONS APPLICABLE TO PRACTICE OF DENTISTRY IN ABSENCE OF FRAUD OR MISREPRESENTATION IN OBTAINING SAID FEE FROM INSURANCE CARRIER.

July 9, 1984

The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether a licensed dentist in Virginia would violate any law or regulation applicable to the practice of dentistry in Virginia by entering into a contract with a business organization to provide dental services to the employees of that business and then agreeing with the business and its health insurance carrier as follows:

The dentist will bill for services provided at his normal rate but will have an agreement and understanding with the business and its health insurance carrier that the dentist will accept, in full satisfaction of his charges, a sum equal to approximately eighty percent (80%) of the total amount of the billing to the patient if payment is made by the insurance carrier for the employer.

The limited statement of facts provided with your inquiry does not give rise to a question under the criminal law of the Commonwealth. The only statute which may be relevant is § 54-187 of the Code of Virginia which sets forth the grounds upon which the Board of Dentistry may take disciplinary action against a dentist. Section 54-187(4) states the following ground:

"Any unprofessional conduct, or any unprofessional conduct likely to defraud or to deceive the public...."

In furtherance of this statutory provision, the Board of Dentistry has promulgated Regulation 6.A., which defines unprofessional conduct to include the following:

"1. Fraudulently obtaining, attempting to obtain or cooperating with others in obtaining payment for services."

Such conduct is considered to be unprofessional within the meaning of § 54-187(4) and as such, may result in the imposition of a disciplinary sanction.

As you have stated the facts, the health insurance carrier and the business will either have agreed to, or have knowledge of, the arrangement by which the dentist proposes to submit a bill to the insurance carrier for his normal fee and, if paid by the
insurance carrier, agrees to accept 80 percent of his usual fee in full satisfaction. This, alone, does not indicate any fraud by the dentist himself or in the cooperating with others in obtaining said payment for services. Accordingly, subject to the limitations expressed in this Opinion, I conclude that the agreement set forth above would not violate any law or regulation applicable to the practice of dentistry.

The absence of additional facts makes analysis of the question difficult. Accordingly, I must note that my conclusion is limited to the facts specified in your request.

PROFESSIONS AND OCCUPATIONS. HEALTH REGULATORY BOARDS. DIRECTOR OF DEPARTMENT OF HEALTH REGULATORY BOARDS AUTHORIZED TO EMPLOY ALL INVESTIGATIVE PERSONNEL WITHIN AGENCY, NOTWITHSTANDING ANY PROVISION OF LAW TO CONTRARY.

July 9, 1984

The Honorable Joseph L. Fisher
Secretary of Human Resources

You have asked for my opinion concerning the proper interpretation of two bills enacted by the 1984 Session of the General Assembly and signed into law by the Governor.

Senate Bill 266, approved by the Governor as Ch. 704 on April 9, 1984, mandates the Board of Funeral Directors and Embalmers (the "Board") to hire a licensed funeral director to inspect funeral homes. That bill amends existing § 54-260.69, which currently confers discretionary authority upon the Board to make such an appointment. On the following day, however, after the Governor had signed the Senate bill, he approved and signed House Bill 681 as Ch. 744. That latter bill confers upon the agency administrator of each executive branch agency the authority to employ such personnel as may be necessary to carry out the responsibilities of the agency.

The "executive branch agency" referred to in H.B. 681 would, in this instance, be the Department of Health Regulatory Boards ("DHRB"). The Board is a part of DHRB. The agency administrator, the director, is appointed by the Governor and not by the DHRB board.

It is significant that in a prior Opinion addressed to the Honorable Herbert S. Small, President, Board of Funeral Directors and Embalmers, dated September 19, 1983, I concluded that the discretionary authority conferred upon the Board by § 54-260.69 and similar discretionary authority upon the Director by § 54-955(E) must be construed together. Thereby, both the Board and the Director are authorized to appoint investigators. In that Opinion, I employed the well-recognized rule of construction that statutes purporting to relate to the same subject are read in pari materia in order to give effect to both. That rule of construction is employed when two or more statutes can be reconciled. For example, 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. See Southern Railway Co. v. Commonwealth, 124 Va. 56, 56; 97 S.E. 343, 349 (1919). I do not believe, however, that the current situation lends itself to a mutual accommodation.

By conferring appointive authority for certain investigative personnel within DHRB
upon both the Director of DHRB and the Board, H.B. 681 and S.B. 266 are in direct conflict with each other. The bills cannot be reconciled because they are mutually exclusive: S.B. 266 reenacts § 54-260.59 so as to mandate the Board, a component part of DHRB, to appoint an inspector for the Board, while newly enacted § 2.1-20.01 in H.B. 681, signed into law after S.B. 266, has the effect of providing that, notwithstanding any other provision of law to the contrary, all personnel within DHRB are to be appointed by its Director.

It is a well-settled rule of statutory construction that when two bills enacted during the same session of the legislature are in irreconcilable conflict, the last approved statute must prevail. See Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938). See also 1980-1981 Report of the Attorney General at 329; 1973-1974 Report of the Attorney General at 220. Moreover, in this case, the General Assembly provided in the House Bill, which happened to be the last signed bill, that its provisions were effective "notwithstanding any other provision of the law to the contrary...."

Accordingly, I am of the opinion that H.B. 681, which was approved by the Governor on April 10, 1984, takes precedence over S.B. 266, which was approved on April 9, 1984. Thus, the appointive authority for all investigative personnel within DHRB rests with its Director, and the Board is without authority to make any such appointment.

As a practical matter, in light of the fact that the General Assembly approved two different bills on the same subject, the Director of DHRB should solicit the views and recommendations of the Board and give due consideration to the professional qualifications previously required by the Board in employing inspectors knowledgeable of the funeral industry to inspect funeral home practices.

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1Senate Bill 266 reads, in pertinent part, as follows: "There shall be appointed by the Board agents whose title shall be 'Inspector of the Board of Funeral Directors and Embalmers of the State of Virginia,' and no person shall be eligible for appointment to such office unless he or she shall, at said time, be licensed under this chapter in the Commonwealth of Virginia and unless prior to the time of such appointment he has had not less than five consecutive years' experience as such a licensee. All inspectors shall receive such compensation as the Board may determine. Inspectors shall hold office during the pleasure of the Board which shall determine what their duties shall be...." (Emphasis added.)

2House Bill 681 adds a new § 2.1-20.01 to the Code as follows: "Notwithstanding any other provision of law to the contrary, the agency administrator of each executive branch agency, except those that by law are appointed by their respective boards, shall employ such personnel as may be necessary for the proper performance of all responsibilities of their agency subject to Ch. 10 of Title 2.1 of this Code and within the limits of appropriations made therefor by law." (Emphasis added.)

3Section 54-950.1 states as follows: "There is hereby created, within the executive branch, a Department of Health Regulatory Boards, responsible to the Secretary of Human Resources."

4Section 54-950.2 states as follows: "The following boards are hereby transferred to and continued within the Department [of DHRB]...Virginia State Board of Funeral Directors and Embalmers...."

5See § 54-952.
You have asked whether a hospital or other health care institution in Virginia would be exempt from the reporting requirements of §§ 54-317.3 and 54-325.1 of the Code of Virginia if the hospital or health care institution receives federal funds, regardless of whether such funds are related to the specific professional who is a patient therein.

Both §§ 54-317.3 and 54-325.1 require practitioners of the healing arts and hospitals or health care institutions to report treatment of licensed health care practitioners for alcohol or drug abuse, or those in need of such treatment, to their respective licensing boards. Each statute, however, contains an exemption if the reporting would violate specified federal laws. The exclusions are virtually identical in both statutes and provide that

"[m]edical records or information learned or maintained in connection with an alcohol or drug abuse prevention function which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall be exempt from the reporting requirements of this section to the extent that such reporting is in violation of 21 U.S.C. § 1175(a), 42 U.S.C. § 4582(a), or regulations promulgated thereunder."

Sections 54-317.3(C) and 54-325.1(D) (omitting the word "abuse").

Sections 21 U.S.C. § 1175(a) and 42 U.S.C. § 4582(a) have been transferred to 42 U.S.C. § 290ee-3 and 42 U.S.C. § 290dd-3, respectively. Those sections provide for confidentiality of patient records maintained in connection with any drug or alcohol abuse treatment or prevention function "conducted, regulated, or directly or indirectly assisted by any department or agency of the United States...."

The federal regulations promulgated under these statutes provide that the confidentiality requirements apply to any alcohol or drug abuse prevention function:

1. Which is conducted in whole or in part, whether directly or by grant, contract, or otherwise, by any department or agency of the United States,

2. For the lawful conduct of which in whole or part any license, registration, application, or other authorization is required to be granted or approved by any department or agency of the United States,

3. Which is assisted by funds supplied by any department or agency of the United States, whether directly through a grant, contract, or otherwise, or indirectly by funds supplied to a state or local government unit through the medium of contracts, grants of any description, general or special revenue sharing, or otherwise, or

4. Which is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program conducting such functions, or by a way of a tax-exempt status for such program.

See 42 C.F.R. § 2.12(a). Accordingly, any hospital in the Commonwealth which conducts a prevention program which falls into one of the above categories would be exempt from the mandatory reporting requirements of §§ 54-317.3 and 54-325.1. Those hospitals having programs which do not fall within one of the categories are not exempt.
Clearly, it is not necessary that the federal aid be directly related to the specific professional who is being treated. Both the federal statutes and the regulations require the confidentiality of records even when federal intervention has been less than direct: 42 U.S.C. § 290ee-3 refers to functions "directly or indirectly assisted," and 42 C.F.R. § 2.12(a) refers to funds supplied "directly...or otherwise...." Two examples of indirect assistance are: (1) a patient receiving direct federal financial aid for some reason not associated with treatment, which he uses to pay for his alcohol or drug abuse treatment at a facility; and (2) another unit (e.g., intensive care) in the facility receiving direct federal funding, thereby arguably benefiting the facility as a whole and indirectly benefiting the substance abuse program.

Although I am unaware of any cases setting the limits on indirect assistance under the federal provisions in question, Grove City College v. Bell, 104 S.Ct. 1211 (1984), represents an analogy. In that case, the Supreme Court of the United States held federal financial aid given directly to students constituted "receiving Federal financial assistance" by Grove City College, thereby subjecting the college to the requirements of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 375, 20 U.S.C. § 1681(a). The Court further held, however, that federal financial assistance grants to some of the college's students did not require all programs of the college to comply with Title IX. Compliance with Title IX was required only for the student financial aid program.

Applying the rationale of Grove City College to your inquiry leads me to the conclusion that the receipt of federal financial assistance (e.g., medicare) to pay for substance abuse treatment by any patient will be considered indirect federal assistance to the substance abuse function. Receipt of federal assistance by a patient in another unit at the facility (e.g., intensive care) will not be considered indirect federal assistance to the substance abuse function. Accordingly, in the former instance the facility would be exempt from the reporting provisions of §§ 54-317.3 and 54-325.1, while in the latter instance the facility would not be exempt.

PROFESSIONS AND OCCUPATIONS. USE OF LABEL "CERTIFIED HEARING AID AUDIOLOGIST" MISLEADING UNLESS USER LICENSED AUDIOLOGIST.

January 16, 1985

The Honorable J. Robert Dobyns
Member, House of Delegates

You have asked my opinion whether a Virginia licensed hearing aid dealer and fitter who displays a sign in his office describing himself as a "Certified Hearing Aid Audiologist" is either engaged in the unauthorized practice of audiology or has violated the regulations governing the practice of the profession for which he does have a license.

You indicate in your letter that the term "Certified Hearing Aid Audiologist" has for some time been a registered mark of the National Hearing Aid Society. You further indicate that on October 26, 1984, the Trademark Trial and Appeal Board canceled registration of the mark "Certified Hearing Aid Audiologist" in the case of American Speech-Language-Hearing Association v. National Hearing Aid Society (Cancellation No. 10775), because the mark tended to deceive the public.

Section 54-83.1:5(e) of the Code of Virginia defines an audiologist for purposes of Virginia licensure by the Board of Examiners in Audiology and Speech Pathology as follows:
"Audiologist' shall mean any person who examines, tests, evaluates, treats or counsels, for which a fee may be charged, persons having or suspected of having disorders or conditions affecting hearing and communicative disorders related thereto or who assists persons in the perception of sound and who is not authorized or permitted by some other licensure law of this State to perform any such services."

Hearing aid dealers and fitters are regulated by the Virginia Board of Hearing Aid Dealers and Fitters. See § 54-524.110 et seq. That Board's Regulation 3.10.1.5, effective September 26, 1984, provides as a basis for discipline of a licensee:

"Representing that the service or advice of a person licensed to practice medicine or audiology will be used in the selection, fitting, adjustment, maintenance, or repair of hearing aids when that is not true; or using the words 'Physician,' 'Audiologist,' 'Clinic,' 'Hearing Service,' 'Hearing Center,' or similar description of the services and products provided when such use is not accurate."

In my opinion, use of the term "Certified Hearing Aid Audiologist," standing alone without any explanation, implies that a hearing aid dealer or fitter is also licensed as an audiologist. Use of that term, therefore, by a hearing aid dealer or fitter who is not also a licensed audiologist would constitute ground for discipline under the regulation quoted above.

Section 54-1.20 provides, in pertinent part:

"A. It shall be unlawful for any person, partnership, corporation or other entity to engage in any of the following acts:

* * *

2. Making use of any designation provided by law or rule to denote a standard of professional or occupational competence without being duly certified or licensed by the appropriate regulatory board.

3. Making use of any title, words, letters or abbreviations which may reasonably be confused with a designation provided by law or rule to denote a standard of professional or occupational competence without being duly certified or licensed by the appropriate regulatory board."

The term "audiologist," used in the Code, applies to a profession with standards of competence different from the standards for hearing aid dealers and fitters. Use of the term "Certified Hearing Aid Audiologist" by a hearing aid dealer or fitter suggests that the hearing aid dealer or fitter is also an audiologist; at the very least, use of that term "may reasonably be confused" with the term "audiologist" as defined in the Code. Accordingly, in my opinion use of the term "Certified Hearing Aid Audiologist," standing alone without explanation, by a hearing aid dealer or fitter who is not a licensed audiologist would be an unlawful act under § 54-1.20.

PROPERTY AND CONVEYANCES. LANDLORD AND TENANT. SECTION 55-233 DOES NOT AUTHORIZE SALE OF TENANT'S PERSONALITY FOR RENT NOT YET REDUCED TO JUDGMENT.

March 21, 1985

The Honorable Archibald M. Aiken, Jr.
Judge, Loudoun County General District Court
This is in reply to your request for my opinion on two questions relating to the distress for rent procedures outlined in the Code of Virginia.

Your first inquiry is whether § 55-233 of the Code of Virginia authorizes the sheriff to sell personalty of a tenant under a distraint warrant obtained by the landlord for so much rent "as...to become due," as well as that rent which is already in arrears and which has already been reduced to judgment. This question must be answered in the negative. Section 55-233, to which you make reference, provides that before third parties, other than the landlord, may remove or sell the tenant's goods, which are subject to the landlord's lien, they must first pay any rent in arrears and secure the landlord for any rent to become due. In Re Balistreri, 8 B.R. 703, 705 (E.D. Va. 1981); Kelly v. Worsham, 160 Va. 275, 168 S.E. 338 (1933). This section has no application to the situation you have described, however, because it does not permit a landlord to take a tenant's property to satisfy the landlord's prospective claim for future rent. Rather, the landlord must obtain a judgment for any rent alleged to be due before seeking the sale of a tenant's property. See §§ 8.01-466, 8.01-128 and 55-237.

In view of my response to your first inquiry, it is unnecessary that I respond to your second inquiry whether the landlord under these circumstances must first execute a bond prior to the sale of the tenant's personalty.

PUBLIC OFFICERS. FORMER HOUSING AUTHORITY COMMISSIONER ELIGIBLE FOR CONSIDERATION FOR AUTHORITY LOAN.

March 21, 1985

The Honorable Frederick H. Creekmore
Member, House of Delegates

You ask if a former member of the Chesapeake Housing Authority is ineligible to qualify for an Authority loan by reason of the fact that he is a former member of the Authority. You state that the former member has been disassociated from the Authority for six months.

The powers and duties of housing authority commissioners are controlled by the Housing Authorities Law, §§ 36-1 through 36-55.6 of the Code of Virginia. Article 2 of the Housing Authorities Law is specifically applicable to commissioners and other agents of housing authorities. I am unaware of any provision in the Housing Authorities Law which limits the eligibility of a former commissioner for authority loans.

The Comprehensive Conflict of Interests Act (the "Act"), §§ 2.1-599 through 2.1-634, is also relevant to your inquiry. Section 2.1-607(A) prohibits an officer or employee of any local governmental agency 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. This section prohibits a serving commissioner from receiving a housing authority loan. In my opinion, § 2.1-607(A) does not prohibit a former commissioner from receiving a loan, provided he is otherwise eligible.

The former commissioner should be aware, however, of § 2.1-602, which reads, in part:

"No officer or employee of a state or local governmental agency or a state or local advisory agency shall:

***
(3) Willfully use for his own economic benefit or that of another party confidential information which he has acquired by reason of his public position and which is not available to the public...."

If the former commissioner, in making his present application, is using confidential information acquired while in office or through a present commissioner or Authority staff member, there would be a possible violation of the Act.

The former commissioner should also check any internal procedures or bylaws of the Authority or any other applicable local restrictions which may limit his eligibility for receiving an Authority loan.

In summation, I am unaware of any provision of the Housing Authorities Law or the Act which directly limits the eligibility of a former housing Authority commissioner to receive a loan from the Authority. The law, however, cannot always guard against every concern. In this regard, the former commissioner should, himself, take the appropriate action to insure that public confidence in the Authority is not diminished.

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PUBLIC OFFICERS. INCOMPATIBILITY OF OFFICE. MEMBER OF COUNTY BOARD OF SUPERVISORS MAY NOT BE APPOINTED AS DEPUTY SHERIFF; QUALIFICATION IN SECOND OFFICE VOID PURSUANT TO § 15.1-50.

May 14, 1985

The Honorable Wm. Roscoe Reynolds
Commonwealth's Attorney for Henry County

This is in reply to your request for my opinion whether a member of the Board of Supervisors of Henry County may be appointed as a deputy sheriff.

Article VII, § 6 of the Constitution of Virginia (1971) prohibits the holding of more than one office mentioned in that article at the same time. Local governing bodies and sheriffs are both mentioned in the article.

Section 15.1-50 of the Code of Virginia provides, in pertinent part, as follows:

"No person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, or supervisor — councilman shall hold any other office mentioned in Article VII of the Constitution at the same time...."

Thus, by virtue of § 15.1-50 and of Art. VII, §§ 4, 5 and 6 of the Constitution, a person may not hold office as a member of the governing body of a county, city or town while at the same time serving as sheriff. This proscription applies as well to a sheriff's deputies. See 1979-1980 Report of the Attorney General at 281, 282. Accordingly, your inquiry is answered in the negative.

You ask my opinion also of the effect of a member of the board of supervisors being appointed and qualifying as a deputy sheriff. I take your question to refer to the common law doctrine of incompatibility of public offices, which holds that acceptance of a second such office operates to vacate or surrender the first. See, e.g., Shell, Judge, v. Cousins And Als., 77 Va. 328 (1883). Prior to 1978, § 15.1-50 expressly so provided, but it was amended in that year to change the rule. See Ch. 762, Acts of Assembly of 1978. Section 15.1-50(C) presently reads as follows:
"If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such other office shall be null and void, except as provided above."

A member of a board of supervisors is ineligible for qualification to the office of deputy sheriff, and § 15.1-50(C) renders ineffective any attempt by a supervisor to so qualify. Thus, rather than automatically causing a vacancy in the office of supervisor, the supervisor's qualification as a deputy sheriff instead would be void. See 63A Am. Jur. 2d Public Officers and Employees § 84 (1984).

PUBLIC OFFICERS. MISCONDUCT. REMOVAL UNDER § 24.1-79.1 ET SEQ. USE OF OFFICIAL STATIONERY FOR PERSONAL CORRESPONDENCE.

April 4, 1985

The Honorable Claude W. Anderson
Member, House of Delegates

You have inquired of the "propriety" of individual members of a town council using the town's stationery for correspondence with individuals. You did not advise the type of correspondence involved. In the absence of facts or examples, it is difficult to give a definitive response.

There is no statutory provision which governs your question. It is clear, however, that a public officer or official has a fiduciary relationship with the body of which he is a member, and has a fiduciary duty to the constituents whom he represents. Roanoke School Bd. v. Times-World, 226 Va. 185, 307 S.E.2d 256 (1983).

In the absence of a town ordinance controlling the matter, I believe it would be appropriate for a council member to use town stationery when corresponding with his constituents or others concerning town business. At the opposite end of the spectrum, it would be inappropriate for a council member to use the town stationery for the purpose of promoting his private financial interests.

Whether use of town stationery constitutes "misuse of office" so as to justify removal from office is ultimately a question for the court, pursuant to § 24.1-79.1 et seq. of the Code of Virginia. In this regard, § 24.1-79.5 permits removal of public officers upon a finding of "misuse of office when such...misuse of office has a material adverse effect upon the conduct of such office."

PUBLIC OFFICERS. OATH ADMINISTERED BY NOTARY PUBLIC TO TOWN COUNCIL MEMBER OR MAYOR VALID PURSUANT TO § 15.1-38.

August 23, 1984

The Honorable Edwin B. Baker
Commonwealth's Attorney for Charlotte County

This is in response to your request for my opinion whether oaths administered to past members of the Keysville town council and mayors by notaries public were valid.
You also inquire whether ordinances adopted are valid if the oaths taken by such officers were not valid.

The general law dealing with the qualifying of county, city and town officers is § 15.1-38 of the Code of Virginia. This section states, in pertinent part:

"Every county and district officer elected by the people, every city and town officer, unless otherwise provided by law, shall, on or before the day on which his term of office begins, qualify by taking the oath prescribed by § 49-1 and give the bond, if any, required by law, before the circuit court of the county or city, having jurisdiction in the county, district, town, or city for which he is elected or appointed, or before the clerk of the circuit court of such county or city or before the clerk of the circuit court of such county or city in his office." (Emphasis added.)

Section 49-1 provides the specific oath which must be taken by any officer of the Commonwealth prior to that officer performing official duties. Section 49-3 deals generally with administering oaths to officers. Councilmen and mayors are not specifically mentioned in § 49-3; however, this section states, in part:

"[O]aths to be taken by a person elected or appointed to any other office or post shall, except in cases in which it may be otherwise directed by law, be administered...by the judge of such court or the clerk thereof in vacation or by the Secretary of the Commonwealth." (Emphasis added.)

Section 15.1-829, relating specifically to towns, states, in pertinent part:

"Every person elected a councilman of a town shall, on or before the day on which his term of office begins, qualify by taking and subscribing an oath...and any person elected mayor shall take and subscribe the oath prescribed by law for State officers.

Any such oath of councilmen and mayors may be taken before any officer authorized by law to administer oaths...." (Emphasis added.)

Section 15.1-829 thus provides an exception to §§ 15.1-38 and 49-3, thereby permitting the oaths of councilmen and mayors of towns to be administered by any officer authorized by law to administer oaths. Section 47.1-12 provides that "[e]ach notary shall be empowered to...[ii] administer oaths...."

It is, therefore, my opinion that a notary public may administer the qualifying oath to councilmen and mayors of towns. In view of the foregoing, it is unnecessary to answer your inquiry regarding the validity of ordinances previously adopted.


PUBLIC OFFICERS. TOWN ATTORNEY MAY BE APPOINTED TOWN ZONING ADMINISTRATOR.

October 15, 1984

The Honorable Richard J. Holland
Member, Senate of Virginia
This is in reply to your request for my opinion whether any provision of law prohibits appointment of the town attorney in the Town of Windsor as the town's zoning administrator. I note from the correspondence attached to your letter that the Commonwealth's attorney for Isle of Wight County is of the opinion that the Comprehensive Conflict of Interests Act, § 2.1-599 et seq. of the Code of Virginia, does not apply in the situation presented.1

There is no constitutional provision, nor other statute of which I am aware, that prohibits the appointment you suggest. Moreover, § 15.1-491, relating to permitted provisions in a zoning ordinance, allows, in subsection (d), provision for the "appointment or designation of a zoning administrator who may also hold another office in the county or municipality." (Emphasis added.) In light of the above, your question must be answered in the negative.

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1Each Commonwealth's attorney is charged with the responsibility to render advisory opinions as to whether the facts in a particular case involving a local officer or employee constitute a violation of the Comprehensive Conflict of Interests Act. See § 2.1-632.

REAL ESTATE. VIRGINIA REAL ESTATE TIME-SHARE ACT. LEASE FOR USE OF REAL ESTATE WHICH GIVES OPPORTUNITY FOR OCCUPANCY IN FIVE OR MORE SEPARATED TIME PERIODS CONSTITUTES TIME-SHARE.

June 24, 1985

The Honorable Alan A. Diamonstein
Member, House of Delegates

You ask whether a certain leasing arrangement, marketed in Virginia by a foreign corporation authorized to transact business in Virginia, is a "time-share" or "time-share program" under the Virginia Real Estate Time-Share Act, § 55-360 et seq. of the Code of Virginia, including the amendments thereto which will take effect on July 1, 1985.

Section 55-362 defines a "time-share program" as follows:

"[A]ny arrangement of 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...."

The same section defines "time-share" to mean "a time-share estate or a time-share use...." Further, it defines "time-share use" as follows:

"[A] right to occupy a time-share unit or any of several time-share units during five or more separated time periods over a period of at least five years, including renewal options, not coupled with a freehold estate or an estate for years...."

You describe the leasing agreement about which you inquire as "no more than a standard lease embodying a right to use. Further, it limits the lessee's access to the studio suite and to the resort every other year with no more than 3 weekly stays allowed during its first 6 years." The lease agreement which you enclosed with your inquiry does indeed contain a restriction that the lessee "shall not be entitled to lease the Studio Suite..."
subject to this agreement in excess of three times during the first six years hereof." The lease form does not, however, restrict the term of the lease or limit the number of times the lessee may occupy the studio suite after the first six years. In fact, use of the phrase "first six years" necessarily implies that the lease will be longer than six years and that there will be no restriction on occupancy after the first six years. The complete text of the pertinent article of the lease is shown below.

A time-share use is created when a person obtains the right to occupy a time-share unit or any of several time-share units during five or more separated time periods over a period of at least five years, including renewal of options. I find nothing in your inquiry which indicates that the lease will not create such a right. If the lease agreement limited the term to a period less than five years or restricted the number of uses to fewer than five over the term of the lease, the arrangement would not become a time-share program. Based upon the documents provided with your request, however, I am unable to reach such a conclusion.

Accordingly, in my opinion, the corporation may use the lease form agreement to create a time-share use, and, if so used, the leasing arrangement would constitute a time-share program under the Virginia Real Estate Time-Share Act.

1

"ARTICLE II

TERM. The term of this Lease shall be for ____ (__) years commencing in the year 19__ and ending in the year ____. Beginning in the year ____ and continuing every other calendar year thereafter, GUEST shall lease the Studio Suite during Week No. __________ (____) only as the term "Week" is defined on the reverse side hereof. Guest shall not be entitled to lease the Studio Suite subject to this agreement in excess of three times during the first six years hereof. There are no renewal terms provided for in this lease."

As can be seen, the spaces for the years are left open, thereby permitting use of the form for a period of time in excess of five years.

REAL ESTATE BROKERS. COMMISSIONS. NEITHER FEDERAL NOR STATE LAW AFFECTS CONTRACTUAL ARRANGEMENTS FOR PAYMENT OF COMMISSIONS OR RATE OF SUCH COMMISSIONS.

October 31, 1984

The Honorable Kenneth B. Rollins
Member, House of Delegates

You have asked four questions dealing with real estate brokers and taxation regarding their commissions. I will address them in the order prescribed.

"1. Is there a Federal or State Law defining the period a properly Virginia licensed real estate broker may be paid his commission upon prior agreement between seller and broker providing for payment of commission over a period of months or years following settlement of a sale of Virginia real estate, there being no disagreement between the parties thereto?"

Under Virginia law, brokerage contracts are treated no differently from other contracts. The appropriate period of limitations would apply to legal actions seeking to enforce them. I know of no reason why, if the parties so agree, commission payments
may not be stretched out or deferred over a period of time. The consequences, for purposes of income tax, will be governed by federal law.

"2. Is there a Federal or State law controlling the amount of commission a properly Virginia licensed real estate broker, acting independently of other brokers, may be willingly paid by the owner of Virginia real estate that he sells for that owner after due authorization, assuming no threat or intimidation, whether related to or associated with that owner, further assuming there is no arrangement between them to evade Federal or State taxes on the sale or the commission?"

I know of no law, federal or State, setting real estate commissions.

Questions 3 and 4 relate to reporting for income tax purposes. This Office does not express opinions on the applicability of income tax statutes or regulations to particular factual situations. Such decisions are made on the federal level. The states are bound by the federal decisions. Consequently, the opinions of the attorneys general of the several states serve no valid purpose. Accordingly, I must defer to the Internal Revenue Service or the federal judiciary on these questions.

REAL PROPERTY. CONSERVATION AND SCENIC EASEMENTS APPURTEINANT MUST MEET CERTAIN CRITERIA. DOMINANT AND SERVIENT ESTATES NEED NOT BE CONTIGUOUS, BUT VALIDITY WILL TURN ON FACTS, INCLUDING GEOGRAPHICAL SEPARATION.

September 7, 1984

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

You have asked whether a private conservation organization such as the Nature Conservancy may acquire perpetual and assignable conservation and scenic easements appurtenant over properties near, but not contiguous to, fee properties owned by that organization.

Because your inquiry arises from a rather detailed letter from the Nature Conservancy, some background and clarification are in order.

At common law, easements were of two general types—easements appurtenant and easements in gross. The Supreme Court of Virginia has described these precisely:

"[T]here are two classes of easements. The first is known as a pure easement, or an easement appurtenant, which has both a dominant and a servient estate, and which is capable of being transferred and inherited. Such an easement passes with the land to which it is appurtenant. Scott v. Moore, 98 Va. 668, 675, 37 S.E. 342, 344. [Citation omitted.]

The other class is termed an easement in gross, sometimes called a personal easement, which is not appurtenant to any estate in land, but in which the servitude is imposed upon land with the benefit thereof running to an individual. Such an easement cannot be transferred by the individual to whom it is originally given, nor can it pass by inheritance. Stokes, Inc. v. Matney, 194 Va. 339, 344, 73 S.E.2d 269, 271. [Citation omitted.]

Thus, the distinguishing feature between these two classes of easements is that in
the first there is, and in the second there is not, a dominant tenement. [Citation omitted.]

The courts, in construing language granting an easement, seek to hold that the easement is appurtenant to land, if such can be fairly done. An easement is never presumed to be merely personal, and it will not be held to be in gross, unless it plainly appears that the parties so intended. French v. Williams, 82 Va. 462, 468, 4 S.E. 591. [Citation omitted.]

An easement is appurtenant to land, and therefore not merely personal or gross, 'if it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right..." Smith v. Garbe, 86 Neb. 91, 124 N.W. 921, 923. [Citation omitted.]

Coal Corporation v. Lester, 203 Va. 93, 97, 122 S.E.2d 901, 904 (1961).

Several Virginia statutes have modified the common law with respect to easements in gross. The latter may now be disposed of by deed or will and are thus perpetual under § 55-6 of the Code of Virginia. Legislation has created the Virginia Outdoors Foundation for the purpose of holding scenic and conservation easements in perpetuity. See Ch. 14, Title 10. All public bodies may do so under the Open-Space Land Act. See Ch. 13, Title 10. See also § 15.1-282. To date legislation authorizing private organizations to do so has not been enacted.

Easements appurtenant, as noted above, have always been perpetual and assignable. It must be remembered that scenic easements and conservation easements vary greatly. Scenic easements are generally negative restrictions on use, whereas conservation easements may also impose affirmative obligations to protect land uses or to promote compatible public uses. Powell on Real Property ¶ 414(5) (1981). No effort will be made here to discuss or to compare all of the possible combinations or to evaluate specific provisions.¹

The majority rule at common law is that the dominant and servient estates need not be contiguous for the establishment of a valid easement appurtenant.² One exception is that an easement of right-of-way must have one terminus in the dominant estate. 25 Am.Jur.2d Easements and Licenses § 11 (1966); 76 A.L.R. 597, 600; 2 Thompson on Real Property § 303 (1980); Burby, Real Property 65 (3rd ed. 1965).

Although the Supreme Court of Virginia has not considered the specific issue, from the authorities cited herein, certain criteria for the construction of easements appurtenant can be extracted:

1. The easement over the servient estate must be of benefit to the enjoyment of the dominant estate.

2. The two estates need not be contiguous.

3. The intent of the parties to the easement is relevant, at least as to the question of appurtenance.

I am unable to find judicial guidance regarding the specific geographical separation which is allowable between the dominant and servient properties. Each case apparently will turn upon its facts. Assuming that an easement granted to an organization such as the Nature Conservancy clearly states the intent of the parties to benefit land owned by the Conservancy, inquiry must necessarily be made as to the extent and nature of such benefit. It seems reasonable to conclude that some limits—both geographical and
content—must apply. If they did not, the distinction between an easement in gross and an easement appurtenant would be greatly diminished.

Because Virginia law (see Coal Corporation, supra) presumes that an easement is appurtenant and because the General Assembly has specifically approved only those conservation and scenic easements in gross held by public bodies, it is my view that the courts may be less likely to construe as appurtenant conservation and scenic easements. As the geographical separation between dominant and servient estate increases, so does the likelihood that the easement does not benefit the former. To the extent the expressed intention or effect of the easement becomes more "public" in nature, it is probable that its purpose to benefit the dominant estate will diminish. As the benefit to the dominant land fades, so does the characteristic of "appurtenance" and the probable validity of the easement.

In summary, the law applicable to easements held by private conservation organizations is the same as that which applies to those held by other private organizations and individuals. While an easement appurtenant may be made assignable by its terms and the affected properties need not be contiguous, geographic separation and lack of demonstrable benefit to the dominant estate must be considered in determining whether the easement is appurtenant. Any significant change in the status of easements in Virginia would be appropriately brought about by the General Assembly.

1 Scenic and conservation easements have certain implications under federal and State tax laws. This Opinion does not consider such implications.

2 Covenants or restrictions may, of course, run with land provided they are created by a conveyance establishing sufficient privity of estate between the parties. Powell on Real Property, supra, at 34. This requires common ownership between the dominant and servient properties and is rarely a practical tool for conservation organizations.

RECORDATION. ASSIGNMENTS. MARGINAL NOTATION OF ASSIGNMENT UNDER § 55-66.1 MUST BE SIGNED BY ASSIGNOR OR DULY AUTHORIZED AGENT.

September 24, 1984

The Honorable V. Elwood Mason
Clerk, Circuit Court of King George County

You have been presented for recordation an instrument titled "Assignment of Deed of Trust Note and Beneficial Interest under Deed of Trust" with a request that you make a marginal notation of the assignment under the authority of § 55-66.1 of the Code of Virginia. You have asked three questions concerning this request:

1. Whether you are authorized by § 55-66.1 to make a marginal notation as requested.

2. Whether the instrument is to be treated as a Certificate of Release. (I presume you mean "transfer.")

3. If the answers to the above two questions are answered in the negative, will the instrument be taxed according to § 58-58 of the Code?

Section 55-66.1 states, in part:
"Whenever any debt secured on real estate...has been assigned, transferred or endorsed to another, in whole or in part, by the original payee thereof, such payee, assignee, transferee or endorsee may cause a memorandum or statement of the assignment to such assignee, transferee or endorsee to be entered on the margin of the page in the book where such encumbrance securing the same is recorded, which memorandum or statement shall be signed by the assignor, transferrer or endorser, his duly authorized agent or attorney, and when so assigned and the signature thereto attested by the clerk in whose office such encumbrance is recorded the same shall operate as a notice of such assignment and transfer." (Emphasis added.)

Under § 55-66.1, a marginal notation must be signed by the assignor or his duly authorized agent or attorney with the signature attested by the clerk. The statute does not allow a procedure whereby the clerk makes the notation based upon the directions of an attorney contained in a letter to the clerk. If it is not convenient for the assignors to sign the marginal notation, they can designate a duly authorized agent by executing a power of attorney allowing him to sign on their behalf. See 1957-1958 Report of the Attorney General at 278. In no case, however, may the clerk make the notation without the proper signatures accompanying the notation in the deed book.

In answer to questions 2 and 3, the instrument you have been presented is not a "certificate of transfer." It has been signed by the assignors and the assignee. This instrument is an assignment of a deed of trust note and, as such, is a legal document which rises to the status of a "contract or memorandum...relating to real...property" under the recordation tax provisions of § 58-58.

In contrast, a "certificate" is a document, signed by one party, which is of limited legal significance in that its only purpose is to provide notice of a particular transaction. A certificate does not rise to the level of a contract. Therefore, recordation of a certificate does not trigger a recordation tax. See 1977-1978 Report of the Attorney General at 326.

It is my opinion that the instrument presented to you is not a mere certificate. Rather, it is a contract relating to real estate and, as such, may be subject to taxation under the recordation tax provisions. See Reports of the Attorney General: 1972-1973 at 432, 1961-1962 at 260, and 1957-1958 at 278.

It should be noted, however, that although an instrument may be determined to be a "contract" under § 58-58, it may escape taxation if it qualifies as a supplemental writing under § 58-60. Section 58-60 provides that no tax is imposed upon the recordation of instruments which are supplemental to prior taxed and recorded instruments "when the sole purpose and effect of the supplemental instrument [is]...to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby...." It is my opinion that the sole effect of the instrument presented to you is to modify the parties and that if the recordation tax was paid when the original deed of trust was recorded, this instrument escapes the tax under § 58-60. See 1981-1982 Report of the Attorney General at 366.

RECORDATION. CERTIFICATE OF SATISFACTION. FORM TO BE USED.

November 29, 1984

The Honorable James W. Robinson
Member, House of Delegates

This is in response to your request for my opinion concerning the validity of the
form of a certificate of satisfaction under § 55-66.4:1 of the Code of Virginia. In particular, you inquire whether the form should provide for certification by the clerk that he has actually been presented the cancelled note.

The permissible forms for certificates of satisfaction or certificates of partial satisfaction are provided in § 55-66.4:1.1 The forms provided in § 55-66.4:1 do not specifically require the presentation of a cancelled note. Section 55-66.3 provides, however, that there shall be produced before the clerk either the cancelled note or an affidavit from the creditor attesting that the debt has been satisfied and the note cancelled and delivered to the debtor, or that the note has been lost.2 Section 55-66.3 also provides that the clerk must certify that such note, bond or other evidence of a debt, duly cancelled, or the affidavit was presented to the clerk prior to the recordation of the certificate of satisfaction.

It is clear that prior to a certificate of satisfaction being recorded, the instrument evidencing the debt to be released or satisfied must be produced before the clerk, or an acceptable affidavit must be filed with the certificate of satisfaction. This requirement is mandated in § 55-66.3. See 1983-1984 Report of the Attorney General at 37.

It is, therefore, my opinion that a certificate of satisfaction, which is drawn according to the form prescribed in § 55-66.4:1, is a valid instrument, but it shall not be recorded by the clerk without compliance with the requirements of § 55-66.3. As a practice, most certificates provide a space for the clerk to certify that the original note, duly cancelled, was produced, or an affidavit was filed, when the certificate of satisfaction is presented in order that the clerk record such certificate.

1Section 55-66.4:1 reads, in part: "Any release by a certificate of satisfaction or certificate of partial satisfaction shall be in conformity with §§ 55-66.3, 55-66.3:1 and 55-66.4 and shall conform substantially with the following forms...."

2It is clear under the statute that the note itself need not be presented if the affidavit, in correct form, is presented as an alternative.

RECORDATION. SEPARATE HIGHWAY PLAT BOOK REQUIRED NOTWITHSTANDING PROVISIONS OF § 17-70.1.

February 25, 1985

The Honorable L. Wayne Harper
Clerk, Circuit Court of Rockingham County

You have inquired whether it is necessary to continue using a State highway plat book, as required by § 17-69.1 of the Code of Virginia, when a clerk has elected to record writings by means of a procedural microphotographic process pursuant to § 17-70.1. For the following reasons, I am of the opinion that a separate highway plat book is still required.

Section 17-70.1 permits a clerk to use a microphotographic process to

"accomplish the recording of writings otherwise required by any provision of law to be spread in a book or retained in the circuit court clerk's office, including, but not limited to, the Common Law Order Book, the Chancery Order Book, the Clerk's Order Books, the Will Book and/or Fiduciary Account Book, and the Partnership or Assumed Name Certificate Book." (Emphasis added.)
Section 17-59 places upon the clerk the duty to record "[e]very writing authorized by law to be recorded, with all certificates, plats, schedules or other papers thereto annexed...." Sections 17-60 through 17-67 deal with the recordation of deeds, deeds of trust, liens, wills and other documents authorized by law to be recorded. These Code sections all provide that the documents therein listed "shall be recorded" by the clerk. Section 17-68 deals specifically with the recordation of plats and maps, and provides that these documents "may in the discretion of the clerks...be recorded."

Section 17-69.1 provides that:

"A loose-leaf book known as 'state highway plat book'...shall be installed in the circuit court clerk's office...and all highway plats...shall be filed therein by the clerk; and provided that the clerk shall note on each recorded deed relating to such plats and on the margin of the page of the deed book, wherein such deed is recorded, the numbers of the state highway plat book and page wherein such plats are filed; and provided further that the clerk so filing the plats and so noting the same shall receive a fee of fifty cents for each sheet of such plats...." (Emphasis added.)

This significant change in wording from the "shall [or may] be recorded" language used in §§ 17-59 through 17-68 indicates that the highway plat book is not used for purposes of recording but, rather, for reference. As a reference book, the highway plat book is not subject to the provisions of § 17-70.1 concerning "the recording of writings." Moreover, the language in § 17-69.1, requiring notation on the page of the deed book of information stating where the plat is filed in the State highway plat book, clearly indicates the General Assembly's intention that the State highway plat book be maintained in addition to the other required books. I am, therefore, of the opinion that a separate highway plat book must be maintained in accordance with § 17-69.1.

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SCHOOL BOARDS. REAL PROPERTY. SURPLUS PROPERTY TO BE CONVEYED TO GOVERNING BODY.

August 28, 1984

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

You have asked whether the Bedford County School Board is authorized to execute a quitclaim deed to a private individual in order to convey its interest in a parcel of land or, alternatively, whether it must convey its interest only pursuant to the provisions of § 22.1-129 of the Code of Virginia. You have advised that the school board acquired the parcel in 1876 and apparently has not used the property since 1918 when the school building located on the property was destroyed by fire. Since 1918, the adjacent landowner has been in continuous possession of the property.

Section 22.1-129(A) provides the procedure by which a school board may dispose of real property for which it has no use. Under that section, such property shall be conveyed to the county, city or town comprising the school division.

Whatever interest the school board has in the parcel in question, it is an interest in real property. I am aware of no statutory authority by which the school board may convey its interest, however small or remote, in real property to anyone other than the political subdivision comprising the school division. Consequently, I am of the opinion that § 22.1-129(A) applies to the land in question and the school board is without authority to execute a quitclaim deed to someone other than the county, city or town.
SCHOOLS. CHILDREN WHO RESIDE WITHIN SEPARATE SCHOOL DISTRICT MAY BE CHARGED TUITION BY SCHOOL DIVISION OF COUNTY IN WHICH SCHOOL DISTRICT LOCATED.

July 27, 1984

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

You ask whether the school division of Westmoreland County has the right to charge tuition pursuant to §22.1-5 of the Code of Virginia to students who are residents of the school division of the Town of Colonial Beach and who attend schools by choice within the county school division.

Section 22.1-3 provides, in part: "The public schools in each school division shall be free to each person of school age who resides within the school division..." For those who are residents of the Commonwealth, but not of the school division in which a public education is sought, the school board may charge tuition pursuant to regulations adopted by the school board. See §22.1-5(A)(2).

Under the facts you presented, the school division of Westmoreland County is charging tuition to students who reside in the Town of Colonial Beach, a separate school division. The Town of Colonial Beach has been authorized by the General Assembly to operate a separate school district. See Ch. 261, Acts of Assembly of 1960, as amended by Ch. 211, Acts of Assembly of 1984. Accordingly, pursuant to §22.1-5(A)(2), the School Board for Westmoreland County may charge tuition to children residing in the Town of Colonial Beach but who seek a public education in the county schools. The decision to charge tuition is discretionary with the School Board for Westmoreland County.

You express concern that an "equal protection" question may be presented, in view of the county tax levy which applies to the residents of the Town of Colonial Beach. You have indicated that Westmoreland County levies a general fund levy throughout the county, including Colonial Beach. You also indicate that Colonial Beach receives a proportionate appropriation of these funds. Section 22.1-113(A)(1) provides, in pertinent part, that the "treasurer of the county in which the town is located shall pay over to the town treasurer...a sum equal to the pro rata amount from such levy derived from such town...." If the funds are apportioned as above provided by law, I am of the view that there is no credible basis for an equal protection challenge.

1Section 22.1-5(A)(2), in pertinent part, provides: "[Persons of school age who are residents of the Commonwealth but who do not reside within the school division] may, in the discretion of the school board of the school division...be admitted into the public schools of the division and may, in the discretion of the school board, be charged tuition...."
You have asked several questions concerning application of the compulsory school attendance laws. Your questions are: (1) What guidelines, if any, should the local school board follow in determining whether a pupil is exempt from school attendance for religious reasons under § 22.1-257(C) of the Code of Virginia; (2) is a child, whose parents declare that they are opposed on the basis of their religious convictions to his attendance at public school, automatically exempt from the school attendance requirements of § 22.1-254; and (3) should a guardian be appointed for a child in the above situation?

Your correspondence indicates that a parent notified the division superintendent of schools by letter that the parent was not enrolling his child in the public schools. I assume, for the purpose of this Opinion, that the child is not enrolled in any public or private school, nor is he receiving approved alternative schooling as permitted by § 22.1-254.1. I further assume that there is no statutory exemption from compulsory school attendance other than § 22.1-257(A)(2), which may apply to this child.

Section 22.1-257(A)(2) requires that a school board excuse from compulsory school attendance, "any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Section 22.1-257(C) specifically provides that a "'bona fide religious training or belief' does not include essentially political, sociological or philosophical views or a merely personal moral code." The guidelines which should be followed by a school board in cases of claimed religious exemption are basically these statutory provisions. A school board should first ascertain, under § 22.1-257(C), that the parents' objection is based on a "'bona fide religious training or belief'" and not on political, sociological, philosophical or purely personal views.

Parents who, for religious reasons, seek excusal from school attendance also must show to the local school board that public school attendance and its statutory equivalents, such as home instruction, do not accommodate their bona fide religious beliefs. See 1983-1984 Report of the Attorney General at 305. Therefore, after a school board determines that the criteria for a "'bona fide religious...belief'" under § 22.1-257(C) have been met, it must determine whether the statutory equivalents of public school attendance meet the parents' religious objections.

The school board may wish to provide the parents with the opportunity to present facts and materials which would aid the school board in making its determination. If the school board determines, on the basis of the parents' presentation or on the basis of its own inquiry, that the child must be excused on religious grounds under § 22.1-257(C), the child is exempt from the compulsory attendance laws in Virginia. See § 22.1-256(A)(4).

In response to your first question, therefore, the school board should use the criteria of § 22.1-257(C) to determine whether the claimed exemption is on the basis of a bona fide religious belief and then should determine whether the statutory alternatives to public school attendance are sufficient to meet that religious belief.

Concerning your second question, I am unable to determine on the facts of the case you recited whether exemption from the compulsory attendance laws is warranted. It appears that the parents have stated facts in their letter which could lead a school board to conclude only that public school attendance is religiously objectionable to them. A school board would be unable to conclude, on the basis of the excerpted letter alone, that the statutory equivalents to public school attendance could not meet the parents' and child's needs. For instance, attendance at a private denominational school or home
instruction may be acceptable to the parents' religious tenets. Nothing in their statement leads to the conclusion that the parents are opposed on religious grounds to these alternatives. The school board, therefore, may want to inquire further on the basis of the parents' initial statement before concluding that the religious exemption in § 22.1-257 does, or does not, apply in the case you presented. I am unable to make such a determination solely on the basis of the statement presented in the parents' letter.

Finally, a child who is subject to the compulsory school attendance laws but is absent from school, habitually and without justification, may be brought before the juvenile and domestic relations court as a "[c]hild in need of services." See § 16.1-228(F)(1). The court, in an appropriate case, may transfer custody of a child found to be in need of services to a relative or other person who is found qualified to care for the child. See § 16.1-279(C)(5)(a). The appropriateness of an order transferring custody in a particular case is a determination which, by law, rests within the sound discretion of the court. Certainly, in the case you presented, the school board must initially determine whether the exemption of § 22.1-257(C) applies before taking any court action. In answer to your third question, therefore, it is my opinion that, solely on the basis of the excerpted letter from the child's parents, there is an insufficient factual basis to conclude that the child in question is a child in need of services. Therefore, it appears to be inappropriate to seek the appointment of a custodian for this child on the facts which you presented.

1The excerpt which you sent of the parents' letter stated: "[D]ue to our religious convictions we cannot in good conscience enroll our son in public school," and that "[d]ue to these religious convictions our son will not attend public school this fall. We are conscientiously opposed to his doing so. We plan to supervise his education at home and anywhere else that is conducive to the best possible education."

You also note in your correspondence that the parents contend their church tenets require "that the parents, not the State, have been given by God the ultimate authority over how and where their children are to be educated," and that a child is to be trained to "approach all knowledge from a christian perspective and to evaluate all claims to Truth according to the standard of God's word - the Bible." (Emphasis added.)

SCHOOLS. COMPULSORY ATTENDANCE. STATE BOARD APPROVAL OF CORRESPONDENCE COURSES.

July 13, 1984

The Honorable Kenneth S. White
President, State Board of Education

You have asked several questions concerning home instruction through correspondence courses as permitted in § 22.1-254.1(A)(iii) of the Code of Virginia. You have generally asked whether, in approving correspondence courses to satisfy Virginia's compulsory attendance law, the State Board of Education ("State Board") may apply its existing standards for certifying proprietary correspondence schools under § 22.1-319 et seq. For the reasons which follow, I answer your inquiry in the affirmative, although I note that the State Board has the discretion to consider whether the existing proprietary standards should be supplemented to better ensure that an adequate home education through a correspondence course is provided.

Section 22.1-254.1 permits home education by a parent under certain conditions. See Opinion to the Honorable Stephen E. Gordy, Member, House of Delegates, dated
By virtue of this recent amendment, the General Assembly has recognized that prescribed forms of home education are acceptable educational alternatives to school attendance. The amended statute provides for home education by a parent who:

"(i) holds a baccalaureate degree in any subject from an accredited institution of higher education, or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Board of Education; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child." (Emphasis added.)

Section 22.1-254.1(A). With respect to home instruction pursuant to a correspondence course, the General Assembly has required only that such course be approved by the State Board. The provisions of § 22.1-254.1 do not, however, define "correspondence course," nor do they define the educational content or objectives of the courses, nor even the approval process to be used by the State Board. Accordingly, in the absence of further legislative direction, the State Board has discretion to fairly and reasonably determine such matters. See § 22.1-16 authorizing the State Board to promulgate regulations as may be necessary to carry out its powers and duties and the provisions of Title 22.1.

It is manifest that parents who choose to educate their children at home through a correspondence course are directly responsible for the educational progress of their children and the adequacy of instruction. It is particularly noteworthy that the General Assembly has not prescribed any specific course content or educational objectives for any of the first three options in § 22.1-254.1(A). Only as to option (iv) has the General Assembly generally required that the educational program fulfill the standards of learning objectives approved by the State Board for language arts and mathematics. The General Assembly has, however, provided a mechanism to ensure that a child is receiving adequate instruction at home by requiring annual competency testing. See § 22.1-254.1(C).

In order for a proprietary correspondence school to currently obtain certification from the State Board under § 22.1-319 et seq., the school must meet specific criteria. State Board regulations provide:

"Since the method of instruction provided by correspondence schools is provided primarily through the exchange of printed material and written examinations, the Board will place considerable emphasis on the following when an application for a Certificate to operate from a correspondence school is being reviewed:

1. The educational objectives shall be clearly defined, simply stated, and of such a nature that they can be achieved through correspondence study.

2. Courses offered are sufficiently comprehensive, accurate, and up-to-date, and educationally sound instructional material and methods are used to achieve the stated objectives.

3. The school provides adequate examination services, encouragement to students, and attention to individual differences.

Correspondence schools that require, as a part of their training program, some type of terminal residence training shall comply with the regulations pertaining to facilities and staff."
Regulations Governing Operation of Proprietary Schools and Issuing of Agent Permits, XXV, B and C.

Although these standards require an administrative examination of the courses and educational materials offered, they do not explicitly require instruction in specific subject areas as, for example, language arts and mathematics. As previously noted, it is within the discretion of the State Board whether to choose to apply these minimal proprietary standards in evaluating a correspondence course for purposes of § 22.1-254.1(A)(iii).

In sum, the General Assembly has not included specific criteria defining the approval process or what should be included in the correspondence school courses. The State Board has the authority to promulgate regulations to carry out its duties under Title 22.1. If the State Board is satisfied that the present regulations pertaining to approval of proprietary correspondence schools are adequate to meet its duties with respect to approving such courses for home education, it may utilize those procedures and regulations in whole or in part. If it is of the opinion that those regulations and procedures are inadequate, then it has the authority to adopt such regulations as are necessary.

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1This section became effective July 1, 1984.

SCHOOLS. COMPULSORY ATTENDANCE. TIME FOR NOTIFICATION MAY, IN APPROPRIATE CASE, BE RELAXED.

November 8, 1984

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

You have requested my opinion concerning the statutory notification deadline contained within those provisions of the Code of Virginia which allow home instruction for school age children. Section 22.1-254.1 permits home instruction of a child under prescribed conditions. See 1983-1984 Report of the Attorney General at 305. The statute specifies the following notification requirement:

"Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction..." (Emphasis added.)

Section 22.1-254.1(B). Your questions are:

"(1) Is the meeting of the August deadline a mandatory requirement for home instruction or does a Division Superintendent have some flexibility and discretion as to the observance of this date?

(2) If the date requirement is mandatory and these parents fail or refuse to send their child to school but otherwise are providing adequate home instruction, are these parents nevertheless subject to criminal prosecution?"
(3) Does a Commonwealth's Attorney have the discretion to not prosecute these parents under this set of facts?

When construing a statute, ordinary words, such as "shall," are properly given their familiar and ordinary meaning. Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206 (1972); Talbott v. Southern Seminary, 131 Va. 576, 110 S.E. 354 (1921). The word "shall" is generally understood as imperative or mandatory. See Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965). Yet, for obvious reasons founded in fairness and justice, statutory time provisions may be read as directory, where a mandatory construction might do great injury to persons not at fault. See 2A C. Sands, Sutherland Statutory Construction § 57.19 (Rev. 3d ed. 1973). The General Assembly, through the enactment of § 22.1-254.1, evidenced its intention to allow home instruction as an alternative to school attendance. See Report of the Joint Subcommittee Studying Home Education, Senate Doc. No. 14 (1984); 1983-1984 Report of the Attorney General at 305. An overly rigid application of the August deadline in § 22.1-254.1(A) is not required by the surrounding statutory language or the legislative history, and would produce a strained, nonsensical result in some cases. It is well-settled that such statutory constructions are to be avoided. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

In answer to your first question, therefore, my opinion is that the August deadline in § 22.1-254.1(B) may be construed as directory in a case where a division superintendent is convinced on the basis of a factual proof by the parent that there is good cause for a parent's failure to meet the August deadline, but such failure may not be exercised where a parent has simply neglected or refused to meet the August deadline.

The recent legislative amendments to the compulsory school attendance statute, which now allow parents to provide home instruction, did not modify the basic enforcement mechanism of the compulsory school attendance statute. Civil or criminal proceedings may be brought against those who violate the compulsory school attendance laws. See §§ 22.1-262, 22.1-263, 22.1-268. See also Grigg v. Commonwealth, 224 Va. 356, 279 S.E.2d 799 (1983). Enforcement of § 22.1-254.1 may be sought, in a proper case, through initiation of criminal proceedings. See Opinion to the Honorable Ralph L. Axselle, Jr., Member, House of Delegates, dated August 20, 1984.

In answer to your second question, my opinion is that parents who neglect or refuse to meet the notification requirements of § 22.1-254.1 are not authorized to avail themselves of the home instruction option permitted by § 22.1-254.1, and may be subject to criminal prosecution; provided, of course, the child is not provided an education under a legislatively permissible alternative. See §§ 22.1-254, 22.1-255, 22.1-256. If the criminal, rather than civil, enforcement route is chosen, however, the Commonwealth must necessarily prove each element of the charge beyond a reasonable doubt, rather than simply meeting the civil standard of "clear and convincing evidence." See Grigg, supra. I am, therefore, of the opinion that, although it is possible to criminally prosecute a parent who has neglected or refused to meet the August deadline, the ultimate decision with respect to prosecution must be left to the Commonwealth's attorney who has responsibility for evaluating and prosecuting criminal offenses and cases arising under the compulsory school attendance laws. See § 22.1-268.1 The Commonwealth's attorney is not constrained, except by the facts of the particular case, as to the enforcement procedure to be utilized.

In answer to your third question, I am of the opinion that the Commonwealth's attorney has responsibility to determine whether the individual case warrants criminal enforcement of the compulsory school attendance requirements. A parent who neglects or refuses to comply with the legislative conditions for home instruction must enroll the child in a private or public school contemplated by § 22.1-254, or be subject to criminal
prosecution for failing to provide the child with an acceptable education recognized by law.

1The foregoing, of course, assumes that the child and the parents do not, in fact, qualify for an exemption from the compulsory attendance statute.

SCHOOLS. COURTS. RESPONSIBILITY OF CLERKS AND INTAKE OFFICERS OF JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS TO ACCEPT FOR FILING AND PROCESSING COMPLAINTS ALLEGING VIOLATION OF COMPULSORY SCHOOL ATTENDANCE LAW.

August 20, 1984

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

You ask three questions concerning the Commonwealth's compulsory school attendance law, § 22.1-254 et seq. of the Code of Virginia. Preliminarily, you ask whether compulsory school attendance laws are constitutional. If so, you ask whether a juvenile and domestic relations district court is required to accept for filing and processing a complaint brought by a local school division alleging a violation of such law. Assuming that filing and processing must occur, you inquire as to what latitude a court possesses in disposing of such cases if a violation has been shown.

As you suggested, compulsory school attendance laws have long been recognized by the Supreme Court of the United States as being constitutional and within the police power of a state to provide for the proper education of its citizenry. See Wisconsin v. Yoder, 406 U.S. 205 (1972). Similarly, and specifically as to Virginia, the Supreme Court of Virginia has twice rebuffed challenges to Virginia's compulsory attendance statute. See, e.g., Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948); Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982). As stated in Grigg:

"The Griggs do not challenge the authority of the Commonwealth to require parents to send their children to public school unless they make proper provision otherwise for the children's education. Such a challenge would be fruitless, for this authority is recognized universally."

224 Va. at 361. See also Art. VIII, § 3 of the Constitution of Virginia (1971) and 1982-1983 Report of the Attorney General at 437. Thus, I conclude that Virginia's compulsory school attendance law is unquestionably constitutional.

Turning to your second question, enforcement of the Virginia compulsory school attendance law rests primarily at the local level of government. The General Assembly has provided for the local appointment of attendance officers. See § 22.1-258. Further, teachers in every school in the Commonwealth are required to keep an accurate daily record of pupil attendance. See § 22.1-259. Each division superintendent is required to make a list of all children who are not enrolled in any school and who are not exempt from school attendance. The attendance officer investigates all cases of nonenrollment and when no valid reason is found therefor, must notify the parent, guardian, or other person having control of the child to require the attendance of the child at school within three days of the notice. See § 22.1-261. If the parent, legal guardian, or such other person fails to comply within the three-day period, the attendance officer has the duty to file a complaint in the name of the Commonwealth before a juvenile and domestic
It is the duty of the Commonwealth's attorney to prosecute all cases arising under the compulsory attendance law. See § 22.1-268.

The statutory framework establishes a cooperative enforcement mechanism at the local level of government necessarily involving both local school officials and the judicial branch. I know of no authority by which the juvenile and domestic relations district court may prevent the attendance officer from fulfilling the statutory responsibility to file the complaint authorized by § 22.1-262. Indeed, it is the general responsibility of the court clerk and intake officer to appropriately process such complaints for disposition by the court. See §§ 22.1-262, 16.1-69.40 and 16.1-260. Accordingly, I am of the opinion that a juvenile court is required to accept for filing and processing the duly lodged complaint of a school attendance officer.

Your third inquiry concerns the power of a juvenile court with respect to such complaints "once sufficient evidence of a violation has been presented." This question involves a delicate balance of the flexible, equitable powers traditionally vested in the juvenile and domestic relations district court with the legislative directive that a parent who violates § 22.1-254 or § 22.1-255 "shall be guilty of a Class 4 misdemeanor." See § 22.1-263.

Necessarily, a court's latitude in disposing of cases will depend upon the posture of the case before it. I assume for purposes of your question that the situation which you hypothesize involves a criminal warrant against a parent charging violation of § 22.1-254 or § 22.1-255; that the Commonwealth proves by credible evidence guilt beyond a reasonable doubt; that the parent offers no valid defense; and that the judge believes the Commonwealth's evidence. For a person who has so violated that statute, the General Assembly has decreed that the person "shall be guilty of a Class 4 misdemeanor." See § 22.1-263. Accordingly, assuming the above-stated hypothesis, I am of the opinion that when the judge rules, he is under a duty to find the person guilty of violating the statute. I note, however, that while the court has a duty to convict the person, it is not bound to impose any sentence. Section 19.2-303 provides, in part, that "[a]fter conviction...the court may suspend imposition of sentence...."

If the facts are not as stated in the hypothesis but involve, for example, a complaint charging only the child as one in need of services, then the broad equitable and remedial powers of the juvenile and domestic relations district court, as specified in § 16.1-279, authorize the court to consider an array of alternatives which range in severity from simply directing corrective behavior to disciplining both child and parent to, where necessary, removal of the child from the home. See § 16.1-279. In such a case, it is the judge's duty to choose the appropriate response, fashioned to best reinforce, for child and parent, the importance of obtaining a basic education.

1Any person found to have violated the law may be guilty of a Class 4 misdemeanor. See §§ 22.1-263, 22.1-264, 22.1-265. The child may also be proceeded against as a child in need of services as provided in Ch. 11 (§ 16.1-226 et seq.) of Title 16.1. See also Grigg, supra. I note, however, that law-enforcement and attendance officers, as set forth in § 22.1-266, "may pick up any child who is reported to be truant from school by a school principal or division superintendent or who the law-enforcement officer or attendance officer reasonably determines, by reason of the child's age and circumstances, is truant from school and may deliver such child to the appropriate school and personnel thereof without charging the parent or guardian of such child with a violation of any provision of law."

2Certainly, if the judge does not believe that the evidence establishes guilt beyond a reasonable doubt or if the defendant offers adequate defenses, the judge has the duty to acquit the accused.
Section 19.2-303 also authorizes the court to impose conditions upon the suspension of imposition of sentence. One such condition could be that the parent or guardian will comply with the compulsory school attendance laws.

SCHOOLS. DIVISION SCHOOL SUPERINTENDENTS MUST BE APPOINTED DURING STATUTORY PERIOD SPECIFIED.

September 17, 1984

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You ask whether, pursuant to § 22.1-60 of the Code of Virginia, a county school board may reappoint its division superintendent eleven months before the expiration of his or her term of office. I understand the Rockbridge County School Board voted in August 1984 to reappoint its current division superintendent effective July 1, 1985.

In pertinent part, § 22.1-60 provides:

"The division superintendent of schools shall be appointed by the school board of the division from the entire list of eligibles certified by the State Board and shall hold office for four years from the first day of July following his appointment or for the unexpired term if appointed to fill a vacancy other than by expiration of term.

The division superintendent shall be appointed by the school board within sixty days (i) before March 1 of the year in which the term of the incumbent division superintendent expires or (ii) after a vacancy occurs other than by expiration of term.

The Board of Education may, in its discretion, extend the time limits prescribed in this section by not in excess of sixty days, or in the event of the death of a superintendent a period not exceeding six months, before acting pursuant to § 22.1-61." (Emphasis added.)

Section 22.1-60 is unambiguous in its command. The General Assembly has specified that all appointments of superintendents must be made "within" the sixty-day period preceding March 1 of the year in which the term will commence unless a vacancy is involved. See also 1948-1949 Report of the Attorney General at 192, which holds similarly in construing the predecessor statute to § 22.1-60. The fact that an incumbent would be appointed is immaterial.

Accordingly, a reappointment of a division superintendent by the local school board at a time not within the sixty-day period would not meet the requirements of § 22.1-60 and, in my opinion, would be ineffective.

SCHOOLS. INSTITUTIONALIZED CHILDREN. APPROPRIATE EDUCATIONAL SERVICES IN LEAST RESTRICTIVE ENVIRONMENT.

October 18, 1984

The Honorable L. Cleaves Manning
Chairman, Joint Legislative Audit and Review Commission
You have asked three questions pertaining to federal requirements governing the education of handicapped children who are in residence at training centers or facilities operated by the Virginia Department of Mental Health and Mental Retardation. You indicate that some children who have been determined as "eligible" for placement in the public schools have not been placed. I assume that the "eligibility" for such placement has been properly determined as part of the pupil's individual educational program ("I.E.P.").

Your first question is as follows:

"Is the Commonwealth vulnerable to a lawsuit under the least restrictive environment clause of P.L. 94-142 if students determined to be eligible for public school placements are not actually placed in that setting?"

As a general principle, handicapped children who reside in the Commonwealth are entitled under both federal and State law to a free, appropriate public education. See 20 U.S.C. § 1401 et seq. (P.L. 94-142) and § 22.1-213 et seq. of the Code of Virginia. An appropriate education is one which is individually designed and reasonably calculated to provide an educational benefit. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982). In addition to the individual educational needs of the handicapped child, public agencies are required to ensure that the education is offered in the least restrictive environment. Public Law 94-142 states:

"To the maximum extent appropriate, handicapped children, including children in public and private institutions and other care facilities are [to be] educated with children who are not handicapped, and that special classes or separate schooling...[is to occur] only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

20 U.S.C. § 1412(5). See also 34 C.F.R. §§ 300.550 through 300.556.

The "public agency" responsible under state law for providing educational services must ensure that handicapped children have the opportunity to receive the free, appropriate education required by law. See 34 C.F.R. §§ 300.11, 300.554 and 300.600. A public agency includes "state agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf and blind) and state correctional facilities." 34 C.F.R. §§ 300.2(b) and 300.11.

Under Virginia law, the Department of Mental Health and Mental Retardation is explicitly mandated to provide education and training to its children in residence. See § 22.1-7. As a public agency and pursuant to § 22.1-7, the Department is responsible for the provisions of educational services to the handicapped children in residence. Accordingly, I must conclude that the Commonwealth is vulnerable to a lawsuit under P.L. 94-142 if resident handicapped children of the Department who require a public school placement, as determined in their I.E.P., are not offered that placement.

Your second question is:

"Can a high quality alternative to public school placement, such as that which is available in a training center school, satisfy the least restrictive environment called for in P.L. 94-142?"

Although the quality of the educational program offered to handicapped children is manifestly important, it is a factor distinct from the requirement to provide an education in the least restrictive environment. As noted, the federal law requires that, to the maximum extent appropriate, handicapped children are to be educated with nonhandicapped children in regular public schools. See 20 U.S.C. § 1412(5)(B). This federal mandate, however, is not a per se rule that all handicapped children, irrespective
of their individual needs, must be educated in a public school. See St. Louis Dev. Dis. Treatment Center v. Mallory, 591 F.Supp. 1416 (1984). Rather, the law presumes that an appropriate education is one that is provided in the least restrictive environment, unless the child would not benefit from such a placement. See, e.g., Springdale Sch. Dist. #50 of Wash. v. Grace, 693 F.2d 41, 42 (8th Cir.), cert. denied, 461 U.S. 927 (1982) (a deaf child should be educated in an appropriate, public school program rather than in a school for the deaf).

In conclusion, I am of the opinion that, notwithstanding a high quality education available in a training center school, when a handicapped child in such a facility is determined, as part of his I.E.P., to be eligible for a public school placement, the provisions of the I.E.P. must be met.4

Your next question is:

"Are local school divisions legally obligated under State law to accept all students from a training center who are identified as eligible for placement in a public school setting, regardless of place of original residence?"

Local school divisions are obligated under State law to provide a free education to children who reside within the school division. The residence of a child for school purposes is generally that of the parent or legal guardian. See § 22.1-3.5 The residence of school age children who reside in facilities operated by the Department of Mental Health and Mental Retardation is that of the school division within which the parents or legal guardians reside. See §§ 37.1-96 and 22.1-281.6 Accordingly, local school divisions are obligated under State law to provide a free public education only to those students who are residents of the school divisions as set forth in § 22.1-3.

School divisions may have agreed, however, to provide educational services to those handicapped children who reside in State facilities when they applied for and received federal P.L. 94-142 funds. Federal regulations state that local school divisions, upon acceptance of federal funds, must ensure that all children residing within the jurisdiction of the division are provided with the opportunity for an appropriate education, including those in public institutions (see § 34 C.F.R. § 300.220 and Comment; the federal authorities have construed "reside" as physical presence within the jurisdiction). Recently, the Office of Civil Rights has found local school divisions to be in noncompliance when they have refused to admit children residing in state schools or facilities within their territorial boundaries. See EHLR 257:215 and 257:386. Moreover, two United States District Courts have refused to permit state and local agencies to "point fingers at one another" over who has ultimate responsibility for assuring that appropriate educational services are provided to handicapped children in state facilities. See Park v. Pawkovic, 557 F.Supp. 1280 (N.D. Ill. 1983), and Kerr Center Parents Ass'n v. Charles, 581 F.Supp. 166 (D.C. Or. 1983).

State and federal laws are not incompatible; local school divisions have the authority to admit nonresident children residing in State facilities under § 22.1-5(A)(2), and the Department of Mental Health and Mental Retardation has the authority and responsibility to contract with local school divisions for the educational services. Failure to follow the mandates of P.L. 94-142 not only renders the Commonwealth vulnerable to litigation, but the local school divisions as well. Accordingly, it is prudent for both jurisdictions to cooperate in providing resident handicapped children with a public school placement, when such placement has been determined to be appropriate.

1 An "I.E.P." is a written statement for a handicapped child that is developed and implemented according to procedures described in detail in federal regulations;
importantly, the I.E.P. is both a process and a document. The document identifies current educational performance, short and long-term educational objectives, and the services necessary to achieve these objectives. See 34 C.F.R. §§ 300.340 through 300.349.

I also assume for purposes of this inquiry that the parents have concurred with the I.E.P.

Section 22.1-7 provides, in pertinent part: "Each State board, agency and institution having children in residence or in custody shall provide education and training to such children which is at least comparable to that which would be provided to such children in the public school system. Such board, agency or institution may provide such education and training either directly with its own facilities and personnel in cooperation with the Board of Education or under contract with a school division or any other public or private nonsectarian school, agency or institution."

In reaching this conclusion, I trust you will understand that a lack of facts prevents me from considering the extent of exposure or potential defenses or the possible liability of other parties.

This conclusion is predicated upon the assumption that the parents have concurred with the proposed placement.

Section 22.1-3 provides, in pertinent part: "The public schools in each school division shall be free to each person of school age who resides within the school division. Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption, or when the parents of such person are dead, a person in loco parentis, who actually resides within the school division."

Section 37.1-96 provides, in pertinent part: "Each person between the ages of two and twenty-one within the population of any state hospital, state training school, state training center for the mentally retarded whom the Department of Mental Health and Mental Retardation determines could benefit from a program of education or training shall be included in the average daily membership for the school division of the county, city or town where such person is included in the census taken as provided in § 22.1-281...."

Section 22.1-281 provides, in pertinent part, that all school age children and "handicapped children who are confined in State hospitals, State training schools or State training centers for the mentally retarded, each as defined in § 37.1-1, or mental institutions, State or federal correctional institutions, the Virginia School at Hampton or the Virginia School for the Deaf and Blind shall be included in the census for the school division within which the parents or guardians of such person or persons legally reside."

SCHOOLS. NEW LONDON ACADEMY. BUDGETS. COUNTY SCHOOL BOARD MAY NOT CONTROL OR REDUCE ACADEMY BUDGET; COUNTY BOARD OF SUPERVISORS HAS SAME AUTHORITY OVER ACADEMY BUDGET AS WITH COUNTY SCHOOL BOARD BUDGET.

August 20, 1984

The Honorable Lacey E. Putney
Member, House of Delegates

This is in reply to your request for my opinion as to which body, the Bedford County Board of Supervisors or the Bedford County School Board, has the authority to control or reduce the budget submitted by the Board of Managers of New London Academy.

New London Academy is a school located in Bedford County and supported jointly by Bedford and Campbell Counties. Provisions for its operation are set out in Ch. 475, Acts of Assembly of 1926, as amended by Ch. 106, Acts of Assembly of 1954. Sections 2, 3 and 4 thereof vest control and management of the school's finances and functions in
a board of managers of five persons. Section 5 provides that "[t]he board of managers shall, in addition to the powers conferred by this act be vested with all the rights, power and authority now or hereafter conferred by law upon county school boards...." Sections 6 and 7 read as follows:

"Section 6. The said academy shall be under the general control and supervision of the State board of education, and in all respects conducted in accordance with the school laws of the State, except as herein otherwise provided for, and shall be within the jurisdiction of the division superintendent of Bedford county, or of Campbell county, as the board of managers may from time to time determine.

§ 7. (a) The expenses of New London Academy shall be determined and paid according to the following plan, to-wit: The board of managers of New London Academy shall each school session apportion between the county school board of Bedford County and the county school board of Campbell County, the cost of instruction, operation and maintenance of New London Academy upon a per capita basis in proportion to the number of pupils attending New London Academy from each of said counties.

* * *

The aforesaid apportionments shall be reported to the county school boards of Bedford and Campbell Counties; and each of said county school boards shall pay to the said board of managers its proportional part of the expenses of New London Academy, approximately one-half of same, not later than October first of each year, and the balance after February first of each year, on demand of said board of managers after thirty days notice, to be by them disbursed as herein provided for."

Prior Opinions of this Office held, in effect, that the Board of Managers of New London Academy is equivalent to, and has the same authority as, a separate school board and that the school operating costs, as apportioned in accordance with §7 of the 1926 Act, quoted above, constitute enforceable obligations of the two counties. See Reports of the Attorney General: 1953-1954 at 173; 1951-1952 at 140. Another prior Opinion addressed a virtually identical question to that which you present and held that, while the authority of the two county school boards to control or reduce the budget submitted by the academy's board of managers is questionable, "the Boards of Supervisors of the two counties do have this authority just as they have the authority to reduce the budgets submitted by the school boards of the two counties." See 1954-1955 Report of the Attorney General at 208. These interpretations of the act governing operation of the academy have not been disturbed by subsequent action of the General Assembly; hence, they are presumed to be correct. See Browning-Ferris v. Commonwealth, 225 Va. 157, 309 S.E.2d 603 (1983); Deal v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983). Accordingly, it is my opinion that the Bedford County School Board does not have authority to control or reduce the budget submitted by the Board of Managers of New London Academy, but that the Bedford County Board of Supervisors has the same authority with respect to its portion of that budget as it does with respect to the budget submitted by the county school board.4

1Chapter 475 amends and reenacts Ch. 174, Acts of Assembly of 1887, as amended by Ch. 164, Acts of Assembly of 1912, with substantial revisions.
2A subparagraph 7(b), which was added by the 1954 amendment, relates to apportionment of capital improvement expenses.
3The foregoing conclusion is not inconsistent with Art. VIII, § 7 of the Constitution of Virginia. The General Assembly has set up a uniquely constituted school board in the
form of the Board of Managers for the administration and governance of the New London Academy.

This result is not changed by the fact that the Bedford County School Board reflects the academy budget as a "line item" in the county school budget, as suggested in correspondence submitted with your inquiry. The inclusion of the academy budget in the county school budget as a single line item, or in some alternative fashion, is a matter of practical convenience with no legal effect. See 1950-1951 Report of the Attorney General at 256.

As to the scope of a local governing body's control over the local school board's budget submission in the annual budgeting process, see 1982-1983 Report of the Attorney General at 409.

SCHOOLS. NEW LONDON ACADEMY PATRON. FOR PURPOSES OF APPOINTMENT TO BOARD OF MANAGERS, CONSTRUED AS PARENT OF STUDENT ENROLLED IN ACADEMY.

February 4, 1985

The Honorable Elliot S. Schewel
Member, Senate of Virginia

You have asked for a definition of the word "patron" as used in legislation pertaining to New London Academy board of managers. See Ch. 475, Acts of Assembly of 1926.

The Act does not define the word "patron." I understand that the term has traditionally been construed by the school boards for both Campbell and Bedford Counties to be a parent or guardian of a child enrolled in the Academy. This construction was determined to be consistent with legislative intent in a letter dated June 27, 1979, from the assistant Commonwealth's attorney for Bedford County to the Board of Managers of the New London Academy.

This established interpretation and practice is not unreasonable or inconsistent with the then accepted meaning of the term "patron" at the time of passage of the Act. The Century Dictionary 1913 defined patron as "one who protects, countenances, supports, or encourages; a protector or benefactor." Current definitions are substantially similar. See, e.g., Black's Law Dictionary 1015 (5th ed. 1979). Words should generally be given their ordinary meaning. See Albemarle County v. Marshall, Clerk, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975). It is not unreasonable to conclude that a parent of an enrolled student falls within the broad class of individuals who may be "patrons."

Moreover, the fact that the school boards have chosen to limit appointments to the Academy board to individuals who are parents with children enrolled in the Academy cannot be clearly understood as violative of legislative intent. "Where a practice which insures and protects the rights of the parties has been uniformly pursued for a great length of time, such practice should be regarded as showing what the law is on the subject." Graham v. Gloucester Fur. Corp., 169 Va. 505, 508, 194 S.E. 814, 815 (1938).

Furthermore, in view of the apparent long-term construction and practice by local officials, such practice not overturned by the General Assembly, I must give due deference to the understanding of the local officials who have been empowered by law to make the appointments. Virginia E. & P. Co. v. Commonwealth, 169 Va. 688, 194 S.E. 775 (1938).

For the foregoing reasons, absent legislative indication to the contrary, I am of the opinion that the term "patron" of the New London Academy, for the purpose of
appointment to its board of managers, is to be construed as a parent of a student enrolled in the Academy.

Section 2 of the Act provides, in part: "The control and management of the estate and administrative functions of said New London Academy shall be vested in a board of managers composed of five persons as follows: The division superintendent of schools of Campbell county; the division superintendent of schools of Bedford county; one member who is a patron of said academy resident in Bedford county to be elected by the county school board of Bedford county...one member who is a patron of said academy resident in Campbell county; and a member who is a qualified elector and resident in Campbell or Bedford county who shall be appointed alternatively from said counties by the State superintendent of public instruction."

SCHOOLS. PUBLIC. OPENING DAY. MAY BE LEGISLATED BY GENERAL ASSEMBLY.

January 11, 1985

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

You have asked whether the General Assembly has the constitutional authority to mandate that the opening date for public schools be a date after Labor Day. I answer your question in the affirmative.

The General Assembly is constitutionally vested with the legislative power of the Commonwealth. See Art. IV, § 1 of the Constitution of Virginia (1971). Moreover, under Art. VIII, § 1, the General Assembly has the singular responsibility to provide for a system of free public education. The manner in which the General Assembly may achieve the goal of quality programs is set forth in Art. VIII, § 2. Local school boards have supervisory authority over the schools in their school divisions. See Art. VIII, § 7.

In establishing the public school system and prescribing standards of quality, the General Assembly must do so within the entire framework contemplated by Art. VIII. See 1982-1983 Report of the Attorney General at 444. The exercise of legislative powers must be harmonized with the constitutional powers reserved to the local school units. See School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978).

In Parham, the Supreme Court of Virginia balanced the powers conferred respectively to the local school board, the State Board of Education and the legislature. In that case, the Court found that a provision in procedures adopted by the State Board of Education for binding arbitration in teacher grievances constituted an unlawful delegation of power away from the local school board to a grievance panel. Central to that determination was the Court's observation that the legislative prerogative to set standards of quality may not be exercised in a manner that would absolutely divest the local school board of indispensable and essential supervisory functions. 218 Va. at 958, 243 S.E.2d at 473.

As held by the Court in Parham, as well as an earlier case, the supervisory authority of local school boards is not absolute. See, e.g., Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). For example, the power to supervise does not preclude the General Assembly's authorizing local school boards to determine the length of the school term while also providing that the local board's determination must
be consistent with State statutes and regulations of the State Board of Education. See § 22.1-79. Also, under § 22.1-98, as a minimum, each local school board must presently operate its schools for 180 instructional days in the term in order to receive Basic School Aid Funds. Such a requirement does not impinge upon the powers of local school boards. See 1975-1976 Report of the Attorney General at 308.

Determining whether a given function is essential and indispensable to local school board supervision necessarily requires a case-by-case analysis. In the proposal suggested in your letter, the General Assembly would be extending its previously mandated number of instructional days to specify that the school year may not commence before a specified date. Unlike the factual situation presented in Parham, I do not view this requirement as an intolerable intrusion into the prerogatives reserved to the local school boards by Art. VIII, § 7. Establishment of a beginning date is within the power reserved to the General Assembly by Art. IV, § 1, as well as Art. VIII, § 1, and cannot be said to be in derogation of the powers reserved to local units of government for supervising the schools. Setting of the date for the commencement of the school year can be analogized with the designation of holidays or days when schools must be closed, a prerogative of the legislative branch of government.

I am of the opinion, therefore, that it is constitutionally permissible for the General Assembly to mandate that the opening date for public schools be no earlier than a day after Labor Day.

SCHOOLS. REAL ESTATE. SCHOOL BOARD DISPOSAL OF REAL ESTATE.

November 7, 1984

The Honorable Thaddeus Robert Cox
Commonwealth's Attorney for Craig County

You ask three questions regarding the ownership, use and potential disposal of improved real property located in Craig County. You indicate that 9.69 acres of property known as Camp Mitchell have been used by the Craig County School Board as a classroom facility, for food service, special education and various athletic programs. You further indicate that Camp Mitchell was conveyed to the Craig County School Board by deed of May 29, 1970.

The deed reads, in pertinent part:

"WITNESSETH: THAT, WHEREAS IT IS THE DESIRE of the parties of the first part to convey to the party of the second part the hereinafter described 9.691 acre tract of land to be used by the party of the second part as a building site for a conservation and recreation center or such other use as the party of the second part deem proper and:

WHEREAS it is the desire of the parties of the first part to give the said land to Craig County School Board accepting the sum of ONE DOLLAR ($1.00) as the full consideration.

Now therefore for and in consideration of the premises and the sum of ONE DOLLAR ($1.00) cash in hand paid by the party of the second part to the parties of the first part the receipt of which is hereby acknowledged, the parties of the first part do hereby give, grant, bargain, sell and convey with covenants of General Warranty of Title and English Covenants of Title unto Craig County School Board...." (Emphasis added.)
Since last winter, the governing bodies for the county and the school board have permitted a private corporation, which had suffered a fire, to use the facility until its new building is ready.

Your inquiries as to ownership, use, and possible disposal, once the corporation relocates, are:

"1) Who retains legal ownership of Camp Mitchell property?
2) What are the legal limitations imposed...by deed?
3) What are the legal disposal rights of the owner?"

Questions 1 and 2 are answered by the deed which you have provided. Under the terms of that deed, ownership is vested in the Craig County School Board. There are no conditions or limitations expressed in the deed; hence, it constitutes an unconditional grant, without any reversionary rights in the grantors.

The law generally presumes that a grantor conveyed all that was his to give, in the absence of clear limitation to the contrary. Sections 55-11, 55-49 of the Code of Virginia. See also Waskey v. Lewis, 224 Va. 206, 294 S.E.2d 879 (1982). The granting of fee simple ownership is, of course, manifestly inconsistent with the reservation of authority to limit the uses of property.

Your final inquiry is what disposition may be made of the property. The answer to your inquiry can be found in § 22.1-129. Under that section, the Craig County School Board may, upon a proper finding and appropriate resolution, declare the property as surplus. In such an event and upon delivery of deed to the county, title to the property would be vested in Craig County by operation of law. See 1982-1983 Report of the Attorney General at 429.

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SCHOOLS. SCHOOL BOARD AUTHORIZED TO PURCHASE ACCIDENT INSURANCE FOR SCHOOL ATHLETIC TEAM MEMBERS.

April 11, 1985

The Honorable Frederick H. Creekmore
Member, House of Delegates

You have asked the following questions:

1. "May school boards purchase football/accident insurance for athletic team members from the general school fund?"

2. "May school...[boards] forward funds from the operating budget of the school division to individual schools for inclusion in the schools' internal accounts for
purposes and in amounts different from those specified in § 22.1-123 of the Code [of Virginia].

As a general proposition, school boards have general statutory authority to purchase insurance coverage for "persons performing functions or services for any school in the school division," even though such functions or services are performed without payment. See § 22.1-84. Further, of the Regulations of the State Board of Education at 93 provide:

"Local school authorities are authorized to purchase, at their discretion, student accident insurance coverage for school-related injuries upon such terms as local school authorities determine to be in the best interest of the school system; however, no school division is to receive credit for sums expended in providing insurance in the distribution of state aid funds."

In answer to your first question, it is my opinion that school boards may purchase football/accident insurance for athletic team members from the general school fund, but consistent with the State Board's regulation, no credit for sums expended on such insurance will be received in the distribution of State aid funds. See also 1976-1977 Report of the Attorney General at 236.

Turning to your second question, each school board is required by law to manage and control funds available to its schools. Section 22.1-89. A modern system of accounting for all school funds is to be maintained, and monthly reporting of school funds is required. Section 22.1-115.

School boards are authorized to establish "petty cash" accounts by § 22.1-123, which provides, in pertinent part:

"Any school board may by resolution establish one or more petty cash funds, not exceeding five hundred dollars each, for the payment of claims arising from commitments made pursuant to provisions of law."

Any person into whose hands any such fund is placed may pay such claims therefrom without necessity of prior receipt and audit of the claims by the school board and without approval and issuance of the warrant of the school board...."

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 1983-1984 Report of the Attorney General at 303. The specific grant of authority in § 22.1-123 for petty cash accounts clearly evidences the General Assembly's intention to limit such accounts to five hundred dollars.2

In answer to your second question, it is my opinion that a school board may establish petty cash funds for the purposes you identified, including the purchase of postage and supplies, but only in accordance with the procedure specified in § 22.1-123 and within the limits contained therein.

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1 You state that such monies would be used primarily for the purchase of postage, office supplies and general instructional supplies, and the management of such monies would be included in the audit of the internal accounts which is accomplished for each school annually. Each principal would be advised of the intended use of such money and that it should be placed in specific line item accounts and not commingled with school generated money. These accounts would then operate outside the city treasurer's responsibility for the receipt, custody and disbursement of the funds of the school board.
This is in reply to your request for my opinion concerning appointments to the Accomac County School Board Selection Commission under § 22.1-35 of the Code of Virginia. You relate that the commission presently consists of three members appointed at large, each of whose terms expire June 30, 1986. The county governing body has requested the court to appoint a commission of five members, one from each of the county's election districts. You ask whether those appointments should be made at this time or after the June 30, 1986 expiration date of the present three members. You state that two of the present members live in the same election district, and you ask also whether the term of one of these two officers may be terminated prior to its expiration date in order that a commission membership in conformity with the governing body's request may be appointed immediately.

Your first question was considered in a prior Opinion of this Office, found in the 1972-1973 Report of the Attorney General at 349. That Opinion held that a request for the alternative method of appointment should be implemented in a timely manner and should not be delayed until the expiration of the terms of the sitting members. Consequently, in answer to your first question, it is my opinion that the governing body's request should be implemented at this time rather than waiting until 1986.

In answer to your second question, no authority is given to the county or the court to terminate the terms of members of the school board selection commission prior to their date of expiration.

Section 22.1-35 provides, in pertinent part, as follows:

"In each county to which the provisions of this article are applicable there shall be a school board selection commission composed of three members appointed from the county at large or, upon the request of the county governing body, one member appointed from each election district of such county. Members shall be qualified voters, shall reside in the county and shall not be county or State officers. Members shall be appointed by the circuit court of the county within thirty days after the first day of July, nineteen hundred fifty, and every four years thereafter. Any vacancy occurring other than by expiration of term shall be filled by the circuit court within thirty days after the vacancy occurs."

I refer you to an Opinion contained in the 1981-1982 Report of the Attorney General at 324, wherein I pointed out that § 22.1-35 requires that commission members be voters and residents of the county, but that it does not require each member to be a resident of the election district from which he is appointed. Thus, the court may comply with the request of the board of supervisors by designating one of the two present...
commission members residing in the same election district as the representative of a
different district until his current term of office expires.

1 Compare § 22.1-29 (school board member must be bona fide resident of district from
which selected, and his board position will be deemed vacant if he ceases district residency).

SCHOOLS. SCHOOL BOARDS. APPOINTMENT OF MEMBERS. NAMES OF
POTENTIAL APPOINTEES TO LOCAL BOARDS NOT REQUIRED TO BE MADE PUBLIC
IN ADVANCE BY APPOINTING AUTHORITY PURSUANT TO § 22.1-29.1.

May 13, 1985

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

This is in reply to your inquiry concerning House Bill 1088 as passed by the
1985 Session of the General Assembly. House Bill 1088, enacted as Ch. 423, Acts of
Assembly of 1985, adds § 22.1-29.1 to the Code of Virginia, effective as of July 1, 1985,
which reads as follows:

"At least seven days prior to the appointment of any school board member pursuant
to the provisions of this chapter, of §§ 15.1-609, 15.1-644, 15.1-708 or § 15.1-770,
or of any municipal charter, the appointing authority shall hold one or more public
hearings to receive the views of citizens within the school division. The appointing
authority shall cause public notice to be given at least ten days prior to any hearing
by publication in a newspaper having a general circulation within the school
division."

You ask the following two questions with regard to the above-quoted statute:

"(1) At the time of the advertisement of the public hearing required by House
Bill 1088, must the names of all potential appointees be made available to the
public?

(2) Assuming that at the time of the advertisement the names of all potential
appointees need not be available, must all potential appointees be named at the
time of the public hearing?"

It may well be sound public policy to announce ahead of time the names of potential
appointees to a school board who definitely are under consideration, and such would
appear to be consistent with the spirit of the new Act. Nevertheless, nothing in the
words of newly enacted § 22.1-29.1, or in any other applicable statute of which I am
aware, actually requires that the appointing authority first compile a fixed list of
prospective appointees from which it will choose and make the list available to the public
prior to the time the appointments are made. 1 Had the General Assembly wished to
require that an appointee be subject to a public hearing prior to the appointment being
made, it certainly could have imposed such a limitation.

Accordingly, your inquiries are answered in the negative.
As a practical matter, the appointing authority may wish to obtain suggestions of potential appointees at the public hearing.

SCHOOLS. SCHOOL BOARDS. BOARDS OF SUPERVISORS. TERMINATION OF OFFICE.

August 21, 1984

The Honorable Dorothy S. McDiarmid
Member, House of Delegates

This is in reply to your request for my opinion whether the Board of Supervisors of Patrick County, which previously appointed two at-large members to the Patrick County School Board pursuant to § 22.1-44 of the Code of Virginia for terms of four years beginning December 30, 1980, had the authority to abolish the two positions effective June 30, 1984. Because of the interplay of several statutes, your question cannot be answered simply by reference to the specified length of the term.

Section 22.1-44 reads, in part, 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." (Emphasis added.)

While the Patrick County School Board is appointed by the board of supervisors, rather than a school board selection commission, 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 section which provides for appointment by the selection commission. Additionally, the governing body of the county may appoint no more than two members from the county at large. The language of the statute clearly indicates that the authority of the county governing body to establish two at-large positions on the school board is permissive rather than mandatory. In the absence of constitutional or statutory restrictions to the contrary, that authority generally carries with it the implied power to abolish the positions created although the facts of each situation must be examined before attempting to apply such a broad maxim. See Reports of the Attorney General: 1982-1983 at 321; 1979-1980 at 158; 1974-1975 at 54; compare Reports of the Attorney General: 1981-1982 at 163; 1980-1981 at 284; 1974-1975 at 139; 1948-1949 at 10.

Although § 22.1-44 fixes the terms of office of school board appointees at four years, following prior Opinions of this Office of long-standing, I have previously opined that the terms of office of the two initial at-large appointees to the Patrick County School Board should end on June 30, 1984, to allow their successors to be appointed for
four-year terms beginning on July 1 as provided by § 22.1-38. See 1983-1984 Report of the Attorney General at 317.\(^1\) Thus, the effective date of termination of the two at-large positions coincided with what should have been the expiration date of the terms of office of the incumbents, and the action of the board of supervisors therefore cannot be said to have improperly curtailed those terms. In light of the above, it is my opinion your inquiry should be answered in the affirmative.

\(^1\)The effect of ending the initial terms on June thirtieth may well be a shortening of the terms of the incumbent. Such a result is essential in order to give effect to both §§ 22.1-38 (terms begin on July first) and 22.1-44 (fixes terms at four years).

**SCHOOLS. SCHOOL BOARDS. MEMBERS. STATE POLICE OFFICER MAY SERVE ON CITY SCHOOL BOARD.**

November 8, 1984

The Honorable Charles C. Lacy
Member, House of Delegates

This is in reply to your request for my opinion whether, under Virginia law, a State police officer may serve on a city school board.

Section 22.1-29 of the Code of Virginia prescribes the qualifications of school board members. Section 22.1-30 prohibits any State, county, city or town officer from being appointed or serving as a member of a city school board, with specific listed exceptions not applicable here. Thus, a State police officer may serve on a city school board if he meets the qualifications of members set forth in § 22.1-29, and if he is not an "officer" as that word is used in § 22.1-30.

Prior Opinions of this Office construing § 22.1-30 and its predecessor statutes\(^1\) recognized that "officer" is used in § 22.1-30 to distinguish between an officer of government and an employee of government in applying the prohibition against public officers serving on school boards, with employees being allowed to serve if they are otherwise qualified. See, e.g., Reports of the Attorney General concluding that for purposes of serving on the school board, the person in question is an employee, not an officer: 1982-1983 at 392 (State Director of Community Services Block Grant Program); 1977-1978 at 363 (special game warden); 1974-1975 at 373 (State forest warden); 1968-1969 at 192 (ABC Board employee); 1965-1966 at 254 (assistant superintendent of correctional farm); see also 1976-1977 at 259; 1974-1975 at 374; 1973-1974 at 442; 1970-1971 at 60, 92.

The above-cited Opinions variously stated that: An officer is distinguished from an employee in the greater importance and independence of the position and by the authority to direct and supervise; a public office is a position created by the Constitution or by statute, with a fixed term of office being a frequent characteristic; and, where the position is created by administrative action, it does not rise to the level of an office.

Applying these criteria here, I note that the position of State police officer is not created by the Constitution or statute; officers are appointed administratively by the Superintendent of State Police, for indefinite periods, and serve under his supervision; and they are included in the classified service of the Commonwealth, subject to the Virginia Personnel Act. I conclude that the position of State police officer lacks the indicia of a public office for purposes of § 22.1-30 and is, in fact, an employment position
with the State. Accordingly, I am of the opinion that a State police officer who meets the qualifications for membership is not prohibited from serving on a city school board by § 22.1-30.

1See former §§ 22-69, 22-92.

SCHOOLS. SCHOOL BOARDS. POWER TO ASSIGN TEACHERS AND PRINCIPALS.

August 15, 1984

The Honorable David G. Brickley
Member, House of Delegates

You ask the following questions concerning the power of the Prince William County School Board and its division superintendent regarding the transfer of teachers and school principals:

"1. May the school board delegate to the division superintendent the power to make permanent assignments of teachers and principals?

2. Does the school board, by continuing resolution, have the power to delegate to the division superintendent the authority to assign teachers and principals for school years after the year in which the resolution is adopted?

3. Does the division superintendent have the authority to reassign a principal without a current resolution adopted by the School Board?

4. If the division superintendent has the authority to reassign a principal without a current resolution adopted by the School Board, is this power limited to reassignment during one particular school year, or may such personnel be reassigned to a new school for that and subsequent school years?"

With respect to the assignment of teachers and principals, § 22.1-297 of the Code of Virginia provides:

"A division superintendent shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, principals and assistant principals. If the school board adopts a resolution authorizing the division superintendent to reassign such teachers, principals and assistant principals, the division superintendent may reassign any such teacher, principal or assistant principal for that school year to any school within such division, provided no change or reassignment during a school year shall affect the salary of such teacher, principal or assistant principal for that school year."

The first sentence expressly recognizes the initial and primary responsibility of the school board to assign teachers, principals and assistant principals to particular schools for each school year, while the second sentence provides a flexible and practical mechanism for reassigning such school personnel to other schools within the division without necessarily involving the school board on each reassignment.

In response to your first question, § 22.1-304 directs the board to make the initial
assignment for each school year. Section 22.1-297 allows the board to adopt a resolution delegating to the superintendent the ability to reassign at any time during that school year for the remainder of that school year.

Your second question is answered in the affirmative. I am of the opinion that the school board is not required to adopt its § 22.1-297 reassignment resolution each year. In the absence of a clear directive by the General Assembly, such a limitation cannot be inferred because it would be at variance with the board's general authority expressly provided by § 22.1-78 to adopt regulations without time limitation. Consequently, the resolution delegating authority to the superintendent remains current and thereby is effective in future years until revoked by the board.

With respect to your third question, I must conclude that, in the absence of a resolution adopted pursuant to § 22.1-297, a superintendent does not have the authority to reassign a principal to a school different from that to which the school board assigned him. As noted previously, a continuing resolution remains "current" so long as it has not been rescinded by the school board. In other words, a school board resolution authorizing the division superintendent to make a reassignment for "that school year" need not be readopted each year by the board.

In light of the foregoing, it is unnecessary to address your fourth question.

\[\text{See also } \$ 22.1-304 \text{ which provides, in pertinent part, that "[a]s soon after April fifteenth, as the school budget shall have been approved by the appropriating body, the school board shall furnish each teacher a statement confirming continuation of employment, setting forth assignment and salary." (Emphasis added.)}\]

\[\text{For example, in April the school board notifies a teacher of his assignment for the ensuing school year. Assuming prior adoption of the requisite resolution, a superintendent may take action in July to reassign a teacher or principal for the full school year. The reassignment, however, does not extend beyond that school year. A new assignment will be issued by the board for the next ensuing school year.}\]

SCHOOLS. SCHOOL BOARDS. PUBLIC OFFICERS. REMOVAL FROM OFFICE. GOVERNING BODY OF COUNTY MAY PETITION TO REMOVE MEMBERS OF SCHOOL BOARD APPOINTED BY ABOLISHED SCHOOL BOARD SELECTION COMMISSION.

April 11, 1985

The Honorable Howard P. Anderson, Jr.
Commonwealth's Attorney for Halifax County

This is in reply to your request for my opinion concerning the applicability of the removal provisions of § 24.1-79.6 of the Code of Virginia to the present members of the Halifax County School Board. You state that the school board members were appointed by a school board selection commission which since has been abolished under the provisions of Art. 3, Ch. 5 of Title 22.1. Pursuant to § 22.1-44, which is part of Art. 3, the governing body of the county hereafter shall appoint all members of the school board. You ask whether the county board of supervisors succeeds also to the former school board selection commission's power, under § 24.1-79.6, to petition for removal of the present school board members.

Article 1.1 of Ch. 6 of Title 24.1, relating to removal of public officers from office, applies to every elected or appointed public officer, except an officer 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. Generally, a county school board member is a public officer appointed to an office with a fixed term whose removal is not controlled by the Constitution and whose appointing authority does not have the unqualified power of removal, and, therefore, Art. 1.1 applies. Section 24.1-79.6, the applicable provision of Art. 1.1, reads 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.)

In the situation which you describe, the commission is the authority which appointed the school board members, and the commission no longer exists. Nevertheless, continuity of government requires that the Act be given a reasonable interpretation so that public officials are not immunized from review of allegations of "incompetency, neglect of duty or misuse of office," which often can be reviewed only through the review and removal procedures established in Art. 1.1. I must presume that the General Assembly never intended to immunize an officer of government from such review simply because the "person or...authority" which appointed the officer has been changed in accordance with other provisions of the Code.

Accordingly, I must answer your inquiry in the affirmative.

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1 See § 22.1-35, which provides that in each county there shall be a school board selection commission whose members are to be appointed by the circuit court of the county, and § 22.1-36, which provides that each school board member shall be appointed by the school board selection commission.

2 Article 3 consists of §§ 22.1-41 through 22.1-46. Section 22.1-42 authorizes a referendum on the question whether the method of selecting school board members should be changed from appointment by the school board selection commission to appointment by the governing body of the county. Section 22.1-43 provides that the school board selection commission of the county shall be abolished if a majority of the votes in the referendum are for the change.

3 See §§ 22.1-38 and 22.1-44.

4 In a limited number of localities having certain specified forms of government, school board members may serve at the pleasure of the appointing authority. See, e.g., § 15.1-544.

5 See Virginia Beach v. VEPCO, 218 Va. 346, 237 S.E.2d 164 (1977) (a literal interpretation of a statutory provision which leads to unreasonable or absurd consequences must yield to a reasonable and fair interpretation to be gathered from the context of the statute).
This is in reply to your request for my opinion whether Ch. 423, Acts of Assembly of 1985, applies to appointments of local school board members whose terms of office are to begin on July 1, 1985. Chapter 423 enacts § 22.1-29.1 of the Code of Virginia, which reads as follows:

"At least seven days prior to the appointment of any school board member pursuant to the provisions of this chapter, of §§ 15.1-644, 15.1-708 or § 15.1-770, or of any municipal charter, the appointing authority shall hold one or more public hearings to receive the views of citizens within the school division. The appointing authority shall cause public notice to be given at least ten days prior to any hearing by publication in a newspaper having a general circulation within the school division."

Any appointment of a school board member for a term commencing July 1, 1985, necessarily must be made prior to that date. Chapter 423 does not contain an emergency clause or any other direction from the General Assembly that it is to take effect other than in due course, and, therefore, § 22.1-29.1 will not be effective until July 1, 1985. See Art. IV, § 13 of the Constitution of Virginia (1971) and § 1-12 of the Code. Thus, the statute will apply to school board appointments made on and after its effective date, July 1, 1985, but it does not apply to appointments completed before that date. Compare Ferguson v. Ferguson, 169 Va. 77, 87, 1982 S.E. 774 (1937); 1983-1984 Report of the Attorney General at 376.

SCHOOLS. TUITION. CHARGING TUITION TO RESIDENTS OF MILITARY BASES.

November 23, 1984

The Honorable Floyd C. Bagley
Chairman, Commission on Veterans' Affairs

You ask whether § 22.1-5(A)(5) of the Code of Virginia violates the Supremacy Clause to the United States Constitution, in light of the recent decision of the United States Court of Appeals for the Fourth Circuit in United States, v. Onslow County Board of Education, 728 F.2d 628 (1984). Section 22.1-5(A) sets forth distinct classes of individuals who are deemed nonresidents of the local school divisions for purposes of receiving a free public education under § 22.1-3. Tuition may, in the discretion of the school board, be charged such individuals. Subsection (A)(5) thereof includes:

"Persons of school age who reside on a military or naval reservation located wholly or partly within the geographical boundaries of the school division and who are not domiciled residents of the Commonwealth of Virginia; provided, however, that no person of school age residing on a military or naval reservation located wholly or partly within the geographical boundaries of the school division may be charged tuition if federal funds provided under P.L. 874 of 1950, commonly known as Impact Aid, shall fund such students at not less than fifty percent of the total per capita cost of education, exclusive of capital outlay and debt service, for elementary or secondary pupils, as the case may be, of such school division."

At issue in Onslow was a North Carolina local ordinance, adopted by the Onslow
County Board of Education, requiring that all nondomiciliary students enrolled in the Onslow County public schools be charged tuition. Despite the facial neutrality of the resolution, the facts were that 92 percent of the nondomiciliary students affected were associated with federal employment or military service at Camp Lejeune. The individual plaintiffs all resided within the locality in off-base housing, and contributed to local and state government revenues by paying sales taxes and, in many instances, real property taxes. Applying Supremacy Clause analysis, the Fourth Circuit concluded in Onslow that the tuition charge, as to military personnel, violated the federal Soldiers' and Sailors' Civil Relief Act of 1940 (the "federal Act"), 50 U.S.C. § 501 et seq.

In pertinent part, § 574(1) of the federal Act provides:

"For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing...such person shall not be deemed to have lost a residence or domicile in any State...solely by reason of being absent therefrom in compliance with military or naval orders...."

As the Fourth Circuit observed, the federal Act was designed to protect servicemen and women from the risk of double taxation on their income and personal property solely by reason of military presence in a state, notwithstanding that their home of record may not impose any such tax. Observing that North Carolina finances its public schools principally through income taxation, the court determined that the Onslow County tuition charge was an impermissible tax substitute. The three-judge panel of the Fourth Circuit stated:

"We find that the Board's tuition charge is but an ill-disguised replacement for those taxes that North Carolina cannot impose on military personnel who are nondomiciliaries because of § 574(1)...."

Accordingly, the court concluded that the North Carolina ordinance was preempted by the federal Act.

Unlike North Carolina and consistent with the decision in Onslow, the Virginia statute does not disqualify nondomiciled military families who are residents of the local school divisions living off base. That portion of the Virginia statute respecting military dependents is limited to nondomiciled residents of lands under the primary sovereignty, control and jurisdiction of the United States.

Moreover, the Virginia law does not single out military-connected individuals. Section 22.1-5, on its face, applies with equal force to any individual who is not a resident of the school division. For example, subsection (A)(2) provides local authority to charge tuition to persons of school age who are residents of other school divisions. Subsection (A)(3) pertains to nonresident, foreign nationals who wish to enroll in the public schools pursuant to a foreign students' exchange program. Subsection (A)(4) includes persons who reside outside the boundaries of the Commonwealth. Finally, subsection (B) requires the imposition of tuition to persons of school age who are not residents of the Commonwealth but are living temporarily with persons residing within a school division. A common characteristic of these excluded classes is that such persons within the class are residents of lands beyond the exclusive sovereignty and control of the local school division.

Onslow did not hold that a local school division must provide a free public education to extrajurisdictional students. Nor am I able to interpret the federal Act as clearly and unmistakably requiring local government to extend its basic governmental goods and services, including education, for the benefit of the federal bases and their residents, without reasonable charge. In my view, Congress has the responsibility to provide
residents of such bases with basic goods and services, both as part of its responsibility to provide for the national defense and its retention of primary sovereignty over the lands and operations of such bases. Obviously, such services may be provided directly with federal resources, or by contractual arrangements made with neighboring localities.

The legislative history underlying the federal impact aid legislation illustrates congressional intent that, to the extent local school divisions are unwilling or unable to provide a free education, the U.S. Commissioner (now Secretary) of Education is authorized to make arrangements for the schooling of military dependents. Congress has not required, "clearly and unmistakably," that local school divisions must provide military base residents with a free education. Rather, should a local school division not provide the services, Congress has authorized the federal government to provide for such public schooling itself, and the penalty to the local school division is the loss of federal impact aid. See 20 U.S.C. § 241f.

The Supreme Court of the United States has adopted a state-oriented analysis when Supremacy Clause challenges are raised to state laws regulating integral state functions in areas traditionally reserved to them, such as education. Federal law will only preempt state laws in such areas if "clearly and manifestly" intended by Congress. See, e.g., Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977); Jones v. Rath Packing Co., 430 U.S. 519, 356 (1977); NYS Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); California v. Zook, 336 U.S. 725 (1949). See also Los Alamos School Board v. Wugalter, 557 F.2d 709 (10th Cir. 1977); and Fouke v. Mandel, 386 F.Supp. 1341 (Md. 1974).

Given the legislative history underlying the impact aid legislation, I am unable to conclude that Congress has "clearly and manifestly" intended that the federal government may shirk its primary responsibility to national defense and the residents of the military bases over which the federal government maintains sovereignty. To the extent that the military base is unable within existing resources to provide public schooling, federal law authorizes contractual arrangements with local school divisions. See, e.g., 20 U.S.C. § 241.

Basic governmental goods and services, including education, should be available to military families and their dependents who reside on federal military bases in the service of our country. The fundamental legal question, not answered by Onslow, is whether such goods and services must be provided by the local government or by federal government.

A state statute, as an act of the people speaking through their legislative representatives, is presumed to be constitutional. A conclusion that such a statute is unconstitutional should be reached only when such a conclusion is unavoidable. For the reasons previously expressed, I am unable to conclude that § 22.1-5(A)(5) clearly conflicts with federal law, and certainly the legislative history is inadequate to conclude that Congress "clearly and manifestly" intended to preempt this particular legislative field. I, therefore, conclude that § 22.1-5(A)(5) is not unconstitutional.

1 In an Opinion found in the 1982-1983 Report of the Attorney General at 456, I expressed the view that the Virginia statute does not violate the Constitution of the United States.

2 "The Commissioner is authorized to arrange for constructing or otherwise providing school facilities for the education of children residing on Federal property, where neither the State nor any political subdivision of the State recognizes any responsibility for the

"When Public Law 81-815 was enacted in 1950, the Commissioner was authorized to provide schools for children living on Federal property when no LEA was able to provide the education for these children. P.L. 81-874 required the Commissioner to provide for the operation of these schools for on base children at full Federal expense." See Senate Committee Report, Labor and Public Welfare, 1965 U.S.Code Cong. Serv., p. 1910.

"Federal assistance has been established to help relieve the strain on local districts of educating federally connected children. However, in cases where an LEA fails, for one reason or another, to educate children who reside on federal property within the school district of the agency, the Commissioner has no authority to withhold federal funds. The committee seeks to remedy this situation by providing effective after fiscal year 1960 that where free public education is not or cannot be provided by an LEA, there would be deducted from P.L. 874 payments to that agency...." See House Committee Report, Education and Labor, 1966 U.S.Code Cong. Serv., p. 3878.

"As of 1978, there were 26 such schools operated by the United States located on or near military bases, 1978 U.S.Code Cong. and Adm.News, p. 100, including, for example, the Marine base at Quantico, Prince William County, Virginia.

SECRETARY OF THE COMMONWEALTH. APPLICABILITY OF ADMINISTRATIVE PROCESS ACT.

July 9, 1984

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in response to your request for my opinion whether your office must comply with the procedures for promulgation of regulations enacted by the 1984 General Assembly, amending the Administrative Process Act, §§ 9-6.14:1 through 9-6.14:25 of the Code of Virginia (the "Act"). See Ch. 5, Acts of Assembly of 1984.

You indicate that your principal areas of concern relate to your obligations under Ch. 2.1 of Title 30, pertaining to lobbying, and Chs. 1-5 of Title 47.1, pertaining to notaries.

In order to answer your question, it is necessary to examine the definitions under the Act and your authority relating to lobbying and notaries. Section 9-6.14:4 defines "[a]gency" to include any officer or other unit of government "empowered by the basic laws to make regulations...." The same section defines "[r]egulation" as "any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance...." Finally, the Act defines "[s]ubstantive," when used in connection with regulations, as "allowing, requiring, or forbidding conduct in which persons are otherwise free or prohibited to engage or which state requirements, other than procedural, for obtaining or retaining a license or other right or benefit." (Emphasis added.)

The effect of §§ 9-6.14:7 (repealed effective October 1, 1984) and 9-6.14:7.1 (effective October 1, 1984) is to permit an agency promulgating procedural regulations to afford interested persons the opportunity to submit data, views, etc., and to require such an opportunity when the regulations are substantive in nature or when the basic law of the agency requires such an opportunity.

Turning to your responsibilities with respect to lobbying and notaries, I am of the opinion that the basic law does not authorize you to promulgate regulations which are
substantive in nature. In each case, the rights, responsibilities and duties are fully established by the basic law. Your responsibilities may necessitate preparing forms and establishing procedural guidelines for administering your duties, but they do not extend to establishing substantive regulations, as defined above.

In applying the requirements of the Act to your authority under the basic laws, I am of the opinion that you may, but you are not required to, afford persons an opportunity to present their views when you promulgate procedural guidelines. Because the basic laws do not vest in you authority to promulgate substantive regulations, the mandatory public participation provisions of this Act are not implicated.\(^1\)

\(^1\)Please note that this Opinion is restricted to the question of regulations and not making case decisions. See, e.g., § 47.1-24.

SHERIFFS. AUTHORITY TO SOLICIT FUNDS OR SPONSOR BAKE SALES TO RAISE FUNDS FOR LAW ENFORCEMENT OPERATION.

May 8, 1985

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

You have asked whether the Sheriff of Greene County may sponsor bake sales to raise funds for a law enforcement operation to be undertaken by his office. You state that the sheriff requested funds for the operation and, after the request was denied, decided to raise the desired funds by holding bake sales. I understand that the request for funds was made to the Greene County Board of Supervisors.

The office of sheriff is a constitutional office created pursuant to Art. VII, § 4 of the Constitution of Virginia (1971). A sheriff is a public officer whose position is created by law, filled by election or appointment, held for a fixed term, and has duties assigned by law which concern the public. 1983-1984 Report of the Attorney General at 153.

While the powers and duties of a constitutional officer are those prescribed by statute, Old v. Commonwealth, 148 Va. 299, 138 S.E. 485 (1927), except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in the manner in which he deems appropriate. To list just several examples of statutory limitations, § 14.1-73 provides that the sheriff’s own salary is to be set by the Appropriations Act; §§ 14.1-73.1:1, 14.1-73.1:2 and 14.1-73.1:3 prescribe the limits and procedure for fixing the salary of deputy sheriffs; § 14.1-70 prescribes the procedure for determining the number of deputies which a sheriff may hire; and § 14.1-75 et seq. prescribe limits and procedures for reimbursement of certain expenses such as mileage. Nevertheless, in other areas which are not so regulated, the sheriff has general authority and discretion to organize and manage his operations.

While the Dillon Rule of strict construction is applicable to constitutional officers, I believe that one can readily conclude that it is within the inherent authority of a constitutional officer who has substantial discretion in managing his office to seek and accept funds which enable him to discharge his prescribed duties in those areas within which he has discretion to act.\(^1\) See 1981-1982 Report of the Attorney General at 411. In this regard, it is a well-known fact that for years sheriffs in certain localities have raised funds for such worthwhile law enforcement programs as victim witness programs...
and other items which enhance law enforcement. The General Assembly has not enacted a prohibition on this practice.

Accordingly, assuming the funds are properly spent within the limits set forth in the Code of Virginia, can be accounted for, and are not designed to influence a law enforcement officer in the discharge of his duties, I am of the opinion that a sheriff does have authority to sponsor an occasional bake sale to raise funds for a law enforcement operation to be undertaken by his office.

By no means should such an occasional practice be seen or accepted as the manner in which traditional law enforcement functions should be funded. That funding responsibility lies clearly with State and local legislative bodies.

1 I note that the General Assembly has enacted various provisions which may limit the manner in which a constitutional officer accepts funds. For example, § 2.1-602(4) prohibits an officer from accepting money or a gift which might reasonably tend to influence him in the discharge of his duties. See generally Art. 2 of Ch. 40 of Title 2.1, the Comprehensive Conflict of Interests Act.

SHERIFFS. BOARDS OF SUPERVISORS. EMERGENCY COMMUNICATIONS SYSTEM. BOARD MAY NOT REMOVE FROM SHERIFF'S OFFICE COMMUNICATIONS SYSTEM AND DISPATCHING FUNCTIONS RELATING TO SHERIFF'S LAW ENFORCEMENT RESPONSIBILITIES; BOARD MAY ESTABLISH E-911 SYSTEM OUTSIDE SHERIFF'S OFFICE TO INCLUDE CALLS FOR POLICE SERVICE.

June 21, 1985

The Honorable O. S. Foster
Sheriff for Roanoke County

This is in reply to your request for my opinion whether the Roanoke County Board of Supervisors may remove from the county sheriff's office the county emergency communications system and functions without the sheriff's permission. You relate that, under the present system, the sheriff's department is responsible for receiving and dispatching all police, fire and rescue calls. The county proposes to establish an E-911 telephone system, under which the board of supervisors may assume supervision of the dispatching functions, including the receiving and dispatching of all calls for police service.

You refer to a prior Opinion to you in which it was held that the sheriff retains administrative control over the operation of communications equipment purchased by the county once its use is assigned to the sheriff's office. See 1973-1974 Report of the Attorney General at 322. Subsequent Opinions consistently have reaffirmed the principle embodied in the 1974 Opinion to the effect that, in the absence of a constitutional or statutory provision to the contrary, constitutional officers, including sheriffs, have exclusive control over the operation of their offices, including use of the equipment therein and selection and supervision of personnel in the positions assigned thereto. See, e.g., Reports of the Attorney General: 1982-1983 at 129, 131, 462, 466; 1978-1979 at 56; 1977-1978 at 383; 1975-1976 at 51, 62; 1974-1975 at 408.

The expenses and allowances for sheriffs' offices are fixed by the State Compensation Board and paid by the Commonwealth pursuant to Arts. 7 and 9, Ch. 1 of Title 14.1 of the Code of Virginia, the provisions of which, among other things, require
the sheriff to justify his equipment needs in relation to the functions of his office, and specify the local governing body's role in the process. See particularly §§ 14.1-50, 14.1-51, 14.1-52 and 14.1-80. It is my opinion, in answer to your inquiry, that the board of supervisors may not remove the communications equipment presently allocated to your office, nor may it remove any function necessary to the operation of your office. See Reports of the Attorney General: 1983-1984 at 69; 1982-1983 at 131, 462. I point out, however, that nothing in the law requires the board of supervisors to assign the function of coordinating county emergency communications to the sheriff's office, nor prevents it from establishing an E-911 telephone system outside the sheriff's office.

SHERIFFS. DEPUTIES. SECTION 15.1-131.8. NO REQUIREMENT THAT DEPUTY GRADUATE FROM STATE-ACCREDITED HIGH SCHOOL.

June 19, 1985

The Honorable Louis E. Barber
Sheriff for Montgomery County

You ask whether the term "high school education," as used in § 15.1-131.8 of the Code of Virginia, requires that a deputy sheriff be graduated from a high school accredited by the State Board of Education (the "Board"), or whether graduation from a private high school not accredited by the Board is sufficient to meet the requirement.

Section 15.1-131.8(A) reads as follows:

"The chief of police and all police officers of any county, city or town and all deputy sheriffs in this Commonwealth who enter upon the duties of such office after July 1, 1982, are required to meet the following minimum qualifications for office. Such person shall (i) be a citizen of the United States, (ii) be required to undergo a background investigation, (iii) have a high school education or have passed the General Educational Development exam, (iv) possess a valid Virginia driver's license if required by the duties of office to operate a motor vehicle, and (v) undergo a complete physical examination." (Emphasis added.)

The statute does not expressly require that the high school education qualification be met by attendance at a State-accredited high school. Moreover, private schools in Virginia are not required to be accredited. See § 22.1-19; 1979-1980 Report of the Attorney General at 286. Accordingly, it is my opinion that § 15.1-131.8 does not require the deputy sheriff to be a graduate of a high school accredited by the Board.

1Section 22.1-19 enables the Board to accredit private schools, but only at the request of the school. I am informed by the Department of Education that the Board will cease accrediting private schools in 1986. Thereafter, private schools may be accredited by the Virginia Council for Private Education, Commission on Accreditation, should the schools request such accreditation and provided they meet the appropriate standards.

2It is readily apparent, however, that the General Assembly desired to establish a minimum level of educational achievement for all police officers and deputy sheriffs who come within the statute. Thus, the private high school must be a bona fide school which offers an educational program comparable to that offered in accredited high schools, and the graduation requirements should be comparable.
You ask whether the Sheriff of the County of Halifax is a "public body" as defined by § 11-37 of the Code of Virginia, a part of the Virginia Public Procurement Act, §§ 11-35 through 11-80 (the "Act").

Section 11-37 reads, in pertinent part: "'Public body' shall mean any legislative, executive or judicial body...office, department...created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter."

The office of sheriff is created by the provisions of Art. VII, § 4 of the Constitution of Virginia (1971): "There shall be elected by the qualified voters of each county and city...a sheriff....The duties and compensation of such officers shall be prescribed by general law or special act." The various powers and duties of a sheriff are set out in the Code.¹

In my opinion, therefore, the Sheriff of the County of Halifax is a "public body" as defined by § 11-37. This conclusion is consistent with prior Opinions of this Office concerning constitutional officers² and other governmental bodies.³

As a public body under § 11-37, you must comply with the Act in the procurement of services and goods from nongovernmental sources.

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¹See, e.g., § 15.1-539 (sheriff may be required to attend board of supervisors' meetings and preserve order), §§ 15.1-79 through 15.1-80 (execution and return of process), and § 8,01-466 et seq. (powers and duties in the execution of judgments).
²1982-1983 Report of the Attorney General at 635 (county treasurer must comply with the Act in selecting a depository of public funds).

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You request my opinion whether a county sheriff may decide the color of all the vehicles used by the sheriff's department.
In 1966, the General Assembly established the Sheriffs and City Sergeants Standard Car Marking and Uniform Commission. See Ch. 167, Acts of Assembly of 1966. Chapter 167, which was codified as § 15.1-90.1 of the Code of Virginia, provided, inter alia, that "[t]he Commission shall prescribe a uniform of standard design for all sheriffs, city sergeants and their deputies, and shall prescribe a standard color and design of car marking for motor vehicles used by them." (Emphasis added.) Thereafter the General Assembly, in Ch. 300, Acts of Assembly of 1977, repealed the first three paragraphs of § 15.1-90.1 and reenacted the fourth, subsection (d), which presently reads as follows:

"On July one, nineteen hundred seventy-seven, the standards for sheriffs' car markings and uniforms existing on such date shall be used by all sheriffs, and their deputies, while in the performance of their duties, if the sheriff prescribes that uniforms be worn and marked motor vehicles be utilized."

Thus, by the terms of the statute, marked sheriffs' vehicles must conform to the standard color and design of car marking for motor vehicles established by the Commission and in existence on July 1, 1977. I, therefore, answer your question in the negative. The statute expressly reserves to a sheriff the option not to utilize marked motor vehicles in his department, however; in my opinion, it would be his prerogative to prescribe the color of such unmarked cars. Compare Reports of the Attorney General:


1 The reference to city sergeants in § 15.1-90.1 was deleted by Ch. 155, Acts of Assembly of 1971.

SOCIAL SERVICES. COUNTY BOARD OF SUPERVISORS MUST APPROPRIATE SUFFICIENT FUNDS TO PROVIDE FOSTER CARE SERVICES TO JUVENILE PLACED IN CUSTODY OF LOCAL BOARD OF SOCIAL SERVICES BY JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT.

May 2, 1985

The Honorable F. Paul Blanock
Commonwealth's Attorney for Mathews County

You have asked whether a board of supervisors must provide an additional appropriation to fund foster care services for the remainder of this fiscal year for a juvenile who has been placed in the custody of the local board of social services by a juvenile and domestic relations district court. You have indicated that the funds initially appropriated for foster care services in the county's budget have been exhausted.

Section 63.1-55 of the Code of Virginia mandates that each local board of social services in the Commonwealth shall provide, subject to the supervision of the Commissioner of the State Department of Social Services and in accordance with rules prescribed by the State Board, certain child welfare services designated therein. That section then provides, in part, as follows:

"The General Assembly and the governing body of each county and city shall appropriate such sum or sums of money as shall be sufficient to provide basic foster care services for children under the custody and control of the local board of public welfare. The local governing body of each county and city shall appropriate such sums of money as necessary for the purchase of such other essential social services
to children and adults under such conditions as may be prescribed by the State
Board in accordance with federally reimbursed public assistance and social service
programs."\(^1\)

This section clearly requires a governing body of a county or city to appropriate sums of
money sufficient for essential social services such as foster care. See Reports of the

According to the information you have provided, the judge for the Juvenile and
Domestic Relations District Court for Mathews County has placed custody of the
juvenile with the local Board of Social Services of Mathews County. A local board has
the right to accept children for placement and is authorized to have custody of children
entrusted or committed to its care. See § 63.1-56; 1980-1981 Report of the Attorney
General at 272. Once a board has accepted custody of such child, that board must then,
in accordance with § 63.1-56 and with rules prescribed by the State Board of Social
Services, provide for foster care services for such child.\(^2\)

The local board of social services having accepted custody of the child, I am of the
opinion that § 63.1-55 requires the board of supervisors to appropriate such sums as are
sufficient to provide basic foster care services and other necessary social services for
this child.

\(^1\) It is necessary to read § 63.1-56 in conjunction with § 16.1-279. The latter section
gives the court the power to transfer legal custody to a local board of social services
under certain circumstances. In such circumstances, only if the placement is with a
board in a county or city for which the court does not have jurisdiction does the local
board have a statutory right to notice and an opportunity to be heard. Otherwise, the
board must accept custody. See § 16.1-279.

\(^2\) As indicated in note 1, there are certain cases in which the board does not have any
discretion whether to accept custody when ordered by the court.

STATE CORPORATION COMMISSION. MAJORITY VOTE OF EACH HOUSE OF
GENERAL ASSEMBLY NECESSARY FOR ELECTION OF MEMBERS OF COMMISSION.

February 1, 1985

The Honorable William F. Parkerson, Jr.
Member, Senate of Virginia

You have requested my opinion whether Art. IX, § 1 of the Constitution of Virginia
(1971) and § 12.1-6 of the Code of Virginia require the affirmative vote of a majority of
the Senate and a majority of the House of Delegates to elect a person to membership on
the State Corporation Commission.\(^1\) For the reasons expressed herein, I concur with the
prior Opinion of this Office that the Constitution requires the affirmative vote of a
majority in each house.

Prior Opinion

The question presented is the same as that addressed by the Attorney General in
1972 in an Opinion to the Honorable George R. Rich, Clerk, House of Delegates. In that
Opinion, the Attorney General concluded that Art. IX, § 1 of the Constitution requires a
majority vote of each house for election of State Corporation Commission members, and
that a majority vote of the members of the General Assembly as if they were sitting in joint session is not authorized. See 1971-1972 Report of the Attorney General at 371.

Evolution of Prior Provisions

It is helpful to briefly review the evolution of the constitutional and statutory provisions pertaining to appointment of State Corporation Commission members, as well as the comments pertaining to the changes.

In 1902, the Constitution provided for appointment of the Commission members by the Governor, "subject to confirmation by the General Assembly in joint session." Section 155 of the Constitution of Virginia (1902). The accompanying statutory provision of the 1902 Code of Virginia provided for confirmation by the General Assembly "in joint session." Section 1313(a)(2).

In 1918, the General Assembly adopted legislation providing for election of Commission members "by the qualified voters of the State." See Ch. 55, Acts of Assembly of 1918.

In 1926, the General Assembly reversed its position and returned to the 1902 statutory provision with appointment by the Governor, subject to confirmation by the General Assembly "in joint session." See Ch. 37, Acts of Assembly of 1926.

In 1926, the Governor appointed a commission to recommend changes to the Constitution. The Commission reported in 1927 and, with respect to appointment of State Corporation Commission members, recommended retention of the 1902 constitutional provision. The House amended the language to provide that "[t]he commissioners shall be elected by the General Assembly in joint session," but the Senate further amended the provision to provide for appointment by the Governor, subject to confirmation by the General Assembly or election "by the General Assembly, as may be provided by law." The conferees adjusted the differences and, as described by the Supreme Court of Virginia, "[t]he provision that the commissioners 'shall be elected by the General Assembly' was deliberately inserted upon the recommendation of the conferees and was adopted by both Houses." It is notable that thereafter the Constitution did not refer to election "in joint session."

The deletion of the constitutional language "in joint session" must be given meaning. Significantly, even in 1944, the Supreme Court described the election process as it related to two elections of Commission members in the 1930's as: "The appointee was nominated for election and 'elected' by both branches of the General Assembly to fill the vacancy." (Footnote omitted.)

In 1944, the General Assembly rewrote the statute and provided for members of the Commission to be "chosen by the joint vote of the two houses of the General Assembly." See Ch. 19, Acts of Assembly of 1944. Today § 12.1-6 of the Code carries forward that language. It is significant that the 1944 statutory language paralleled language in § 91 of the Constitution of 1902 pertaining to election by the General Assembly of the justices of the Supreme Court. That constitutional provision and the statutory provision both provided for election "by the joint vote of the two houses of the General Assembly."

Interpretation of the Commission on Constitutional Revision

When the Commission on Constitutional Revision recommended a new Constitution in 1969, it commented on the language "joint vote of the two houses" found in old § 91 and recommended clarifying language. As stated in its Report:
"It also should be noted that the words 'the joint vote of the two houses' which appear in present section 91 have been replaced in proposed section 7 with the words 'a majority of the members elected to each house.' The reason for the change is to clarify an ambiguity. The present language is subject to the interpretation that the two houses must vote together and a majority of the total vote would suffice for election. Thus, under this approach, any combination of 71 senators and delegates would be sufficient to elect a justice to the Supreme Court. What is of course meant by the present language, however,—and made explicit by the substituted language—is that a majority in each house vote favorably. Thus, the affirmative vote of 21 senators and 51 delegates is needed for election.\(^n\)\(^9\) (Emphasis added.)

Report of the Commission on Constitutional Revision 196 (1969). That interpretation is equally applicable to the identical language of S 12.1-6.\(^1\) Moreover, this interpretation was squarely placed before the General Assembly, which took action consistent with the recommendation.\(^1\)\(^1\)

The General Assembly is a Bicameral Body

The interpretation of the Commission on Constitutional Revision is consistent with the constitutional structure of the General Assembly as a bicameral body, meaning that each house is independent of the other and that, unless otherwise specified in the Constitution,\(^1\)\(^2\) action requiring approval of the General Assembly requires separate approval of each body. As stated in Art. IV, § 1 of the Constitution, "[t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates."\(^1\)\(^3\) This concept of bicameralism is firmly entrenched in our history. See generally I. A. Howard, Commentaries on the Constitution of Virginia 465 et seq (1974).

Any other interpretation of the provisions pertaining to election of a State Corporation Commission member would nullify the bicameral structure of the General Assembly, because it would permit any combination of 71 delegates and senators or even just 71 members of the House to control an election, thereby rendering meaningless the action of the Senate, a coequal branch of the legislature.

Conclusion

To summarize, I concur with the Opinion of my predecessor and the views of the Commission on Constitutional Revision. The election of a member to the State Corporation Commission is governed by Art. IX, § 1, requiring an election by the General Assembly. The General Assembly, as a bicameral body, necessarily functions through action of the Senate and the House of Delegates. As interpreted by the Commission, the implementing language of the statute does not require a contrary result. A requirement of only a majority of the votes of the members of the Senate and House added together is not authorized. Rather, the Constitution requires a majority vote in each house of the General Assembly.

\(^1\)Your question requires an interpretation of the Constitution and § 12.1-6 of the Code. It does not involve the Rules of either body of the General Assembly or the caucus of any party which this Office historically has not interpreted.

The pertinent portion of Art. IX, § 1 provides: "Members of the Commission shall be elected by the General Assembly...."

The pertinent portion of § 12.1-6 provides: "Members of the Commission shall be elected by the joint vote of the two houses of the General Assembly...."

The 1902 Constitution also permitted election by popular vote beginning in 1908.
See Ch. 481, Acts of Assembly of 1926.


See 1927 Extra Session Journal of the Senate at 227.

Norris v. Gilmer, 183 Va. 367, 375-376, 32 S.E.2d 88, 92 (1944). This case involved a petition for a writ of mandamus to require the Comptroller to pay the salary of an individual whom the Governor had appointed as a Commission member. The Court denied the writ. The case has an excellent summary of the pertinent constitutional and statutory changes.

Ibid at 376.

While each of the eleven members of the Commission is distinguished in his own right, it is noteworthy that three of the members ultimately served as justices of the Supreme Court of Virginia and one member as justice of the Supreme Court of the United States.

Note that the General Assembly has not followed a consistent practice of tabulating and reporting the votes. For example, in 1966, the Journals show that Lester Hooker was nominated in the Senate and the House. The vote was taken in each house, and members of both bodies were appointed to a committee to count the "joint vote." The House Journal shows that the committee reported that the number of votes cast was 135; the number of votes required for election was 68; and the number which Judge Hooker received was 135. There was no distinction between Senate and House votes. The votes on justices and judges were treated in a similar manner. 1966 Journal of the House of Delegates, pp. 140-146. This practice appears to have been followed in all elections prior to 1972.

In 1972, Junie L. Bradshaw was nominated in each house; a committee was appointed "to count and report the vote of each House;" the report listed the votes of the Senate and House separately without indicating the number required for election; Mr. Bradshaw, "having received a majority of the votes cast by the joint vote of the members elected to each house," was elected. 1972 Journal of the House of Delegates, pp. 1296-1301. The same pattern of tabulation occurred in elections through 1980.

In 1982, Preston C. Shannon was nominated in each house and a vote was taken in each house. His nomination and election was handled at the same time and in the same manner as a number of judges. A committee was appointed to report the vote of each house. The Committee reported the "number of votes necessary to elect:

In the House of Delegates....................... 51
In the Senate.............................. 21"

The votes for Mr. Shannon were listed separately by Senate and House and, "having received a majority of the votes cast by the members elected to each house," he was elected. 1982 Journal of the House of Delegates, pp. 197-200. The same pattern was followed in 1984 in the election of Mr. Bradshaw, together with a Supreme Court justice and a number of other judges. 1984 Journal of the House of Delegates, pp. 334-348.

Title 12.1 of the Code was recodified in 1971 to conform to the new Constitution. As indicated above, the pertinent language of new § 12.1-6, pertaining to election of members of the Corporation Commission, was carried forward from its predecessor, and that language pertaining to "joint vote of the two houses" paralleled old § 91 (election of justices of the Supreme Court) of the Constitution of 1902. Thus, there is no reason to presume the legislature intended any result inconsistent with the interpretation of the Commission on Constitutional Revision. Cf. Deal v. Commonwealth, 224 Va. 618, 621, 299 S.E.2d 346, 348 (1983).

Unlike § 1 of Art. IX, which simply provides that State Corporation Commission members shall be elected by the General Assembly, § 2 of Art. V, pertaining to the Governor, specifies an entirely different basis for breaking a tie vote in the popular election of a Governor. That latter section states that of the two persons receiving the highest and equal number of popular votes "one of them shall be chosen Governor by a majority of the total membership of the General Assembly." (Emphasis added.)

The Commission on Constitutional Revision stated that "[w]hile significant theoretical arguments could be raised on behalf of a change to unicameralism in Virginia,
the Commission sees little practical gain in such a move and therefore proposes no change in Virginia's present bicameral structure." (Footnote omitted.) Report of the Commission on Constitutional Revision, supra, at 127.

STATUTES. ACT WHICH EXPRESSLY REPEALS STATUTE AND CLEAR ON FACE REQUIRES NO RESORT TO RULES OF CONSTRUCTION FOR INTERPRETATION.

November 30, 1984

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

You request an Opinion interpreting the repeal of § 38.1-822.1 of the Code of Virginia. Specifically, you raise two questions: (1) Whether the repeal of § 38.1-822.1 imposes upon the Blue Cross and Blue Shield plans operating in Virginia an affirmative obligation to enter into the geographical areas previously served by other plans; and (2) whether the repeal grants to each plan the right to compete in all areas of Virginia without imposing a legal duty to do so.

The now-repealed statute provided:

"Geographical area.--Every plan seeking to be licensed by the Commission shall specify the geographical area it desires to serve and shall satisfy the Commission that it is able to render the services of the plan.

The Commission may, after notice and hearing, license more than one plan for the same geographical area unless the Commission finds that (i) the plan's proposed method of operation or manner of doing business is not satisfactory or (ii) licensing more than one plan for the same geographical area will not promote the public welfare. If more than one plan is licensed in a geographical area, the plans in such area shall be obligated to make arrangements among themselves to see that any claim filed with the wrong plan in such area be promptly forwarded to the proper plan where the proper plan can be determined.

Subscription contracts shall not be sold to persons residing outside the area of the plan unless they are regularly employed within the area. The subscription contract of a subscriber who neither lives nor is employed within the area shall be cancelled by notice given in accordance with the terms of the subscription contract."

Section 38.1-822.1. This provision was expressly repealed by Ch. 151, Acts of Assembly of 1983.

The repealed statute authorized the State Corporation Commission to limit each Blue Cross or Blue Shield plan to a specific geographical territory within Virginia. This type of regulation restrained the ability of the plans to compete in each others' designated territories. One noteworthy by-product of § 38.1-822.1 was protection of the plans from antitrust liability under the "state action" doctrine first enunciated in Parker v. Brown, 317 U.S. 341 (1943).

The 1983 repealer is unambiguous and, therefore, does not require resort to rules of construction other than a reading of its plain language. The Act merely rendered § 38.1-822.1 a nullity. The State Corporation Commission is no longer authorized to license the various plans to do business in limited territories. With regard to territorial division of the State by the plans, the Commission now occupies a position of precise neutrality. Cf. Community Communications Co. v. Boulder, 455 U.S. 40, 55 (1982). The
plans, therefore, are not insulated by "state action" from operation of the federal antitrust laws should two or more of them agree to a territorial restriction of their operations. See United States v. Sealy, 388 U.S. 350 (1967) (agreement among trademark licensees to allocate territories a *per se* violation of the Sherman Act). Repeal of the statute also subjects any territorial allocation to the provisions of the Virginia Antitrust Act. See § 59.1-9.4(b).

The Act was entirely silent with regard to the issues raised by your request. Consequently, it is my opinion that the repeal of § 38.1-822.1 imposes no affirmative obligation or legal duty on any plan to operate in a particular portion of the Commonwealth of Virginia. Each plan has the right to operate throughout the State in conformity with the applicable provisions of the Code. See § 38.1-810 et seq. Presumably, the Blue Cross and Blue Shield plans operating in Virginia will be guided in their operating decisions by their independent business judgment, exercised within the legal limits set by any applicable laws.

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

July 20, 1984

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

You have asked whether § 14.1-52.01 of the Code of Virginia, effective July 1, 1984, grants clerks of the circuit court a right of appeal from a decision of the Compensation Board affecting their budgets for the 1984-1985 fiscal year. The decisions of the Compensation Board were rendered in June 1984. You also have asked whether § 14.1-52.01 allows appeals from Compensation Board decisions regarding the "classification plan" for employees of the clerk.1

The right to appeal from a decision of the Compensation Board was originally granted to all clerks of the circuit courts by § 14.1-52.1. This statute was repealed by the enactment of Ch. 589, Acts of Assembly of 1982. In an Opinion to you, dated July 27, 1983, I noted that with the repeal of § 14.1-52.1, there was no statutory authority which gave standing to clerks of the circuit courts to appeal from a decision of the Compensation Board. During the 1984 Session, the General Assembly enacted § 14.1-52.01. This section restored the right of appeal to the clerks of the circuit courts. I, therefore, presume that the General Assembly intended that such right of appeal be available for the 1984-1985 fiscal year budgets.

Section 14.1-52.01 provides that:

"Any clerk of a circuit court shall have a right to appeal from the annual budget decision of the Board under this article affecting the expenses or allowances of the clerk, or the salary and number of clerk's deputies....Such appeals shall be taken and heard as provided in § 14.1-52."

Section 14.1-52 provides, in pertinent part, that the right to appeal lies "within forty-five days from the date of [the Compensation Board's]...decision."

As a general rule, an act of the General Assembly speaks as of the time it takes effect. See School Board v. Town of Herndon, 194 Va. 810, 75 S.E.2d 474 (1953). The effective date of § 14.1-52.01 is July 1, 1984. As long as this date falls within the 45-day period in which the right of appeal may be exercised, the appeal would lie. Thus, a clerk of the circuit court may appeal to the judiciary from a decision of the Compensation
Board which was rendered no earlier than 45 days prior to July 1, 1984.

With respect to your second question, § 14.1-52.01 specifically prescribes that a clerk of the circuit court shall have a right to appeal "from the annual budget decision of the [Compensation] Board...affecting the expenses or allowances of the clerk, or the salary and number of clerk's deputies." (Emphasis added.) Although a "classification plan" may affect the salary of an individual employee insofar as it sets forth a general salary structure, it is my opinion that this statute contemplates an appeal challenging budget decisions on individual salaries, rather than an appeal stating general objections to a pay schedule. Your second question is therefore answered in the negative.

1 The classification plan is a guideline adopted by the Compensation Board which it utilizes to determine the salary of individual employees. The plan includes as variable factors such items as experience and level of responsibility.

STATUTES. RECODIFICATION. RETROACTIVE APPLICATION. TAXATION. BAIL BONDSMEN. STATUTE REGULATING BAIL BOND BUSINESS NOT BEING APPLIED RETROACTIVELY.

June 11, 1985

The Honorable Floyd C. Bagley
Member, House of Delegates

This is in reply to your recent inquiry concerning § 19.2-152.1 of the Code of Virginia, which was enacted by Ch. 675, Acts of Assembly of 1984, to be effective January 1, 1985. Section 19.2-152.1 prescribes certification requirements for and limitations on the bail bondsman business. The last paragraph of § 19.2-152.1 exempts from application of certain of its provisions "guaranty, indemnity, fidelity and security companies doing business in Virginia or their agents and attorneys-in-fact, under the provisions of §§ 38.1-639 to 38.1-657...." The last sentence of the section states, however, that "[n]o person may act as such an agent or attorney-in-fact when such person, his or her spouse, or a member of his or her immediate family holds any office as magistrate, clerk or deputy clerk of any court." You ask my opinion whether such latter prohibition may be applied retroactively before the January 1, 1985 effective date of Ch. 675 without conflict with the restrictions contained in Arts. I (§§ 9 and 11) and IV (§ 14) of the Constitution of Virginia (1971). 1

Although Ch. 675 does not, in and of itself, disclose the source of § 19.2-152.1, much of its language was derived from former § 58-371.2, which was repealed as of that same date, by virtue of §§ 8 and 9 of Ch. 675. In other words, the regulatory language in § 58-371.2 was simply relocated to Title 19.2, effective January 1, 1985, without interruption in its applicability or enforceability. See, e.g., Report of the Virginia Code Commission on The Revision of Title 58 of the Code of Virginia 437, 502-503 (House Doc. No. 16, 1984).

The last sentence of § 19.2-152.1, containing the prohibition about which you inquire, was first enacted as the last sentence of § 58-371.2 in Ch. 543, Acts of Assembly of 1981, which took effect on July 1, 1981. Thus, the prohibition has been in force continuously from that date, and, in my opinion, may continue to be applied without posing a question of retroactive application.
Article I, § 9 prohibits imposition of excessive bail and fines and cruel and unusual punishment, suspension of the writ of habeas corpus, and enactment of bills of attainder and ex post facto laws. Article I, § 11 prohibits the taking of life, liberty or property without due process of law, enactment of laws impairing the obligation of contracts and the taking of private property for public uses without just compensation, and governmental discrimination based on religious conviction, race, color, sex or national origin. Article IV, § 14 places certain limitations on the legislative power of the General Assembly.

SUBDIVISIONS. ORDINANCES. REQUIREMENTS PLACED ON SUBDIVIDERS OF LAND ABUTTING PUBLIC ROADS FOR RIGHT-OF-WAY DEDICATIONS.

August 30, 1984

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

You have asked whether § 19-35 of the Botetourt County Subdivision Ordinance violates Art. I, § 11 of the Constitution of Virginia (1971) and § 15.1-466 of the Code of Virginia. That section of the ordinance reads, in pertinent part:

"(d) Minimum widths. The minimum width of proposed streets, measured from lot line to lot line, shall be in accordance with regulations established by the State Department of Highways and Transportation. However, in no case shall a street be less than fifty feet in width. Alleys, if permitted, shall be not less than twenty feet, no more than twenty-eight feet in width. If an existing street is to be utilized and such street is not fifty feet in width and the subdivider owns property on both sides of the street, then provisions shall be made on the plat to widen such street to fifty feet or the standard width of that street, whichever is greater. Should the subdivision abut on only one side of an existing street, the subdivider shall dedicate enough land so that one-half the width of such street, as measured from the centerline to the subdivision property line, shall be twenty-five feet or one-half the standard width of such street, whichever is greater."

I am advised by you that most older secondary roads in Botetourt County have thirty-foot wide rights-of-way. When a proposed subdivision fronts on such a road, the subdivision agent has been requiring developers to dedicate a ten-foot strip. You further state that the added ten-foot strip has no relation to traffic control within or without the subdivision, but is merely required to save the State condemnation expense if and when the secondary highway is widened in the future.

Virginia follows the Dillon Rule of strict construction concerning the legislative powers of local governing bodies, unless too strict a construction of a statute would defeat the intent of the General Assembly. See Nexsen v. Bd of Supervisors, 142 Va. 313, 128 S.E. 570 (1925). Generally, the powers of local governments can be no greater than those which the General Assembly has conferred upon them expressly or by necessary implication. Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980); Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); 1982-1983 Report of the Attorney General at 151.

Section 15.1-465 of the Code authorizes localities to enact ordinances regulating the subdivision of land. Section 15.1-466 enumerates the elements to be included in a subdivision ordinance. Subsection (c) of that statute provides "[f]or the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage." Subsection (f)
provides "[f]or the acceptance of dedication for public use of any right-of-way located within any subdivision which has constructed or proposed to be constructed within the subdivision, any street, curb, gutter, sidewalk...or other improvement...." The section of the Botetourt County Ordinance in question clearly does not violate § 15.1-466 insofar as it mandates a uniform street width. Not so clear, however, is the requirement of dedication of sufficient land to extend an existing road to a specified width when the developer owns property only on one side of the road.

Subdivision ordinances are enacted as a delegation of the police power of the State to the locality. Nat. Realty Corp. v. Virginia Beach, 200 Va. 172, 163 S.E.2d 154 (1968). The exercise of the police power is subject to constitutional guarantee of due process of law, but courts will not restrain the exercise of such power except when the conflict is clear. Board of Supervisors v. Carper, 200 Va. 653, 197 S.E.2d 390 (1969). The power of a locality to exercise its police power, however, must be pursuant to an express grant in the enabling statutes. Nat. Realty Corp. v. Virginia Beach, supra. The Supreme Court of Virginia has indicated, in review of the statutes empowering localities to enact subdivision ordinances, that the statutes support an inference that local governing powers, in the exercise of their authority to grant or withhold subdivision approval, are empowered to require an offer and acceptance of dedications for access roads and other public facilities. Bd. of Sup. James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975). The Court held in Rowe that the enabling statute failed to delegate, and in fact, the Constitution would prohibit the requirement that individual landowners dedicate a portion of their land as a condition of the right to develop their parcels.

Based on the Rowe decision and subsequent cases of the Court, I am of the opinion that the requirement for a dedication for right-of-way or other public use in a subdivision ordinance is permitted under § 15.1-466; however, the requirement must be related to the need generated, in whole or in part, by the proposed development, as opposed to traffic demands unrelated to the proposed development or land use. See Cupp v. Bd. of Supervisors, Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984); Hylton v. Prince William Co., 220 Va. 435, 258 S.E.2d 577 (1979). In the absence of a provision in the ordinance that the dedication is related to the need generated by the proposed development, the requirement is violative of Art. I, § 11 of the Constitution, which prohibits the taking of private property for public uses without just compensation. The ordinance in question contains no such provision. Clearly, the last sentence of § 19-35(d) of the ordinance quoted above does not contemplate development on both sides of the existing road by the subdivision developer. There is no requirement of a showing that the need for the additional right-of-way on the side abutting the subdivision is necessitated by the development of the subdivision.

In view of the foregoing, I am of the opinion that § 19-35 of the Botetourt County Subdivision Ordinance, if applied without regard to the given facts of a particular development, cannot withstand a constitutional challenge. That is not to say that an ordinance could not be drafted that would withstand a constitutional challenge.

SUBDIVISIONS. VACATION OF PLAT. ZONING LOTS. EVIDENCE. PROCEDURES FOR VACATING SUBDIVISION LOT LINES SET BY STATUTE; TWO OR MORE SUBDIVISION LOTS TREATED AS ZONING LOT; CRITERIA FOR VACATING SUBDIVISION LOT LINES UNDER § 15.1-482(b); EVIDENCE ADMISSIBLE TO SHOW "IRREPARABLE DAMAGE" UNDER § 15.1-482(b).

December 27, 1984

The Honorable Thomas W. Athey
County Attorney for York County
You ask my opinion on several questions concerning the application of zoning and subdivision regulations to a certain piece of property located in York County. You relate that a landowner operates a motel on a piece of property fronting on a major highway. He has acquired four other lots which he desires to devote to parking or other accessory use in connection with the motel's operation. Two of the lots, hereafter referred to as lots "A" and "B," directly adjoin the rear lot line of the main motel parcel, and the other two, hereafter referred to as lots "C" and "D," are behind and directly adjoin lots A and B, respectively. Lots C and D are in a platted residential subdivision and are subject to typical restrictions imposed by the subdivision's developer which limit their use to residential purposes. Lots A, B, C and D all front on a cul-de-sac which is the terminus of a public street in the subdivision. With the exception of a small portion of lot D, all of the above-described properties lie within a "B-1" zoning district under the county zoning ordinance, a classification which permits commercial uses, including the operation of a motel. You ask five questions, which I will state and answer in order below.

Your first question is whether the lot lines dividing lots A and B from each other and from the main motel parcel retain any significance now that all of the property is in common ownership. I will assume that the lots of which you speak, and which appear on the diagram sketch enclosed with your letter, are all platted lots recorded under provisions of the county subdivision ordinance required to be enacted pursuant to § 15.1-485 of the Code of Virginia. The procedures for vacating or altering subdivision lot lines on a recorded plat are specified in § 15.1-481 et seq. They are mandatory and must be complied with in order for any such vacation or alteration to be effective. See, e.g., Reports of the Attorney General: 1978-1979 at 258, 259; 1973-1974 at 343; compare Reports of the Attorney General: 1980-1981 at 332, 335; 1979-1980 at 330; 1964-1965 at 316. Accordingly, in answer to your first question, it is my opinion that the mere acquisition of lots A and B by the motel property owner, bringing all of those parcels into common ownership, had no effect on the subdivision lot lines of record.

Your second question is whether, assuming that the lot lines remain in effect, lots A and B may be devoted to parking or another permitted accessory use in connection with the motel use on the main parcel or as an extension of such accessory use presently existing on the main parcel. At the outset, it should be noted that subdivision ordinances and zoning ordinances, although related, are enacted to serve different purposes, and subdivision regulations are to be considered as distinct from zoning regulations. See, e.g., Reports of the Attorney General: 1980-1981 at 422; 1979-1980 at 409; 1976-1977 at 199. With particular regard to the circumstances you describe, a "lot," within the meaning of zoning regulations, may or may not coincide with a lot as shown on a plat recorded pursuant to subdivision regulations. See 8E McQuillin, Municipal Corporations § 25.137 (3d ed. Rev. Vol., 1983); E. Yokley, Law of Subdivisions §43(b) (2d ed. 1981). There is no provision of Virginia law of which I am aware which requires local ordinances to equate zoning lots with subdivision lots, or which prohibits the treatment of two or more contiguous subdivision lots in common ownership as a single unit of property to be devoted to main and accessory uses permitted under the zoning ordinance. Thus, in the situation presented, the question whether lots A and B may be devoted to parking or another accessory use in connection with the motel operation is controlled by the terms of the county zoning ordinance. By long-standing policy, this Office does not construe local ordinances, and, accordingly, the answer to your question must be determined locally. See Reports of the Attorney General: 1977-1978 at 31, 484; 1976-1977 at 17.

You next ask whether, assuming that the subdivision plat line between lots C and D and the line dividing lots C and D from lots A and B are not vacated, lots C and D may be devoted to parking or another accessory use in connection with the principal use on the main parcel or with a use on lots A and B, at least to the extent permitted by the applicable zoning. I refer you to the answer given to question two, above, for the answer to this question, insofar as zoning regulations are concerned. It should be noted, however, that while the uses in question may be permissible under the county zoning
ordinance, the ordinance cannot relieve the lots from lawful restrictive covenants limiting them to residential use.¹ See Ault v. Shipley, 189 Va. 69, 52 S.E.2d 56 (1949); see generally 20 Am. Jur.2d Covenants, Conditions and Restrictions § 277 (1965); compare Yokley, supra, § 49 (the mere fact that a statutory procedure exists for the vacation of subdivision lot lines does not mean that restrictive covenants accompanying the lots are extinguished).

In your fourth question, you ask what criteria should be taken into account by the county board of supervisors pursuant to § 15.1-482(b) in considering an application to vacate the line between lots C and D and the line dividing lots C and D from lots A and B. Section 15.1-482(b) provides that in cases where any lot in a subdivision has been sold, all or part of the subdivision plat may be vacated according to the following method:

"By ordinance of the governing body of the county or municipality in which the land shown on the plat or part thereof to be vacated lies on motion of one of its members or on application of any interested person. Such ordinance shall not be adopted until after notice has been given as required by § 15.1-431. Said notice shall clearly describe the plat or portion thereof to be vacated and state the time and place of the meeting of the governing body at which the adoption of the ordinance will be voted upon. Any person may appear at said meeting for the purpose of objecting to the adoption of the ordinance. An appeal from the adoption of the ordinance may be filed within thirty days with the circuit court having jurisdiction of the land shown on the plat or part thereof to be vacated. Upon such appeal the court may nullify the ordinance if it finds that the owner of any lot shown on the plat will be irreparably damaged." (Emphasis added.)

The statute does not expressly specify the criteria to be used by the board of supervisors in deciding whether to adopt an ordinance vacating all or part of a subdivision plat, but by clear implication the board should not adopt the ordinance vacating a plat or portion thereof if it is of the opinion that such vacation will irreparably damage the owner of any lot shown on the plat. In addition, the implied criteria would include those by which all ordinances which affect private property rights are governed.² A local ordinance must conform to constitutional principles (observing rights of due process and just compensation for property taken or damaged), and the power must be exercised in good faith. See Nat. Linen Service v. Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954); Richmond-Ashland v. Commonwealth, 182 Va. 296, 173 S.E. 892 (1934); City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926); Danville v. Hatcher, 101 Va. 523, 44 S.E. 723 (1903).

Your final question reads as follows:

"In an appeal to the circuit court from enactment of an ordinance vacating the subdivision lot lines, may adjoining lot owners, as a basis for claiming that they are 'irreparably damaged' within the meaning of § 15.1-482(b), properly offer evidence tending to show that the act of vacating per se diminished the value of their lots because of the probable future use of the 'vacated' lots? Or would the court be in error in considering at all the effect of the probable future use of the vacated lots in determining whether there had been irreparable damage?"

The Supreme Court of Virginia recognizes the general rule that a litigant should be allowed to introduce all competent, material and relevant evidence which tends to prove or disprove any material issue raised, and the court trying the case should give consideration to such evidence before making findings of fact. See Barnette v. Dickens, 205 Va. 12, 135 S.E.2d 109 (1964); Hepler v. Hepler, 195 Va. 611, 79 S.E.2d 652 (1954); see also Peacock Buick v. Durkin, 221 Va. 1133, 277 S.E.2d 225 (1981) (evidence having rational probative value is admissible unless some rule requires its exclusion; trial court has great deal of discretion in determining whether evidence is relevant to the issue). Accordingly, in answer to your question, in my opinion other lot owners in the
circumstances you describe may offer any evidence bearing upon the issue of whether they have been irreparably damaged by the act of vacating the subdivision lot lines in question, and the court would not be in error in considering the evidence offered unless such consideration could be shown to be an abuse of the court's discretion, or a rule of evidence requires its exclusion.

1Note that once lots have been sold in a subdivision, 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; or it may become unenforceable by way of abandonment, waiver, estoppel, acquiescence in violations, or change of conditions, among other means. See 5 R. Powell, The Law of Real Property ¶ 677, 679 (rev. ed. 1981); Duvall v. Ford Leasing, 220 Va. 36, 255 S.E.2d 470 (1979); Village Gate v. Hales, 219 Va. 321, 246 S.E.2d 903 (1978); Booker v. Old Dogmion Land Co., 188 Va. 143, 49 S.E.2d 314 (1948).

2It appears that a portion of an existing street will be vacated by the proposal. For a discussion of the applicable principles governing rights of the other users of the vacated street, see City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926).

SUNDAY CLOSING LAW. EXEMPTION IN § 18.2-341(a)(7) REGARDING ENTERTAINMENT FACILITIES DOES NOT APPLY TO BUSINESS ENGAGED IN SALE AND LEASING OF PRERECORDED VIDEOTAPES.

November 28, 1984

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

You have asked whether the sale or leasing of prerecorded videotapes on Sunday is within the "entertainment...facilities" exemption of § 18.2-341 of the Code of Virginia. You describe a business that sells videotape equipment and televisions in addition to the sale and leasing of prerecorded videotapes. The latter activity is stated to produce most of the business income.

Section 18.2-341 makes it a misdemeanor for persons to engage in, or hire others to engage in, work, labor or business on Sundays, except in counties or cities which have opted out of the statutory prohibition pursuant to § 18.2-342. The General Assembly has provided for certain carefully defined industries and businesses to be exempt from coverage of the prohibition. The business involved apparently claims that it is within the exemption provided for "[s]ports, athletic events and the operation of historic, entertainment and recreational facilities...." See § 18.2-341(a)(7). The terms "entertainment" and "facilities" are not defined by the statute.

Statutory language is to be accorded its ordinary and everyday meaning unless a contrary meaning is clearly intended. McCarron v. Commonwealth, 169 Va. 387, 193 S.E. 509 (1937). While we may assume that prerecorded videotapes are used for the purchaser's entertainment, as that term is commonly understood, a business which sells or leases tapes does not thereby become an entertainment facility. A "facility" is defined by Webster's Third New International Dictionary (1968) as "5 b: something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Entertainment facilities have been defined as "a place where admission, dues and fees are paid for one to enter and attend. Having been granted this privilege the customer may then have access and the use of the facilities therein made available to him."

In the context of the statute, it is apparent that the General Assembly contemplated exempting business facilities where a particular activity, entertainment, occurs on the premise such as a concert hall. A business which sells or leases videotapes to be viewed by the consumer at his home or another location, cannot therefore be considered an entertainment facility.

To characterize the business activity here as within the entertainment facility exemption of § 18.2-341 distorts the interpretation of that term beyond the commonly understood meaning in order to permit the particular business to avoid the general statutory prohibition against working or transacting business on Sunday. I cannot ascribe such a distorted interpretation to the General Assembly. Accordingly, I am of the opinion that the sale or leasing of prerecorded videotapes is not exempt from the Sunday closing law in localities in which the law is applicable.

1The prohibition of § 18.2-341 states as follows: "On the first day of the week, commonly known and designated as Sunday, no person shall engage in work, labor or business or employ others to engage in work, labor or business except in the following industries and businesses...."

SUPREME COURT OF VIRGINIA. RULES. COLLECTION AGENCY MAY NOT REPRESENT CLIENTS IN COURT IN UNCONTESTED CASES.

May 8, 1985

The Honorable Robert C. Scott
Member, Senate of Virginia

You have asked for my opinion whether a collection agency may represent clients in court in uncontested cases. I assume that the representation includes the action necessary to obtain the warrant and proceed to judgment.

The Supreme Court of Virginia has defined the practice of law, in relevant part, as follows:

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

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(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

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

Rules of Supreme Court of Virginia, Part Six: § 1, Definitions (A). The Unauthorized Practice of Law Rules state, in part:

"(B) A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions."

These rules clearly provide that it is the unauthorized practice of law for one who is a non-lawyer to represent another before a tribunal unless (1) such non-lawyer is appearing on behalf of his employer and does not engage in activities involving the examination of witnesses, the preparation or filing of briefs or pleadings, or the presenting of legal conclusions; or (2) the non-lawyer is a regular employee acting for his employer and prepares notices or contracts incident to the regular course of conducting a licensed business.

Under normal circumstances, a collection agency would not be considered as a regular employee of its creditor/client. Based on this assumption, the collection agency would be engaging in the unauthorized practice of law if it represented the interests of its client before a tribunal.

A limited exception to the prohibition against unauthorized practice has been granted by the Supreme Court in Rule 3D:5. That Rule now provides: "No judgment for plaintiff shall be granted in any case except on request made in person in court by the plaintiff, plaintiff's attorney, or plaintiff's regular and bona fide employee." (Emphasis added.)

Rule 3D:5, as amended, became effective on February 15, 1983. Prior to the amendment, the Rule allowed the request for judgment on behalf of the plaintiff to be made by "plaintiff, plaintiff's attorney, or plaintiff's agent." (Emphasis added.) In my opinion, the effect of the Supreme Court's amendment was to limit the representation of the plaintiff to lawyers and to a regular and bona fide employee of the plaintiff.

A collection agency is not an employee of its client, but rather it is an agent of its client. Therefore, based upon the Rules of Court cited above, I must conclude that a non-attorney member of a collection agency, who is not the regular and bona fide employee of a client, may not represent such client in court, even though the cases may be uncontested.

1Collection agencies are no longer required to obtain a license from the State to engage in business. Ch. 203, Acts of Assembly of 1984.
You ask a question which emanates from my Opinion to the Honorable Edgar L. Turlington, Jr., Judge, General District Court for the City of Richmond, dated July 11, 1984. I concluded in that Opinion that when a civil proceeding is initiated in the general district court by obtaining a warrant on a certain preprinted form of application, the completed form could be mailed to the defendant to satisfy the requirement of § 8.01-296(2)(b) of the Code of Virginia for mailing a copy of the "pleading" to the defendant. In view of that conclusion, you now ask: "Would it then be the unauthorized practice of law for a non-lawyer to file this paper on behalf of anyone other than himself? In particular, would employees, rental agents, credit managers, etc., now be precluded from filing requests for civil warrants in the general district court."

The purpose of § 8.01-296(2)(b) is to ensure that a party to whom service is directed is fully apprised of the pendency of the action, specifically when service is effected by posting and no personal service or other substituted service is available. Although this section refers to a subsequent mailing of the "pleading" to such party, I concluded in the Turlington Opinion that the mailing of the completed, preprinted application for a civil warrant contained sufficient information to fulfill the due process requirements for notice of the pendency of the action. Therefore, mailing of the warrant itself, which had already been posted at the party's abode, was unnecessary. The application for a civil warrant in this context fulfills the statutory requirement of sending a copy of the "pleading," and meets the practical needs of court administration.

The Rules of Supreme Court of Virginia provide that a non-lawyer may not prepare "pleadings" on behalf of another. See Part Six: §1 and Unauthorized Practice Rule 1-101(B). The purpose of this principle is to protect the public from relying on actions of one not trained in the law to represent their interests in proceedings requiring a knowledge of the law. "Pleading" is not generally defined in Title 8.01, Title 16.1, or the Rules of Court. Therefore, the content and effect of the activities undertaken must be examined to determine whether a non-lawyer is engaging in the unauthorized practice of law.

As you know, practice in the general district courts includes a number of preprinted forms which request the issuance of certain types of process. In a prior Opinion, this Office concluded that filling in the blank spaces on a Suggestion for Summons in Garnishment did not require legal knowledge or skill and, hence, did not constitute the unauthorized practice of law. 1964-1965 Report of the Attorney General at 259.

Based on the considerations underlying the requirement of furnishing a "pleading" under § 8.01-296(2)(b) and the prohibition against a non-lawyer preparing and filing "pleadings," I am of the opinion that the submission of a request for a civil warrant on behalf of a party by a bona fide employee or agent who is not a lawyer does not constitute the unauthorized practice of law. 3

1Rule 3:16 states that motions in writings are pleadings. This Rule applies only to civil actions at law in a court of record.

2The Court has recognized the difference between "motions" and "requests." See Rule 3D:5.

3It should be noted, however, that Rule 3D:5 limits those who may request judgment to the plaintiff, plaintiff's attorney and regular employees of the plaintiff. See Opinion to the Honorable Robert C. Scott, Member, Senate of Virginia, dated May 8, 1985.
TAXATION. ASSESSMENTS. BOARD OF SUPERVISORS MAY ESTABLISH DEPARTMENT OF REAL ESTATE ASSESSMENT TO CONDUCT BIENNIAL ASSESSMENT.

August 7, 1984

The Honorable Joseph Rigo
Commissioner of the Revenue for York County

You have asked whether a board of supervisors of a county has the authority to establish a department of real estate assessment to conduct biennial reassessments when the county's commissioner of the revenue has not refused to undertake such reassessments. You also have asked a question pertaining to Ch. 299, Acts of Assembly of 1979.

Based upon my review of the Code of Virginia, I am of the opinion that your first question is required to be answered in the affirmative. In § 58-769.2, the General Assembly has authorized counties and cities to provide for the assessment and equalization of real estate on an annual or biennial assessment basis. Whether that authority should be exercised by York County is a policy decision for the board of supervisors to make.

That section further states that no commissioner of the revenue, without his consent, shall be required to make such an assessment.

Section 58-778.1 provides, however:

"Notwithstanding any other provision of law, general or special, the governing body of any county or city having at least one full-time real estate appraiser or assessor certified by the Tax Commissioner may provide by ordinance for the biennial assessment and equalization of real estate in lieu of the reassessments required under this chapter. Any county or city employing such method shall conduct a new reassessment of all real property biennially...."

As may be readily seen, the enabling provisions of that section control, "Notwithstanding any other provision of law." Thus, so long as the requirements of this section are met, I am of the opinion that a board of supervisors may, by ordinance, establish a department of real estate assessment to perform the valuation function related to biennial assessment of real estate.

Turning to your second inquiry, Ch. 299, Acts of Assembly of 1979, in relevant part, states:

"Upon establishment of a department of real estate assessment, James City County may, by resolution duly adopted, enter into an agreement with any contiguous county or city for the establishment of a joint department of real estate assessment. The joint department shall assess all real estate within such localities on an annual basis and transfer such assessment to the commissioner of the revenue...." (Emphasis added.)

You have inquired whether the reference to any contiguous county is limited to those counties which have independent authority to establish a joint department of real estate assessment such as has been granted to James City County by Ch. 299. The language of this statute clearly does not limit the establishment of a joint department of real estate assessment to James City County and a contiguous county or city which also has been
granted enabling legislation to establish such a department. This legislation, however, does restrict such joint department to the assessment of real estate on an annual, not biennial, assessment basis.

1This Opinion addresses those counties operating under a "traditional" form of government. See Ch. 12 of Title 15.1 of the Code. It is my understanding that York Co. operates under the "traditional" form of government.

2Cf. 1982-1983 Report of the Attorney General at 546 (commissioner of the revenue is the local assessing officer for purposes of Art. 1.1, Ch. 15, Title 58 in the absence of other appointed assessing officers). See also 1976-1977 Report of the Attorney General at 36 (commissioner of the revenue may not be certified as a full-time appraiser).

TAXATION. ASSESSMENTS. SOME FUNCTIONS MAY BE PERFORMED BY DEPARTMENT OF REAL ESTATE ASSESSMENT.

December 14, 1984

The Honorable Joseph Rigo
Commissioner of the Revenue for York County

In light of my Opinion to you dated August 7, 1984, that the county is authorized to establish a department of real estate assessment, you have asked for guidance in determining who should perform certain real estate assessment functions. You ask which functions are performed by a commissioner of revenue and which are performed by a county department of real estate assessment established incident to the adoption of an ordinance providing for biennial assessments pursuant to § 58-778.1 of the Code of Virginia. You note that the ordinance establishing the department provides for an office of "county assessor" to be filled by a duly appointed and qualified, full-time real estate appraiser or assessor.

The duties of the commissioner of the revenue with regard to real estate assessment are prescribed in Ch. 15, Title 58. Section 58-796 et seq. requires each commissioner of the revenue to ascertain all real estate in his county or city and to prepare the land books containing tax assessment information. See 1982-1983 Report of the Attorney General at 571. Transfers in the land book are to be verified by the commissioner of the revenue. See 1966-1967 Report of the Attorney General at 14.

There is no general statutory authority for the commissioner of the revenue to reassess the value of real property, such as exists for tangible personal property. See 1982-1983 Report of the Attorney General at 546. Indeed, this Office has previously opined that, with certain exceptions, it is the duly appointed assessor, rather than the commissioner of the revenue, who is responsible for determining the value of real estate for tax purposes. See 1977-1978 Report of the Attorney General at 71. Throughout Ch. 15 of Title 58, however, there are a number of instances where the commissioner of the revenue is required to reassess the value of real estate apart from general, biennial or annual reassessments, based upon changed circumstances.

With respect to new construction, it is the responsibility of the commissioner of the revenue to reassess the value of any buildings and enclosures not previously assessed. See §§ 58-810 and 58-811.1. It is also the commissioner's responsibility to assess new subdivisions. See § 58-772.1.

The General Assembly has placed the duties mentioned, inter alia, upon the
commissioner of the revenue. This precludes a county or city from assigning them to any other officer in the absence of statutory authority. See 1972-1973 Report of the Attorney General at 84.

Many functions related to real estate assessment, however, may be performed by a local assessing officer. For instance, the application process for the § 58-760.1 exemption from taxes on property of elderly and handicapped persons may be administered through such an officer. Similarly, the application and valuation process for land use taxation may be administered by a local assessing officer. See § 58-769.7 et seq.

In summary, the duties which are statutorily prescribed as those of the commissioner of the revenue must be performed by him. Other functions related to real estate assessment, however, may be assigned to the locality's department of real estate assessment by an appropriate ordinance.

1Section 58-778.1 provides that the governing body of a city or county having at least one full-time real estate appraiser or assessor certified by the Tax Commissioner may provide by ordinance for biennial assessment and equalization of real estate.

2See also § 58-768.3(B) which requires a real estate appraiser to transfer his assessments to the commissioner of the revenue.

3See 1982-1983 Report of the Attorney General at 546, wherein it was noted that the commissioner of the revenue is the local assessing officer for purposes of Art. 1.1, Ch. 15, Title 58, in the absence of other appointed assessing officers.

4See, e.g., § 58-764 (easement affecting value); § 58-772.1 (rezoning, reclassification or exception by zoning authorities); § 58-810 (omitted properties); and § 58-813 (destroyed or damaged buildings).

TAXATION. BOARDS OF EQUALIZATION. CHANGES IN VALUE EFFECTIVE FOR YEAR OF BOARD'S ORDER. COMMISSIONER OF REVENUE REQUIRED TO MAKE SUPPLEMENTAL ASSESSMENTS AND REFUNDS CURRENTLY.

December 21, 1984

The Honorable Rodger L. Smith
County Attorney for Page County

You have inquired whether the tax assessments in Page County should be adjusted for the 1984 tax year in order to effect the order of the 1984 board of equalization or wait until the 1985 tax year.

Page County had a general reassessment during 1982 which was effective January 1, 1983. Normally, a board of equalization would have been created and appointed by the board of supervisors to sit during 1983 as contemplated by § 58-897 of the Code of Virginia. This was not done in 1983. Effective January 1, 1984, § 58-897 was amended to delete the authority for the governing body of a county to create and appoint a board of equalization "in any other year" other than the year following the general reassessment. Consequently, Page County was then left without legal authority to have a board of equalization created until after the next general reassessment in 1986. In order to authorize the creation of a board of equalization to review and act upon the 1982 general reassessment, the General Assembly passed special legislation on behalf of Page County allowing the creation of a board of equalization for the tax year 1984.
Section 58-910 provides the answer to your question as follows:

"The commissioner of the revenue shall make on his land book the changes so ordered by the board and, if such changes affect the land book for the then current year and such land book has been then completed, the commissioner of the revenue may for that year make a supplemental assessment in case of an increase in valuation; and in case of a decrease in valuation, the order of the board shall entitle the taxpayer to an exoneration from so much of the assessment as exceeds the proper amount, if the taxes have not been paid by him and, in case the taxes have been paid, to a refund of so much thereof as is erroneous." (Emphasis added.)

By virtue of the special act applicable only to Page County, the General Assembly provided a means for a board of equalization to act. The board of equalization sat during 1984 and, in that year, entered an order making various adjustments to real estate valuations in Page County.

Because of the enactment of § 58-895(D), it is my opinion that the Commissioner of the Revenue for Page County is required to adjust assessments for the tax year 1984 and may not wait until tax year 1985 to assess the changes ordered by the board of equalization. See also Woodward v. Staunton, 161 Va. 671, 171 S.E. 590 (1933); 1974-1975 Report of the Attorney General at 450.

1The authority for the Page County Circuit Court to appoint a board of equalization in the year immediately following the year of a general reassessment as now appears in § 58-895 became effective January 1, 1984, too late for any such appointment to take place in the year 1983.
2The special legislation was codified at § 58-895(D), which states: "Notwithstanding any other provisions of this section, the circuit court for Page County may, at the request of the governing body of Page County, appoint a board of equalization of real estate assessments for the tax year 1984. The term of such board of equalization shall expire June 30, 1984."

TAXATION. CLERKS. DELINQUENT REAL ESTATE TAX LIENS SHOULD BE TRANSFERRED TO TREASURER.

April 9, 1985

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

You have asked whether the clerk of the circuit court may transfer the delinquent real estate tax liens, currently recorded in the clerk's office, to the office of the county treasurer. You have asked this question in light of the amendments to the pertinent sections of the Code of Virginia which were made during the 1985 Session of the General Assembly.

Currently, § 58.1-3929 requires that liens for delinquent real estate taxes "shall be recorded in the clerk's office...." Section 58.1-3930 details the manner in which the clerk is to record and release tax liens for cities and counties. Section 58.1-3937 requires the clerk to keep a book in which delinquent town taxes are entered. The 1985 General Assembly repealed § 58.1-3929 and amended §§ 58.1-3930 and 58.1-3937, effective July 1, 1985, as follows:
$58.1-3930. How liens to be recorded; release of liens.--The liens required by $58.1-3929 to be recorded in the clerk's office shall be recorded. Liens of delinquent real estate taxes shall be recorded in the office of the treasurer in a book or an approved visible card system to be kept for the purpose and indexed in the names of the persons against whom the taxes on real estate are assessed, or in a computer system approved by the Auditor of Public Accounts. Any officer collecting any such taxes unless otherwise specifically provided by law, shall forthwith transmit such payment to the clerk treasurer, who shall give his receipt therefor and record the payment, thereby releasing the lien. Where such list is kept in a visible card index file, the clerk treasurer may, at the time of entry of the records of payment, remove from the file the cards on which such payments have been noted; and such cards may, on certification by the Auditor of Public Accounts that the same are no longer needed for audit, be destroyed.

$58.1-3937. Recordation of list of delinquent town taxes; sale of real property for town taxes.--When any town taxes are found to be delinquent on August 1 of the year following the year for which they were assessed by the town treasurer or other officer charged with the duty of collecting such taxes due, a list of the same shall be returned to the clerk of the circuit court treasurer of the county wherein such town is located and be by him entered in a book furnished by the town and kept in his office, the form and manner of entering the same to be similar to that provided by law for the record of delinquent taxes on real estate due to the county. In such book there shall also be columns in which shall be entered the names of the purchasers and the amount and date of sales of real estate sold for delinquent taxes, as hereinafter provided.

2. That $58.1-3929 of the Code of Virginia is repealed.


By these amendments, the General Assembly unequivocally placed the responsibilities of retaining, recording and releasing delinquent real estate tax liens on local treasurers. Upon reading $58.1-3930, on July 1, 1985, and thereafter, a person searching the public records for delinquent real estate tax liens will expect to find them listed in the treasurer's office. The language does not indicate that clerks were intended to retain responsibility for liens recorded prior to July 1, 1985.

Based on the foregoing, it is my opinion that the clerk of the circuit court should transfer the delinquent real estate tax liens, currently recorded in the clerk's office, to the local treasurer's office, effective July 1, 1985, so that thereafter, all such records may be kept in one place.

TAXATION. COLLECTION. PERMIT REFUSAL NOT GENERALLY AUTHORIZED METHOD OF COLLECTING DELINQUENT REAL AND PERSONAL PROPERTY TAXES.

July 20, 1984

The Honorable B. H. Perry, Jr.
Treasurer for Isle of Wight County

You have inquired as to the legality of an ordinance passed by the Board of Supervisors of Isle of Wight County. The ordinance prohibits the issuance of permits related to the use of property until real or personal property taxes owed the county on
the property have been paid. The ordinance also provides for the revocation of permits
issued for a particular use of property where subsequent taxes are assessed on the
property and are delinquent for as much as one year.

You also refer to an Opinion of this Office holding that a city may not legally
refuse to issue a business license to persons or entities who are delinquent in the payment
of personal property taxes because there is no authority for collection of these taxes in
this manner. See 1982-1983 Report of the Attorney General at 516. You state that,
unlike that Opinion, the county has taken the position that it will issue no permits to
property on which taxes are delinquent on the basis that such denial is similar to refusal
to issue motor vehicle licenses if personal property taxes on that vehicle are delinquent.

While the board's action in seeking to encourage payment of delinquent taxes is
certainly understandable and commendable, it can be upheld only if the board had the
authority to adopt the particular ordinance. It is my opinion that the principles stated in
the Opinion found in the 1982-1983 Report of the Attorney General, supra, are equally
applicable to the ordinance in question.

Taxes may be collected only in the manner prescribed by statute. The Code of
Virginia provides various methods for collection of taxes,1 but I find no authority for the
collection by making payment of delinquent real and personal property taxes a
prerequisite to the issuance of permits for use of the property or the revocation of
permits where, subsequently, taxes are past due on the property.

Accordingly, I am forced to conclude that the board of supervisors of the county is
without authority to enact the ordinance in question.2 The action relating to motor
vehicles is distinguishable. Section 46.1-65(c) expressly allows a local government to
refuse to issue local motor vehicle licenses where personal property taxes on the vehicle
to be licensed are not paid.3 Thus, legislative authority exists for this delinquent tax
collection method unlike the collection methods set forth in the county's ordinance.

1E.g., SS 58-1010, 58-1014 and 58-1117.1.
2See also 1970-1971 Report of the Attorney General at 15 (holding that a subdivision
ordinance could not be amended to make payment of all taxes owed by an applicant a
condition precedent to approval of a subdivision application because no legislation
existed authorizing such a delinquent tax collection method).
3This statute also permits a locality to require payment of delinquent personal
property taxes on all motor vehicles, trailers or semitrailers of the applicant as a
prerequisite to issuance of the local license decal. But see 1981-1982 Report of the
Attorney General at 262 (holding that the locality's authority to deny issuance of a local
motor vehicle license does not extend to delinquent personal property taxes owed the
assessing locality by the applicant on all specie of property but only to such delinquent
taxes on motor vehicles, trailers or semitrailers).

TAXATION. COLLECTION. SECTION 58-1010. APPLICATION MAY BE SERVED ON
REGISTERED AGENT OF FOREIGN CORPORATION WHICH HAS SUFFICIENT
CONTACTS IN VIRGINIA TO BE DEEMED TRANSACTING BUSINESS IN VIRGINIA.

September 26, 1984

The Honorable Charles A. Reid
Treasurer for Greensville County
You have asked whether a treasurer may use the procedure outlined in § 58-1010 of the Code of Virginia to collect delinquent personal property and State income taxes from the wages of a taxpayer who presently works out of State for a foreign corporation which has a registered agent in Virginia. The taxpayer resided in your county on January 1, but subsequently moved out of State. You state further that the corporation has operations in Virginia. Based upon this information, I assume it has sufficient contacts to be deemed to be transacting business in Virginia and that it has a certificate of authority to do so under § 13.1-102 et seq.

Section 58-1010 states, in pertinent part:

"Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate...From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands."

Although neither § 58-1010 nor any other section in the Code sets statutory limitations on where or how service of the application must be made, constitutional due process principles must be considered. In a recent Opinion, I noted that the § 58-1010 application and garnishment are different procedures, but that the garnishment statutes provide useful guidelines for designing acceptable due process procedures under § 58-1010. The garnishment procedures permit service upon a corporation to be made, inter alia, on the registered agent of the corporation upon certification that no corporate officer or managing employee authorized to accept service can be located within Virginia. See § 8.01-513.

Based on the foregoing, it is my opinion that you may serve the § 58-1010 application on the registered agent of a foreign corporation in your efforts to collect delinquent personal property and State income taxes from the wages of a taxpayer who works out of State for the foreign corporation, so long as you are unable to locate a corporate officer or managing employee authorized to accept service can be located within Virginia. See § 8.01-513.


2The procedure under § 8.01-513 is valid in any particular case only if the corporation has sufficient contacts with Virginia so as to make it reasonable and just to subject the corporation to the jurisdiction of the Virginia courts. See 1976-1977 Report of the Attorney General at 93. Similarly, sufficient contacts with Virginia are necessary before any procedure under § 58-1010 would be valid. As noted in the opening paragraph of this letter, I assume that in your situation the requisite contacts with Virginia exist.

3I call your attention to that portion of the above-referenced Opinion to Mr. O'Leary pertaining to the possible applicability of the principles enunciated by the court in Harris v. Bailey, 574 F.Supp. 966 (W.D. Va. 1983), to the § 58-1010 procedure.

TAXATION. COLLECTION. SECTION 58-1010. EMPLOYER SERVED WITH NOTICE REQUIRED TO WITHHOLD FROM WAGES AMOUNTS OWED BY EMPLOYEE FOR DELINQUENT TAXES; EMPLOYER NOT REQUIRED TO PAY AMOUNTS IN EXCESS OF WAGES OWED.
You have asked several questions concerning § 58-1010 of the Code of Virginia. That section provides, in pertinent part:

"Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed."

First, you have expressed concern that a locality's use of § 58-1010 makes an employer liable for an employee's delinquent personal property tax and that such use does not constitute due process and is confiscatory. Section 58-1010 does not, in any manner, transfer an employee's liability for his personal property tax to his employer. Procedures under § 58-1010 simply provide the locality direct access to the assets (wages) of the employee taxpayer in the hands of the employer to expedite the locality's tax collection. The employer must pay to the taxing authority the amount recited in the § 58-1010 notice, only to the extent that he, the employer, is indebted to the employee for wages earned. The sample notice you enclose properly recites that payment is demanded "for so much thereof as may be in your hands on account of such...indebtedness."

In addition, you have asked whether a locality may use procedures under § 58-1010 to require an employer to withhold from an employee's wages amounts owed by the employee for delinquent personal property taxes. You also have asked whether § 58-1010 applies to salary earned by an employee but not yet paid by the employer. I am of the opinion that the procedures available under § 58-1010 do apply to employers who hold wages to be paid to employees, provided the locality properly avails itself of those procedures.

Finally, you have asked whether the sample notice which you enclosed properly effects collection under § 58-1010. In this regard, I am enclosing a copy of an Opinion dated September 5, 1984, which I sent to the Honorable Francis X. O'Leary, Jr., Treasurer for Arlington County. As you can see from that Opinion, because of the recent case of *Harris v. Bailey*, 574 F.Supp. 966 (W.D. Va. 1983), I suggest that localities using § 58-1010 should ensure that copies of notices are timely sent to the taxpayers, that the notices outline major exemptions, and that the notices inform the taxpayers of the procedures by which they may seek relief. To the extent that a prior Opinion of this Office, found in the 1978-1979 Report of the Attorney General at 265, conflicts with this Opinion, the prior Opinion is expressly overruled.

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1 *Harris v. Bailey* involved an attack on Virginia garnishment laws which have since been amended to cure the defect found by the court in that case. Because of the similarity in the procedures, it is possible that the holding of that case may be applied to § 58-1010.

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**TAXATION. COLLECTION. SECTION 58-1010. "FISHING EXPEDITION" PROHIBITED.**
The Honorable Francis X. O'Leary, Jr.
Treasurer for Arlington County

You have asked for guidance regarding the use of § 58-1010 of the Code of Virginia to obtain funds in bank accounts belonging to delinquent taxpayers. You have presented three plans for implementing a § 58-1010 procedure. The first plan requires that you gather information from various sources, such as a credit bureau, so that you may reasonably identify a bank in which a delinquent taxpayer has an account. You would then serve a § 58-1010 application on that bank with the name of the taxpayer, and the bank would be responsible for paying the delinquent tax amount from the taxpayer's account. The other two plans involve attaching a list or magnetic computer tape to a § 58-1010 application and distributing it to all banks in the locality. Such list or tape would contain all delinquent taxpayers' names, social security numbers, and amounts owed. Each bank would then be required to identify on the list or tape the individuals who are its customers. Subsequently, the bank would deduct the tax amount owed from the appropriate customers' accounts.

Section 58-1010 states, in pertinent part:

"Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate....From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands."

Whereas § 58-1010 authorizes a procedure by which bank accounts may be subjected to levy, the statute contemplates service of the requisite application upon a specific entity which is indebted to a delinquent taxpayer or which possesses some part of his estate. The language "indebted to or having in his hands" affirms that the party to be served with a § 58-1010 application be an identifiable source. It would, therefore, be incumbent upon a tax collection officer to obtain sufficient information so that he may formulate a reasonable belief that a particular bank account is attributable to a delinquent taxpayer. The exploratory method described in your latter two plans does not meet these prerequisites.

Additionally, your letter does not mention the requirements of certain due process considerations enunciated in the recent case of Harris v. Bailey, 574 F.Supp. 966 (W.D. Va. 1983), in which the court found constitutional defects in the garnishment procedures authorized by §§ 8.01-511 to 8.01-525, as those procedures existed prior to amendment by the 1984 Session of the General Assembly. The defects included: (1) the failure of the statutory scheme to affirmatively require that notice of garnishment to the judgment debtor be served simultaneously, or within a reasonable time after the garnishment; (2) the failure of the statutory scheme to affirmatively require that notice to the judgment debtor identify the essential federal and State exemptions that provide the basic necessities of life and other possible exemptions from the garnishment law; and (3) the failure of the statutory scheme to affirmatively provide for a mandated, expeditious hearing on the exemptions claimed by judgment debtor.

In compliance with that case, the recodification of Title 58, effective January 1, 1985, provides in § 58.1-3952 (presently § 58-1010) a requirement that the treasurer or other tax collector of a locality send a copy of the (§ 58-1010) application to the delinquent taxpayer, with a notice informing him of the remedies provided in the current §§ 58-1141, 58-1142 and 58-1145, recodified in Title 58.1 as §§ 58.1-3980, 58.1-3981 and 58.1-3984. The recodification provisions meet the first and third elements of the Harris decision but do not require notice of the available exemptions.
Garnishment is a different procedure from a § 58-1010 application, but the garnishment process provides a useful tool in designing an acceptable procedure under § 58-1010. The exemptions for garnishments are listed in § 8.01-512.4. Exemptions 1-6 pertain to federal benefits while the remainder pertain to State benefits. It is my understanding that the State exemptions from garnishment do not apply to tax claims. The federal exemptions may apply. Accordingly, I recommend that you inform the taxpayer in the required notice that he may be entitled to claim an exemption to a § 58-1010 application to the extent that he can demonstrate that the funds in the bank account were derived from:

4. Annuities to survivors of federal judges (28 U.S.C. § 376(n)).

2 While the Harris v. Bailey case concerned garnishment procedures, it is possible that a future case would apply the analysis of that case to a § 58-1010 proceeding. To the extent that a prior Opinion of this Office, found in the 1978-1979 Report of the Attorney General at 265, conflicts with this Opinion, the prior Opinion is expressly overruled.

TAXATION. DELINQUENT. LISTS OF DELINQUENT TAXPAYERS MAY BE DISCLOSED TO THIRD PARTIES.

February 12, 1985

The Honorable Dorothy B. Saunders
Treasurer for the City of Franklin

You have asked whether delinquent real estate tax lists may be sent to all law firms in your jurisdiction as requested by the mayor. You explain that each month an updated computer printout of all delinquent real estate taxes in the city is sent to the Southampton County Circuit Court, with a copy being retained in your office. You do not state what purpose would be served by providing the delinquent real estate tax lists to the law firms.

The publication of the names of delinquent taxpayers is specifically excluded from the bar against disclosure of tax information found in § 58.1-3 of the Code of Virginia. Thus, you are not precluded from sending the delinquent real estate tax lists to the law firms in your city by the nondisclosure mandate of § 58.1-3.1 See 1981-1982 Report of the Attorney General at 379.

Such mailings to the law firms in your city would, however, involve the expenditure of public funds. Section 58.1-3141² limits the use of public funds by treasurers to those purposes provided by law. Treasurers have the duty to collect delinquent taxes³ and may incur expenses related to such collection. See Aetna Casualty Co. v. Supervisors, 160 Va. 11, 168 S.E. 617 (1933); 1971-1972 Report of the Attorney General at 448.
Based on the foregoing, I am of the opinion that the delinquent real estate tax list could not be sent to all the law firms in your locality at the expense of your office, unless you determine that such expense would aid you in your statutory duty to collect delinquent real estate taxes.

1The exclusion language reads, in pertinent part: "Nothing contained in this section shall be construed to prohibit the publication of...delinquent lists showing the names of taxpayers who failed to timely pay their taxes...." Section 58.1-3(B).

2The relevant language of § 58.1-3141 provides: "No treasurer or any other person handling public money shall knowingly apply, disburse or use any part of the public money held by him in any manner or for any purpose other than the manner and purposes provided by law."

3See §§ 58.1-3919, 58.1-3927 and 58.1-3928. The duties of the treasurer to collect and disburse taxes and public funds are set forth generally in Art. 2, Ch. 31 and Art. 2, Ch. 39 of Title 58.1. City charter provisions are not affected by any provision of Art. 2, Ch. 39 where a conflict exists between the two. In that event, the charter provision prevails. See § 58.1-3148.

4The lists are, however, official records, subject to the Virginia Freedom of Information Act, § 2.1-341 et seq. That Act requires you to make the lists available for inspection and copying during regular business hours on the request of any citizen of this State. You may assess reasonable charges for the cost of copying and any search time expended in supplying the records. See § 2.1-342(a); 1981-1982 Report of the Attorney General at 379.

TAXATION. DELINQUENT. REAL ESTATE. CLERK OF CIRCUIT COURT MAY NOT RETAIN DELINQUENT TAX LIEN RECORDS AFTER JULY 1, 1985, EVEN THOUGH COLLECTION EFFORTS COMMENCED PRIOR TO THAT DATE; RECORDS TRANSFERRED TO LOCAL TREASURER UNDER § 58.1-3930.

June 27, 1985

The Honorable Marie C. Durrer
Clerk, Circuit Court of Greene County

You have asked for an interpretation of § 58.1-3930, as amended by the 1985 Session of the General Assembly, effective July 1, 1985. You explain that as of April 1985, the Board of Supervisors for Greene County hired an attorney to collect delinquent taxes, that you are currently involved in the collection of these taxes, and expect the collection thereof to continue for the next 12 to 15 months, prior to the sale of the lands for delinquent taxes pursuant to § 58.1-3965 et seq. You have advised me further that the list of such lands to be sold will be published in accordance with § 58.1-3965 prior to July 1, 1985. You have also indicated that you have made a statement and calculated interest on the delinquent lands, as provided in § 14.1-112(13), although you may not receive payment on some of the delinquent accounts until after June 30, 1985. You have asked whether, under these circumstances, the records pertaining to these particular lands may remain in the clerk's office after June 30, 1985.

My Opinion to the Honorable Warren E. Barry, found in the 1984-1985 Report of the Attorney General at 307, construed § 58.1-3930, as amended by the 1985 Session of the General Assembly. The Barry Opinion held that the 1985 amendment to § 58.1-3930 "unequivocally placed the responsibilities of retaining, recording and releasing delinquent real estate tax liens on local treasurers." The Opinion concluded that "the clerk of the circuit court should transfer the delinquent real estate tax liens, currently recorded in
the clerk's office, to the local treasurer's office, effective July 1, 1985, so that thereafter, all such records may be kept in one place." Id.

I find no reason why the facts you have described would change the conclusion of the Barry Opinion. It is my opinion, therefore, that you must turn over the records at issue to the treasurer's office on July 1, 1985, even though collection efforts have begun with respect to these records.4

I am aware of the concern which has been expressed by clerks and treasurers alike over the transfer of the existing records as required by the 1985 statutory amendments. In absence of statutory guidance to conclude otherwise, I have no alternative to applying the statutes as enacted.

1Your letter asks for an opinion as to § 58.1-3928, but concerns only the retention of certain delinquent real estate tax lien records in your office. Section 58.1-3928 deals with the publication and collection of delinquent real estate taxes by the treasurer. Section 58.1-3930, on the other hand, deals with how liens are to be recorded and released. Accordingly, my opinion construes § 58.1-3930 and not § 58.1-3928.

2As amended and effective July 1, 1985, § 58.1-3930 will provide, in pertinent part: "Liens of delinquent real estate taxes shall be recorded in the office of the treasurer in a book or an approved visible card system to be kept for the purpose and indexed in the names of the persons against whom the taxes on real estate are assessed, or in a computer system approved by the Auditor of Public Accounts. Any officer collecting any such taxes unless otherwise specifically provided by law, shall forthwith transmit such payment to the treasurer, who shall give his receipt therefor and record the payment, thereby releasing the lien." Ch. 131, Acts of Assembly of 1985.

Prior to this amendment, § 58.1-3929 required that liens for delinquent real estate taxes be recorded in the clerk's office, and § 58.1-3930 set forth the manner in which the clerk was to record and release tax liens for cities and counties. Section 58.1-3929 is repealed, effective July 1, 1985. See Ch. 131, Acts of Assembly of 1985.

3Section 14.1-112(13) mandates that clerks, for services performed by virtue of their office, charge a fee of one dollar for each year of tax delinquency upon "making a statement, calculating interest and receiving payment of taxes on any parcel or tract of land returned delinquent...."

4You have also mentioned the fee which clerks are to charge pursuant to § 14.1-112(13) for making a statement, calculating interest and receiving payment on delinquent parcels. It is my opinion that so long as you actually receive payment of the taxes, even though such payment is after June 30, 1985, you may charge the requisite one dollar fee for each year of real estate tax delinquency. Of course, beginning July 1, 1985, you must transmit any tax payments received to the treasurer under § 58.1-3930.

TAXATION. DELINQUENT. TOWN LEVIES. COLLECTOR OF TAXES WHO MAINTAINS NORMAL OFFICE HOURS NOT REQUIRED TO FILE DELINQUENT LIST BY JANUARY 31; CHARGES FOR STRUCTURE REMOVAL INCLUDABLE IN TOWN REAL ESTATE TAX LIEN.

December 21, 1984

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

You have asked (1) whether the collector of town taxes, who maintains normal office hours Monday through Friday, is required to file with the clerk of the circuit court
of the county a list of delinquent real estate taxes on or before January 31 in order for the tax liens to be enforceable, and (2) whether, in the sale of real estate for delinquent taxes, there is a priority of distribution of proceeds among the delinquent taxes and a town assessment for removal of debris from the property.

As to your first question, § 58-1000.1 of the Code of Virginia provides no deadline by which the town tax collecting officer must file the delinquent list with the clerk of court. The section, however, does provide that "[u]ntil the taxes so returned delinquent are entered in such record as herein provided, the real estate shall not be liable for town taxes as against purchasers for value and without notice." This provision would indicate that the failure to make such a filing affects the town's remedy to enforce collection and that the delinquent lists should be filed as soon as possible after taxes are returned delinquent.1

As to your second question concerning the priority of tax and other municipal assessments, § 58-762 provides that "[t]here 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 authority for a local government to provide a charge for removing certain structures is found in § 15.1-11.2. That section provides, in part, that the charges "may be collected by the county, city or town as taxes and levies are collected" and "shall constitute a lien against such property."

The authority under § 15.1-11.2 to charge the property for removal of structures is identical to the authority given under § 15.1-11 to charge the property for cutting grass and weeds. An Opinion found in the 1971-1972 Report of the Attorney General at 259 addresses that section and states:

"These provisions [§ 15.1-11 and ordinance] authorize the county to treat the expenses incurred in such weed removal as property taxes. A permissible procedure for collection would be to add the charge, if it remains unpaid during the year the work was performed, to the ensuing year's real estate tax assessment. It would thus appear on the tax ticket for that year and, if not paid, would be collected in the same way as a real estate tax, under chapters 20 and 21 of Title 58."

I am, therefore, of the opinion that charges for local services such as removal of structures are includable in the outstanding real estate tax lien of the particular locality. As to priorities between tax liens of municipalities with concurrent taxing jurisdiction, i.e., town and county, ordinarily, where liens are given by statute, the first in time takes precedence. Puryear v. Taylor, 53 Va. (12 Gratt.) 401, 409 (1855).

1 Although you have referred to § 58-1000.2 in your first question, that section is not applicable to a town where the collector of taxes maintains an office open during normal office hours Monday through Friday.

TAXATION. ERRONEOUS ASSESSMENTS. EXONERATION UNDER §§ 58.1-3981, 58.1-3984 AND 58.1-3990 PRECLUDED WHERE TAXPAYER DID NOT MAKE TIMELY, WRITTEN APPLICATION.

May 22, 1985

The Honorable Thomas W. Athey
County Attorney for York County
You have asked several questions concerning the statutory authority for York County to exonerate a taxpayer from the payment of a supplemental real estate tax assessment for the 1980 tax year which was made by the commissioner of the revenue and which was not contested until 1984. For purposes of this Opinion, your letter requests that I assume that such assessment was erroneous. You then ask whether:

1. Section 58.1-3980 of the Code of Virginia requires that the taxpayer, who has not yet paid his assessment, must "apply" for exoneration in any particular manner or form;

2. the commissioner of the revenue has a duty to exonerate the taxpayer administratively pursuant to § 58.1-3981 or to seek judicial relief pursuant to § 58.1-3984(B), assuming that he acknowledges that the assessment is erroneous;

3. the adoption by the county of an ordinance pursuant to the provisions of § 58.1-3990 would allow the commissioner to exonerate a taxpayer when exoneration is otherwise barred; and

4. exoneration of the taxpayer can be effected through judicial action.

I will answer your questions seriatim. As to your first question, § 58.1-3980 expressly provides that §§ 58.1-3980 through 58.1-39831 govern an exoneration of an erroneous assessment of real estate when the error was made by the commissioner of the revenue or such other official "to whom the application is made." Under the facts you have presented, these sections would apply.

Section 58.1-3980 requires that "[a]ny person, firm or corporation...may, within three years from the last day of the tax year for which such assessment is made, apply to the commissioner of the revenue or such other official who made the assessment for a correction thereof." (Emphasis added.) Section 58.1-3981 is the statutory authorization for a correction of an erroneous assessment to be made by the commissioner. It refers not only to "such applicant" in terms of authority to correct the assessment, but also refers to "the applicant" in addressing the specific procedure for exoneration when payment has not yet been made.

Several Opinions of the Office have noted that a "letter, indicating all relevant facts," a "proper application," a "timely application," or a "petition" from the taxpayer is a requisite for correction to be made by the commissioner under § 58.1-3981, except in the case of clerical errors or calculations. See Reports of the Attorney General: 1982-1983 at 509, 525; 1978-1979 at 262; 1973-1974 at 397.

Furthermore, it is significant that the Supreme Court of Virginia has not allowed simply a notice of intention to apply for correction within the statutory period to suffice as an application to court to correct an erroneous assessment under § 58.1-3984. In Leesburg v. Loudoun Nat. B'k, 141 Va. 244, 246-48, 126 S.E. 196, 197 (1925), the Court stated:

"The remedy, because it is based solely upon the statute, is also limited thereby....[T]he application must be actually made....The application...can only be made during the period prescribed by the statute. This is true because the statute so provides in language so clear that its meaning cannot be fairly doubted." (Emphasis added.)

The prerequisites set forth by § 58.1-3980 before correction may be made by the commissioner under § 58.1-3981 are in language as clear as the language in § 58.1-3984, which the Court has strictly applied. Furthermore, there is no common law remedy for correction of an assessment. The right to apply for an administrative correction is
purely a statutory right.\textsuperscript{5}

\textit{Black's Law Dictionary} 90 (5th ed. 1979) defines "application" as a "petition." "Petition" is defined as "[a] formal written request addressed to some governmental authority." \textit{Id.} at 1031. In my opinion, § 58.1-3980 requires that a taxpayer who has not yet paid his assessment must make a written request to the commissioner of the revenue within three years from the last day of the tax year for which the assessment is made. In this case, the last day would be December 31, 1983.

Your second question is answered in the negative with respect to administrative exoneration under § 58.1-3981,\textsuperscript{6} in view of the answer given to the first question, \textit{i.e.}, there must have been a timely application in the form of a written request to the commissioner.\textsuperscript{7} With respect to the commissioner's duty to apply for judicial exoneration pursuant to § 58.1-3984(B), the answer is also in the negative, because in this particular case, the applicable three-year statute has expired.\textsuperscript{8} Cf. 1982-1983 Report of the Attorney General, supra. According to that Opinion, the application to court by the commissioner of the revenue on behalf of the taxpayer must be made within the three-year statute of limitations period.\textsuperscript{9} The provision in subsection B, providing for the commissioner's application to be made "in the manner herein provided," necessarily refers back to subsection A, which contains the three-year statute of limitations. Moreover, the January 24, 1983 Opinion referenced above was issued shortly before the recodification of Title 58.1, and the General Assembly did not amend new § 58.1-3984 to permit a contrary result. Thus, it may be presumed that the General Assembly concurred in that earlier Opinion. See \textit{Browning-Ferris v. Commonwealth}, 225 Va. 157, 300 S.E.2d 603 (1983).

Your third question as to exoneration under § 58.1-3990\textsuperscript{10} is answered in the negative. According to the previous Opinion of this Office, exoneration of assessments by the commissioner of the revenue is governed by this section or § 58.1-3981, but in either case, a "timely application" is a prerequisite. See 1982-1983 Report of the Attorney General, supra.

Your last question is also answered in the negative. The three-year statute of limitations contained in § 58.1-3984, addressed in my answer to your second question, precludes exoneration by the court under the facts you have given. Furthermore, this section provides the exclusive judicial remedy for correction of an assessment of local taxes.

\textsuperscript{1}Formerly §§ 58-1141 through 58-1144 prior to the recodification of Title 58, effective January 1, 1985.

\textsuperscript{2}Section 58.1-3981 provides, in part: "If any assessment is erroneous because of a mere clerical error or calculation the same may be corrected as herein provided and with or without petition from the taxpayer."

\textsuperscript{3}Formerly § 58-1145.

\textsuperscript{4}See also \textit{Washington County v. Sullins College}, 211 Va. 591, 179 S.E.2d 630 (1971) (remedy based solely on the statute is thus limited thereby); \textit{Barksdale v. H.O. Engen, Inc.}, 218 Va. 496, 237 S.E.2d 794 (1977) (distinction between a pure statute of limitations and a special limitation prescribed by a statute creating a new right.)\textsuperscript{5}


\textsuperscript{6}Section 58.1-3981 provides, in pertinent part: "If such commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue...is satisfied that he has erroneously assessed such applicant with any such tax he shall correct such assessment. If the assessment exceeds the proper amount, he 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."

"If there were such application, however, § 58.1-3981 clearly requires that exoneration by the commissioner of the revenue is mandatory if he is satisfied that the assessment is erroneous. See 1983-1984 Report of the Attorney General at 346 (requirement that the commissioner of the revenue take action on an application for refund).

Section 58.1-3984 provides, in pertinent part:

"A. Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made....

B. In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, and he is not able to correct it under § 58.1-3981, the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer." (Emphasis added.)

"See also 1976-1977 Report of the Attorney General at 269 (application to court by the taxpayer or the commissioner of the revenue must be made within the statutory limitations period).

Formerly § 58-1152.1, § 58.1-3990 provides, in pertinent part: "The governing body of any city or county may provide by ordinance for the refund of any local taxes or classes of taxes erroneously paid. If such ordinance be passed, and the commissioner of the revenue is satisfied that he has erroneously assessed any applicant with any local taxes, he shall certify to the tax-collecting officer the amount erroneously assessed. If the taxes have not been paid, the applicant shall be exonerated from payment of so much thereof as is erroneous...."

No refund shall be made in any case when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed...." (Emphasis added.)

TAXATION. ESTATES. JOINTLY HELD PROPERTY WITH RIGHT OF SURVIVORSHIP NOT SUBJECT TO TAX ON WILLS AND ADMINISTRATION.

August 10, 1984

The Honorable William T. Wilson
Member, House of Delegates

You have asked for guidance regarding procedures involved in the administration of a decedent's estate. Your inquiry arises as a result of the following circumstances.

In accordance with Title 64 of the Code of Virginia, a personal representative is required to qualify as an executor or administrator of a decedent's estate. At the time of qualification, the representative, generally, submits a "probate tax return" listing the personal and real property of the estate. See § 58-66.1. Within four months thereafter, the executor or administrator is then required to file with a commissioner of accounts an inventory of the personal property and real estate which is under his supervision or control. Some commissioners of accounts require that such inventory list jointly owned property with the right of survivorship because such property may be made subject to the decedent's debts.

In the particular situation which you present, a personal representative, upon qualification and submission of the probate tax return, paid the tax on wills and
administration imposed by § 58-66, which is calculated upon the assets of the estate. Subsequently, the representative duly filed the inventory (which included survivorship property) required by the commissioner of accounts. Because survivorship property was listed in the inventory but not on the probate tax return, the clerk of court collected the additional tax imposed pursuant to § 58-70.

Section 58-66 imposes a tax on the probate of every will or grant of administration. The rate of tax is determined in accordance with the value of "the estate, real, personal or mixed, passing by such will or by intestacy of the decedent...." (Emphasis added.) Section 58-70 further provides as follows:

"The clerk of the court wherein probate or administration tax has been paid by an estate shall thereafter compare the total value of the probate estate as shown on the probate tax return with the total value shown on the inventory of such estate to determine whether the estate has been undervalued for tax purposes. If such clerk finds that such estate has been undervalued, he shall thereupon collect such additional tax as may be due."

This Office has held that the tax imposed by § 58-66 applies only to assets passing under a will or by intestacy. See 1969-1970 Report of the Attorney General at 289. Property jointly held with the right of survivorship passes by survivorship and not by will or intestacy. Thus, the tax is not applicable to such property. See 1954-1955 Report of the Attorney General at 261.

The additional tax provided in § 58-70 is to be imposed when the estate has been undervalued for tax purposes. It is a basic rule of statutory construction that when construing statutes on the same subject matter in pari materia, the statutes should be harmonized if possible. See 1982-1983 Report of the Attorney General at 484. It is, therefore, reasonable to conclude that the additional tax is applicable only to assets passing under a will or by intestacy which were not listed or were undervalued on the probate tax return. The mere fact that survivorship property is listed as part of the inventory does not alter its status as property which does not pass by will or by intestacy.

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TAXATION. EXEMPTION. ARTICLE X, § 6(a)(4) MAY APPLY TO CORPORATION ORGANIZED IN 1980 FOR RELIGIOUS AND EDUCATIONAL PURPOSES.

January 21, 1985

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked whether property of the Christian Heritage Academy (the "Academy") is exempt from property taxation under § 58.1-3606(4) of the Code of Virginia, or whether an exemption under the powers granted the General Assembly pursuant to Art. X, § 6(a)(6) of the Constitution of Virginia (1971) must be sought utilizing the procedures outlined in § 30-19.04 of the Code.

Information you submitted with your inquiry indicates that the Academy was incorporated as a Virginia corporation in April of 1980. For purposes of this Opinion, it is assumed that the Academy did not exist prior to the date of its incorporation. The Academy's articles of incorporation, which you provided, state that the purpose of the corporation is to operate exclusively for educational and religious purposes.

My Opinion to the Honorable Ivan D. Mapp, Commissioner of the Revenue for the City of Virginia Beach, found in the 1983-1984 Report of the Attorney General at 353,
held that § 58.1-3606 does not exempt from real property taxation an organization which did not exist on July 1, 1971 (the effective date of the revised Constitution). In accordance with the Mapp Opinion and the legislative analysis contained therein, I must find that property owned by the Academy is not entitled to exemption from property taxation under § 58.1-3606(4), because the corporation did not exist on July 1, 1971. I have also reviewed the other statutory exemptions from property taxation and find that none would apply to the Academy.

Please note, however, that while there is no statutory exemption, there is a constitutionally authorized exemption which may apply to the property of the Academy. Article X, § 6 provides, in pertinent part:

"(a) [The] following property and no other shall be exempt from taxation, State and local...

* * *

(4) 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."

This constitutionally authorized exemption is self-operative and, therefore, property coming within its requirements is exempt from property taxation without further action by the General Assembly. See Mapp Opinion, supra, at 363; 1971-1972 Report of the Attorney General at 438.

Whether the Academy is a nonprofit institution of learning and whether its property is "primarily used for literary, scientific, or educational purposes or purposes incidental thereto," within the meaning of Art. X, § 6(a)(4), is a factual determination which is the responsibility of the office of the commissioner of the revenue. See 1983-1984 Report of the Attorney General at 349. Prior Opinions of this Office have established that, at a minimum, an "institute of learning," for purposes of Art. X, § 6(a)(4), must have a faculty, student body and prescribed courses of study. See Reports of the Attorney General: 1983-1984 at 349; 1975-1976 at 348; 1971-1972 at 391. A narrow construction of the phrase is mandated by Art. X, § 6(f).

Finally, if an exemption pursuant to Art. X, § 6(a)(4) is not available to the Academy, that organization may seek a specific exemption from the General Assembly as authorized under Art. X, § 6(a)(6), following the procedures of § 30-19.04. The property must be used for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes in order for the power granted to the General Assembly under § 6(a)(6) of Art. X to be utilized.

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1The Mapp Opinion referred to § 58-12, the forerunner to § 58.1-3606. The two sections are substantively identical.

2Section 58.1-3606(4) provides, in pertinent part, for exemption from property taxation for "incorporated colleges or other institutions of learning not conducted for profit...primarily used for literary, scientific or educational purposes or purposes incidental thereto...."

"See the remaining paragraphs of §§ 58.1-3606 and 58.1-3607, 58.1-3609 through 58.1-3620, and 58.1-3650 through 58.1-3650.172.

I note that § 58.1-3617 exempts from taxation property owned by "[a]ny church, religious association or religious denomination operated exclusively on a nonprofit basis for charitable, religious or educational purposes...[which] property...[is] used exclusively for charitable, religious or educational purposes...." Assuming, without deciding, that the
Academy met the purpose test of that section, it is a corporation, so it does not qualify as one of the designated organizations. See Reports of the Attorney General: 1983-1984 at 352; 1981-1982 at 373 (holding that the failure to include corporations in § 58-12.24 means their property cannot qualify for exemption under that statutory provision).

4 The exemptions of §§ 6(a)(1)-6(a)(3) of Art. X are not applicable for the reasons set forth in my Opinion found in the 1983-1984 Report of the Attorney General at 349.

5 Section 183(d) of the Virginia Constitution of 1902 contained a similar, but not identical, exemption. Its reference to "institutions of learning" read "incorporated colleges or other incorporated institutions of learning...." The institution had to operate in corporate form for its property to qualify for exempt status. By way of contrast, Art. X, § 6(a)(4) does not require the institution to be a corporation. See Reports of the Attorney General: 1971-1972 at 438; 1970-1971 at 366.

TAXATION. EXEMPTION. CEMETERIES AND BURYING GROUNDS OPERATED FOR PROFIT NOT EXEMPT.

September 28, 1984

The Honorable A. Willard Lester
County Attorney for Wythe County

You have asked whether the commissioner of the revenue may exempt from taxation burial spaces and the crypts in a mausoleum located in a private, for-profit cemetery based upon an oral representation that the crypts and burial spaces have been sold to private parties. The person claiming the exemption has not presented instruments evidencing the sale and conveyance of the property. You also ask whether the mausoleum building itself becomes exempt from taxation once all of its individual crypts have been sold.

In a recent Opinion, found in the 1983-1984 Report of the Attorney General at 353, this Office held that all property exemptions obtained after July 1, 1971, must be strictly construed as required under the 1971 Constitution.1

Property tax exemptions are provided by Art. X, § 6 of the Constitution of Virginia (1971). Section 6(a)(3) specifically affords an exemption for "[p]rivate or public burying grounds or cemeteries, provided the same are not operated for profit." (Emphasis added.) In the instant case, the entity operating the cemetery and mausoleum does so for profit and, therefore, is not eligible for the exemption provided in Art. X, § 6(a)(3).

Once a burial plot is purchased by a private individual, however, a question arises whether that property would then be exempt under the rules of strict construction.

A burying ground is a place set apart for the interment of the dead. Black's Law Dictionary 179 (5th ed. 1979). A burial plot would meet the terms of this definition. Article X, § 6(a)(3) allows the exemption for nonprofit burying grounds regardless of whether the ownership is private or public. Thus, a sale to a private individual does not bar the exemption.

The origin of the 1971 constitutional exemption is found in § 183(c) of the 1902 Constitution of Virginia which exempted "private family burying-grounds not exceeding one acre in area" and nonprofit public burying-grounds, whether publicly or privately owned. According to Professor A. E. Dick Howard, the 1928 revision to the 1902 Constitution, which deleted the reference to "private family burying-grounds," merely simplified the language as a part of a general revision. II A. Howard, Commentaries on the Constitution of Virginia 1978 (1974); Ch. 206, 1928 Acts of Assembly at 836, 699.
is reasonable to conclude, therefore, that an individual burial plot does fall within the Art. X, § 6(a)(3) exemption for nonprofit burying grounds. See 1963-1964 Report of the Attorney General at 296. The commissioner of the revenue must, however, examine the underlying instruments to ensure that the conveyance has transferred ownership to the private individual. It is not necessary that the instrument be recorded to effect a transfer of ownership. See Hunton v. Wood, 101 Va. 54, 43 S.E. 186 (1903).

With respect to the mausoleum building itself, assuming ownership of the land and the structure thereon remains in the operating entity, that property will continue to be subject to taxation. See 1963-1964 Opinion, supra, at 297.

1There is one exception allowing liberal construction of exemptions for property not actually exempt on July 1, 1971; namely, for which the owning organization (1) existed on July 1, 1971, (2) owned the property on July 1, 1971, and (3) was entitled to an exemption under the 1902 Constitution of Virginia.

2Although this Opinion was written prior to 1971, I concur with its holdings and find them still applicable.

3I am informed that it is not the usual and customary practice of cemeteries when selling burial lots to convey a lot in fee simple to a purchaser with a deed. The cemetery usually issues a certificate awarding burial rights, and the purchaser's property right is in the nature of a permanent easement with the exclusive right to bury on the lot, subject to the general proprietorship and control of the company in which the legal title is lodged. Goldman v. Mollen, 168 Va. 345, 191 S.E. 627 (1937); Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S.E. 769 (1903).

TAXATION. EXEMPTION. CHURCH-OWNED PROPERTY LEASED TO NONEXEMPT LESSEE TAXABLE.

November 30, 1984

The Honorable Joseph J. Saunders, Jr.
Commissioner of the Revenue for the City of Bedford

You have asked whether § 58-758.1 of the Code of Virginia requires that the real property tax be assessed on the leasehold interest held by a nonexempt lessee of a church's property.

Based upon the information in your letter and attachments thereto, the lessee, a funeral home, is a nonexempt entity leasing real property from a church. In return for the church's agreement to lease the property for a ten-year period and to allow the funeral home use of all the church's parking areas, the funeral home has agreed to improve the leased property for the use of the communicants and congregation of the church, as well as its own employees and patrons.

Previous Opinions of this Office have held that exempt property leased by a church to an individual or entity for nonexempt purposes is not exempt from taxation. See Reports of the Attorney General: 1982-1983 at 534; 1965-1966 at 276. A "lease" may be defined as a "conveyance, usually in consideration of rent or other recompense, for life, years, or at will. Black's Law Dictionary 800 (5th ed. 1979). A "lease" exists here where the church has agreed to accept consideration for its allowance of nonexempt use by the funeral home. It will gain substantial improvements to the property, as well as rights to use all parking areas of the funeral home "at such times as the lot is not utilized by the...Funeral Home...."
Section 58-758 provides for the assessment of taxable real estate, including "a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from assessment for taxation to the owner." I, therefore, answer your question in the affirmative.

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TAXATION. EXEMPTION. CHURCH-OWNED PROPERTY NOT NECESSARILY EXEMPT.

December 26, 1984

The Honorable Charles H. Yeatts
Commissioner of the Revenue for New Kent County

You have asked whether a 150-acre farm acquired by a church in 1977 is exempt from property taxation under § 58-12 of the Code of Virginia. If such property is not exempt, you also have asked for the time limitation on collecting back taxes.

With respect to your first inquiry, you describe the property as follows:

"Approximately 30 acres of this farm is cropland which someone cultivates (no rental fee) in exchange for looking after the property. The other 120 acres of this farm is in trees which are growing and appreciating about $15-20 in value per acre each year.

The large farm house appears to be unfurnished and unused for several years."

You also mention that the property is used three or four times per year as a weekend retreat for a youth group and three times per year on weekends by adults for religious and recreational purposes.

It first should be noted that § 58-12 is not applicable to property acquired after 1971. See 1983-1984 Report of the Attorney General at 353. The legal authority authorizing exemptions for the property in question arises from two sources, Art. X, § 6(a)(2) of the Constitution of Virginia (1971), and § 58-12.24 of the Code. Article X, § 6(a)(2) states that the following property shall be exempt from taxation:

"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."

Because none of the uses presented in this case would qualify the property for exemption under this section, the only possible source of authority under which exemptions can be claimed is § 58-12.24. See Opinion to the Honorable Hunt A. Meadows, III, Commissioner of the Revenue for the County of Pittsylvania, dated December 4, 1984.

Section 58-12.24 states:

"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."

Property exempted under § 58-12.24 must meet both the ownership and use tests.
will assume for the purposes of this Opinion that the ownership test is met and that you are only concerned with the issue of use of the property. In determining whether the tests are met, the rule of strict statutory construction must be applied. See Art. X, § 6(f).

Whether the property in question is used exclusively for charitable, religious or educational purposes is necessarily a factual matter for determination by the commissioner of revenue. See 1974-1975 Report of the Attorney General at 491. Based upon the facts as presented by you, however, it is my opinion that any portion of the property which is not currently being used for any charitable, religious or educational purpose is not entitled to an exemption. See 1974-1975 Report of the Attorney General at 494. Similarly, farmland which is being cultivated by a private individual or which otherwise lies idle is also not eligible for an exemption. See Meadows Opinion, supra; 1973-1974 Report of the Attorney General at 356. Property used as a youth camp or summer camp is exempt. See Reports of the Attorney General: 1965-1966 at 277; 1956-1957 at 253.

With respect to your second inquiry, the time limit for assessing back taxes is three years. Section 58-1164 provides:

"If the commissioner of the revenue of any county or city or the tax-assessing officer of any town ascertain that any person or property subject to local taxation...has not been assessed for any tax year of the three years last past or that the same has been assessed at less than the law required for any one or more of such years...the commissioner of the revenue or other assessing officer shall list and assess the same...."

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1 Article X, § 6(a)(6) allows exemptions for "[p]roperty 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." Thus, by enacting § 58-12.24 under the authority of Art. X, § 6(a)(6), the General Assembly created a separate classification for tax exemption and subjected that classification to the restrictions prescribed in the statute.

2 Cf. 1973-1974 Report of the Attorney General at 391, where the property in question was a tract of 139 acres owned by a church which was used for a Christian camp. This Opinion held that any structure or land which was used exclusively for religious worship was exempt; however, the remainder of the property should be taxed.

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TAXATION. EXEMPTION. COLLEGE ENDOWMENT ASSOCIATION PROPERTY EXEMPT UNDER ART. X, § 6(a)(1).

February 19, 1985

The Honorable Joseph Rigo
Commissioner of the Revenue for York County

You have asked whether a gift of real property to the Endowment Association of the College of William and Mary in Virginia, Inc. ("Endowment Association") is exempt from property taxation. The Endowment Association is a nonprofit holding corporation for all real property and tangible personal property gifts made to the College of William and Mary (the "College"). All such gifts made to the College are actually deeded to and
held by the Endowment Association. You state that the property is to be "utilized to further scientific research of marine and land environments, as part of the marine science education program of the college."

Article X, § 6(a)(1) of the Constitution of Virginia (1971) provides a tax exemption for "[p]roperty owned directly or indirectly by the Commonwealth..." 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 forerunner of Art. X, § 6(a)(1). The Court noted 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." Id. at 179; see also 1983-1984 Report of the Attorney General at 350 (holding that where a political subdivision transfers bare legal title to its property to an entity in the role of mortgagee but retains beneficial ownership of such property, the property is indirectly owned by the political subdivision and, thus, entitled to the exemption provided in Art. X, § 6(a)(1)).

The Endowment Association was established by the College to receive gifts in its name. It thereby acts as a holding corporation for the College. The College, as a State entity, is the Commonwealth for purposes of Art. X, § 6(a)(1). See 1979-1980 Report of the Attorney General at 351. Applying the rationale of the Citizens' Foundation decision, the College retains the beneficial ownership of the property in question, whereas the Endowment Association retains bare legal title to such property. Thus, the property is indirectly owned by the College.

The origin of the exemption provided in Art. X, § 6(a)(1) may be traced to the Constitution of Virginia (1870) which simply authorized the General Assembly to exempt property used for State purposes. II A. Howard, Commentaries on the Constitution of Virginia 1074 (1974). The concept that property owned and used for governmental purposes is exempt from taxation is the settled policy of the Commonwealth. As stated in Pelouze v. Richmond, 183 Va. 805, 33 S.E.2d 767 (1945):

"[P]roperty owned by a State...is exempt from taxation either as a matter of public policy or by specific constitutional or statutory provisions, provided it is devoted to uses public in their nature." Id. at 810 (quoting 51 Am.Jur. Taxation § 557 (1944)). (Emphasis added.)

Although the emphasized language in the quote from the Pelouze opinion would appear to admit of the possibility that State-owned property must be devoted to a public use before it qualifies for exemption, another decision of the Court, Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1933), in dicta, suggests that property owned by the State is exempt without qualification. The latter view appears to be the better-reasoned position, because the constitutional exemption for publicly owned property contains no use/purpose limitation. See Art. X, §§ 6(a)(1)-(4) and 6(e); 71 Am.Jur.2d State and Local Taxation §§ 347-48 (1973).

Based upon the foregoing and the facts presented, I am of the opinion that the gift of real property which you describe to the Endowment Association is exempt from property taxation under Art. X, § 6(a)(1).\(^1\)

\(^1\)Compare 1956-1957 Report of the Attorney General at 253 (holding that a deed conveying real estate to a nonprofit holding corporation for a religious body is exempt from State recordation tax, as the deed in effect conveys property to a religious body).

\(^2\)Accordingly, it is not necessary to consider whether the property is also exempt
under the provisions of § 58.1-3606(4) or § 58.1-3618. In regard to the latter section, see Opinion to the Honorable Stanley R. Lewis, dated November 5, 1984, which considered whether a gift to a college educational foundation was exempt under § 58.1-3618, but which did not consider whether the gift was exempt under the Constitution.

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TAXATION. EXEMPTION. CREDIT UNIONS VARY, WHETHER FEDERAL OR STATE, AS TO LICENSE AND REAL OR PERSONAL PROPERTY TAXES.

November 27, 1984

The Honorable Ora A. Maupin
Commissioner of the Revenue for the City of Charlottesville

You have asked whether the real and personal property of State and federally chartered credit unions is subject to local property taxation. You also ask whether such credit unions may be subject to local business license taxes. I assume, for the purposes of this Opinion, that the city has an ordinance requiring businesses providing financial services to pay a business license tax measured by its gross receipts, as authorized by § 58-268.1 of the Code of Virginia.

A prior Opinion of this Office addresses your question pertaining to federal credit unions. See 1971-1972 Report of the Attorney General at 393. In considering whether the Norfolk Teachers Association Federal Credit Union was exempt from State and local taxes, that Opinion held that federal credit unions are subject only to real and personal property taxation. That holding was based on 12 U.S.C. § 1768 which provides, in pertinent part, that federal credit unions

"shall be exempt from all taxation now or hereafter imposed by...any State...or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State...and local taxation to the same extent as other similar property is taxed." (Emphasis added.)

In accordance with this earlier Opinion and 12 U.S.C. § 1768, I find that federal credit unions may be subject to local real and personal property taxes but not local business license taxes.¹

State chartered credit unions are controlled by § 6.1-196 et seq. Section 6.1-225 pertains to the taxation of these credit unions. It provides: "All credit unions organized under the laws of this State and doing business purely as credit unions shall be exempt from the payment of any franchise tax." (Emphasis added.) I am aware of no other exemption from taxation applicable to State chartered credit unions.² Accordingly, in order to answer your question, it must be determined whether the exemption from payment of any franchise tax, as provided in § 6.1-225, encompasses business license taxes or real and personal property taxes.³ I am of the opinion that the three taxes are separate and distinct.

The term "franchise tax" has been defined as a tax on the privilege of doing business under a corporate organization. See Superior Corp. v. Commonwealth, 147 Va. 202, 136 S.E. 666 (1927). The term "franchise taxes" clearly does not include real and personal property taxes. See § 58-760 et seq. on real estate taxes and § 58-829 et seq. pertaining to tangible personal property taxes. Thus, generally speaking, a corporation may be subjected to a property tax, license tax and a franchise tax, each being a separate and distinct tax.

While license taxes are, like franchise taxes, in the nature of a tax for a privilege,
they are exacted for the right of engaging in or carrying on a business, trade, profession or occupation in a locality, whether such business is a corporate entity or is operated by a person or other type of business organization. See § 58-266.1(A)(1) and Chambers v. Higgins, 169 Va. 345, 193 S.E. 531 (1937). Local business license taxes are not franchise taxes from which State chartered credit unions are exempt under § 6.1-225.4

Based on the foregoing, it is my opinion that State chartered credit unions are subject to local real estate and personal property taxes and may be subject to local business license taxes, provided your local ordinance imposing license taxes contains a provision applicable to corporations providing financial services.

1A business license tax, as authorized under § 58-266.1, is not a property tax but a tax on the privilege of engaging in a business or occupation in the locality. See McKenney v. C. C. of Alax., 147 Va. 157, 136 S.E. 588 (1927); Postal Tel. Cable Co. v. Norfolk, 191 Va. 125, 43 S.E. 207 (1933). But cf. Commonwealth v. Hutzler, 124 Va. 138, 97 S.E. 775 (1919), wherein a license tax imposed on private bankers measured on the amount of capital employed, when considered in reference to the statute imposing an ad valorem tax on all of the property in state, but directing that all capital of individuals invested or employed in any trade or business not otherwise taxed shall be the subject of such tax, was regarded not merely as a privilege tax, but as a charge on the capital itself.

See also Guidelines For Local Business, Professional and Occupational License Taxes ("BPOL"), issued by the Department of Taxation, January 1, 1984. BPOL guideline 3-2.1, n.18, states that federal credit unions are not subject to local license taxation under 12 U.S.C. § 1768.

2Credit unions are not "banks," which are generally not subject to local license taxes except in connection with the sale of tangible personal property sold by banks as provided in § 58-485.04. Nor is the exemption from all State and local taxes, except real and personal property taxes in § 6.1-226.12, applicable to credit unions providing financial services. This exemption applies only to credit union share insurance corporations.

3The exemption from franchise taxes is limited to State chartered credit unions doing business solely as credit unions. It would not apply to a credit union engaged in noncredit union activities. See § 6.1-200 for powers of credit unions.


5A local license tax provision applicable to persons engaged in retail sales may also apply to State chartered credit unions if they sell tangible personal property, e.g., the sale of promotional items or blank checks to their customers. See BPOL guidelines 2-5 and 2-6.

TAXATION. EXEMPTION. DISABLED VETERANS' MOTOR VEHICLES NOT SUBJECT TO STATE OR LOCAL LICENSE TAX.

February 5, 1985

The Honorable Lucille Q. Reed
Commissioner of the Revenue for Floyd County

The General Assembly has provided for waiver of the annual registration fees imposed by the State under Title 46.1 of the Code of Virginia on motor vehicles owned by certain disabled veterans. See § 46.1-149.1. You ask whether the General Assembly has also provided disabled veterans with an exemption from paying locally imposed personal property taxes on vehicles.
By virtue of Art. X, § 1 of the Constitution of Virginia (1971), all property is subject to taxation unless exempted by the Constitution or by law enacted by the General Assembly pursuant to the Constitution.

The vehicles to which you make specific reference are obtained by the veterans through a federal program administered by the Veterans Administration and authorized by 38 U.S.C. §§ 1901-1904. Those statutes entitle certain veterans who have suffered service-connected disabilities, such as the loss or permanent loss of the use of one or both feet, one or both hands or the permanent impairment of vision of both eyes, to have the total purchase price of an automobile or other conveyance paid for by the federal government up to a fixed dollar amount. The statutes also entitle the veteran to be furnished with adaptive equipment deemed necessary to safely operate the automobile or conveyance in accordance with State standards of licensure.

The Commonwealth of Virginia waives the annual motor vehicle registration fee prescribed in § 46.1-149 for certain disabled veterans. The registration fee waiver is set forth in § 46.1-149.1 and is extended to "any one motor vehicle owned and used personally by any veteran who has either lost or lost the use of one or both legs, or an arm or a hand, or who is blind or who is permanently and totally disabled as certified by the Veterans Administration." The Code mandates a similar waiver of local motor vehicle license fees in § 46.1-66(e), which states:

"No county, city or town shall impose a license fee for any one motor vehicle owned and used personally by any veteran who holds a current state motor vehicle registration card establishing that he has received a disabled veteran's exemption from the Division of Motor Vehicles and has been issued a disabled veteran's motor vehicle license plate as prescribed in § 46.1-149.1." (Emphasis added.)

The local personal property taxes with which you are concerned are assessed under the authority of Title 58.1. That title does authorize local governing bodies to grant certain types of real property tax relief to persons, including veterans, who are permanently and totally disabled. See § 58.1-3210 et seq. The General Assembly has not, however, exempted disabled veterans from tangible personal property taxes on their motor vehicles. No exemption from local property taxation is granted by 38 U.S.C. §§ 1901-1904, and I am unaware of any other provision of federal law which would permit such an exemption. Accordingly, because of the lack of any statutory basis for granting such an exemption, I must necessarily conclude that such vehicles are subject to local personal property taxes.

TAXATION. EXEMPTION. FARMLAND OWNED BY CHURCH FARMED BY PRIVATE INDIVIDUAL FOR PERSONAL AND CHURCH USE NOT EXEMPT.

December 4, 1984

The Honorable Hunt A. Meadows, III
Commissioner of the Revenue for Pittsylvania County

You have asked whether real property owned by the trustees of a religious association is exempt from property taxation when used for the various purposes described in the information you provided. Particularly mentioned is property used as (a) a sanctuary; (b) classrooms; (c) a dwelling made available to a needy family, rent-free; (d) a dwelling generating monthly rental income under a lease to a private entity; (e) recreational space; and (f) farmland farmed by an individual for his own and the church's use.
Based on the assumption that all property about which you ask was acquired after 1971, the legal authority authorizing exemptions for such property arises from two sources, Art. X, § 6(a)(2) of the Constitution of Virginia (1971), and § 58-12.24 of the Code of Virginia. Article X, § 6(a)(2) states, that the following property shall be exempt from taxation: "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." It is my opinion that if the sanctuary is used exclusively for religious worship, the sanctuary building and the land upon which it stands are exempt from real property taxation under Art. X, § 6(a)(2). None of the other five uses mentioned, however, would qualify property for the exemption under this section of the Constitution.

The only other possible source of authority under which exemptions can be claimed in the circumstances you presented is § 58-12.24. Section 58-12.24 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."

Property exempted under § 58-12.24 must meet both the ownership and use tests. I will assume for purposes of this Opinion that the ownership test is met and that you are only concerned with the issue of use of the property. In determining whether the tests are met, the rule of strict statutory construction must be applied. See Art. X, § 6(f); 1974-1975 Report of the Attorney General at 491.

Based on the foregoing statements of law and the facts as presented by you, it is my opinion that property used as classrooms is exempt from real property taxation under § 58-12.24 on the basis of its educational purpose. Property used as a dwelling for a needy family is tax exempt under § 58-12.24 on the basis of its charitable purpose. The property used as a dwelling which generates rental income, however, does not meet the charitable, religious or educational purpose test of § 58-12.24. Nor is the farmland entitled to an exemption because it is not used exclusively for charitable, religious or educational purposes when the private individual farming the land derives personal gain from his efforts. You have not furnished a sufficient description of the use of the property for recreation to determine whether the use is fulfilling a charitable, religious or educational purpose, but it is conceivable that its use could meet any one of those purposes. It is for you, as the official with the responsibility to make such factual determinations, to ascertain whether the use qualifies for exemption. See 1974-1975 Report of the Attorney General, supra.

1It is suggested in the material provided with your letter that § 58-12 authorizes an exemption for all property owned by a church that does not produce income. In an Opinion found in the 1983-1984 Report of the Attorney General at 353, however, this Office found that "in no circumstances 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." Id. at 362. It appears from the material you provided that this property was not acquired until 1975. Therefore, § 58-12 is not applicable in this case.

2Article X, § 6(a)(6) allows exemptions for "[p]roperty 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 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." Thus, by enacting § 58-12.24 under the authority of Art. X, § 6(a)(6), the General Assembly created a separate classification for tax exemption and subjected that classification to the restrictions prescribed in the statute.

TAXATION. EXEMPTION. JOINT EFFORT OF POLITICAL SUBDIVISIONS ENJOYS PRIVILEGES OF SAME UNDER §§ 15.1-20 and 15.1-21(a).

October 18, 1984

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

You have asked whether the Southeastern Tidewater Area Manpower Authority ("STAMA") is a tax-exempt authority for purposes of personal property taxation. You have supplied a copy of STAMA's amended charter agreement, dated October 1, 1983.

Property tax exemptions are provided by Art. X, § 6 of the Constitution of Virginia (1971). Section 6(a)(1) specifically affords an exemption for "[p]roperty owned directly or indirectly by the Commonwealth or any political subdivision thereof...." According to the amended charter agreement, STAMA is a joint venture among the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southampton entered into pursuant to authority granted by § 15.1-21 of the Code of Virginia. STAMA's purpose is to provide manpower services in the eight jurisdictions. It acquires and holds tangible personal property in its own name.

Section 15.1-21(a) provides for the joint exercise of the powers or privileges of political subdivisions as follows:

"Any power or powers, privileges or authority exercised or capable of exercise by any political subdivision of this State may be exercised and enjoyed jointly with any other political subdivision of this State and, with any political subdivision of another state." (Emphasis added.)

Additional authority for joint endeavors is granted by the following language of § 15.1-20:

"The governing bodies of two or more of the political subdivisions of the State may, in their discretion...form and maintain associations for the purpose of promoting, through investigation, discussion and cooperative effort, the interest and welfare of the several political subdivisions of the State of Virginia, and to promote a closer relation between the several political subdivisions of the State. Any such association so formed shall be an instrumentality of the political subdivisions which are members thereof." (Emphasis added.)

Based upon the foregoing provisions, I am of the opinion that a joint effort or association of political subdivisions, in this case, STAMA, is entitled to the same property tax exemption or "privilege" constitutionally granted to the political subdivisions which have joined to form STAMA.

TAXATION. EXEMPTION. LOSS OF EXEMPTION. WHETHER TAX EXEMPT HOSPITAL MAY RENT ROOMS TO RELATIVES OF ILL PATIENTS.
You have asked whether a nonprofit hospital which enjoys tax exempt status would adversely affect that tax exempt status if it rents rooms to relatives of seriously ill patients when those relatives desire to spend the night near their family members.\footnote{I have been advised that the hospital received tax exempt status prior to 1971 by reason of § 58-12(5) of the Code of Virginia, which exempts from taxation real estate belonging to, and actually and exclusively occupied and used by, hospitals "conducted not for profit but exclusively as charities."}

The answer to your inquiry necessarily depends upon the determination of certain facts, which is the responsibility of the commissioner of the revenue. I am, therefore, unable to state definitively whether the hospital would lose its tax exempt status if it embarks upon the plan outlined above.

I can, however, describe the test enunciated by the Supreme Court of Virginia which the commissioner of the revenue must follow in making his determination. A leading case in this area is Hanover County v. Trustees, 203 Va. 613, 125 S.E.2d 812 (1962). In that case, Randolph Macon College, faced with an increasingly large student body and a shortage of faculty housing, purchased a number of lots in a subdivision adjoining the college campus. The college then prepared to sell the land to faculty members for faculty housing. The college claimed that the land which it held should be exempt from real property taxation and the county disagreed. The Court noted that the college's dominant purpose in acquiring the property and selling it to members of the faculty was to anchor the faculty to the college. The Court concluded that this action had a direct reference to the purposes for which the college was established and tended to promote an efficient administration. The Court stated that the small profit derived from the sale of property to the faculty members was incidental to the college's main purpose. Accordingly, the Court upheld the trial court's determination that the property was entitled to tax exempt status.

A similar result was reached in Hospital Association v. County of Wise, 203 Va. 303, 124 S.E.2d 216 (1962), when the Court concluded that a nonprofit hospital's income-generating operations of a cafeteria, pharmacy, staff apartments and office space did not adversely affect the tax exempt status of the hospital, because the dominant purpose of those operations was not to obtain revenue or profit but to promote the purposes for which the hospital was established.

Applying the same test to the hospital in your question, the commissioner of the revenue should determine whether the rental of rooms to relatives of seriously ill patients is incidental to the hospital's purpose and function as a healing institution. If the rental of rooms does not change the dominant purpose of the hospital but, instead, contributes to that purpose, and if any profit derived from the room rentals is merely incidental to the hospital's budget, then it would appear that the hospital would satisfy the test articulated by the Court in the Trustees and Hospital Association cases.
The Honorable Owen B. Pickett
Member, House of Delegates

You have asked whether a locality may, with specific authorization from the General Assembly, exempt real property from taxation for a prior tax year for which the tax has been legally assessed but currently remains uncollected.

The authority to classify or designate certain entities as tax exempt lies only with the General Assembly pursuant to Art. X, § 6(a)(6) of the Constitution of Virginia (1971). Approval by three-fourths vote of each house of the General Assembly is required in order for these entities to obtain tax exempt status. Consequently, a locality has no authority to grant a property tax exemption. The question then becomes whether the General Assembly may exempt real property from taxation pursuant to Art. X, § 6(a)(6) for a prior tax year for which the tax has been previously legally assessed but currently remains uncollected.

In holding a statute valid which imposed a retroactive tax, the Supreme Court of Virginia stated: "It is well settled 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 vested rights, impair contractual obligations, or violate due process." Pipeline Company v. Commonwealth, 206 Va. 517, 521, 145 S.E. 2d 227, 231 (1965), appeal dismissed, 384 U.S. 268 (1966); see also Eaton v. Davis, 176 Va. 330, 336, 10 S.E. 2d 893 (1940); 1983-1984 Report of the Attorney General at 343.

In Pipeline, the Court spoke of "statutes affecting taxation..." without limiting its decision to statutes which only impose taxes. Thus, the four standards cited for testing the validity of retroactive tax legislation also apply to retroactive exemption statutes.

If the General Assembly passes retroactive tax exemption legislation which has the effect of prohibiting collection, the issue may arise whether the right to collect an already validly assessed local tax is a vested property right of the locality which subsequent State legislation could not defeat. A locality's power to tax is derived solely from delegation of that power by the General Assembly. See Art. X, § 4; § 58-758. Cf. Whiting & Als. v. Town of West Point, 88 Va. 905, 907, 14 S.E. 698, 699 (1892). In this regard, the legislature has authority to make modifications pertaining to a locality's authority so that it cannot be validly contended that a locality acquires a vested right superior to the authority of the General Assembly in collection of a particular tax.

Based on the foregoing, it is my opinion that the General Assembly, but not a locality, may exempt real property from taxation pursuant to Art. X, § 6(a)(6) for a prior tax year for which the tax has previously been legally assessed but currently remains uncollected.

1 Certain other entities are exempted from taxation directly by the Constitution without the necessity of legislative action. See Art. X, § 6(a)(1)-(a)(4) concerning the property of public bodies, churches, nonprofit cemeteries, public libraries and nonprofit institutions of learning. I assume that you are concerned only with legislatively authorized exemptions granted pursuant to Art. X, § 6(a)(6).

2 All legislation granting the tax exempt designation pursuant to Art. X, § 6(a)(6) is currently codified in §§ 58-12.1 through 58-12.187. These sections have been recodified, effective January 1, 1985, as § 58.1-3650.1 et seq. Presumably, all future legislation granting tax exemptions under Art X, § 6(a)(6) will be similarly codified in serial order.

3 In the Pipeline decision, the Court relied on a United States Supreme Court case...
which affirmed the constitutionality of a retroactive state income tax. See Welch v. Henry, 305 U.S. 134 (1938).

4The four tests are whether the statute (1) is arbitrary, (2) disturbs vested rights, (3) impairs contractual obligations, and (4) violates due process.

5I note that statutes are normally given only prospective application. Thus, if the General Assembly intends for a statute to have retroactive effect, it should clearly evidence that intent. See Whitlock v. Hawkins, 105 Va. 242, 249, 53 S.E.401 (1906).

TAXATION. EXEMPTION. PROPERTY OF EDUCATIONAL FOUNDATION EXEMPT IF USED EXCLUSIVELY FOR EDUCATIONAL, LITERARY OR SCIENTIFIC PURPOSES.

November 5, 1984

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You have asked whether certain real property owned by the Virginia Polytechnic Institute Educational Foundation, Inc. (the "Foundation") is exempt from real property taxation. The property consists of 27.2 acres of idle woodland and a two-story house located in Middlesex County which is rented to a local citizen. You note that the property is not being "used by the educational foundation in a manner which would indicate tax exempt purposes." I presume you have already determined that the Foundation is an organization which falls within the purview of § 58-12.25 of the Code of Virginia.

This Office has previously opined that in order to be exempt, property for which the exemption is sought must satisfy not only an ownership requirement but also a use requirement. See Reports of the Attorney General: 1983-1984 at 347; 1982-1983 at 354. This is in accordance with the requirement of § 58-12.25 which specifically states that "[p]roperty owned by...[charitable educational foundations and used exclusively for literary, scientific and educational purposes is hereby determined to be exempt from taxation." (Emphasis added.) Thus, the use of the property of the Foundation should be carefully scrutinized to determine if it is used exclusively for literary, scientific and educational purposes.

With respect to property that is leased to individuals for private housing, this Office has held that property leased by a church to an individual for nonexempt purposes is not exempt from taxation. See 1965-1966 Report of the Attorney General at 276. Similarly, property leased by a charitable educational foundation to an individual for nonexempt purposes would not be exempt from taxation.

With regard to the idle woodland, see 1973-1974 Report of the Attorney General at 356 (a tract of uncleared woodland owned, but not used, by an exempt organization does not qualify for an exemption).

Based on the limited information that is supplied, I would conclude that the property in question would not be exempt from taxation. Whether a specific property qualifies for an exemption, however, requires a complete factual determination by the commissioner of the revenue.

1Section 58-12.25 furnishes an exemption for "incorporated charitable foundations conducted not for profit, the total income from which is used exclusively for literary,
The Honorable Anna Lee Pullin
Commissioner of the Revenue for the City of Staunton

You ask three questions concerning real estate tax relief for the elderly or permanently disabled as authorized by § 58.1-3210 et seq. of the Code of Virginia. Specifically, you ask whether: (1) the niece of a tax relief applicant's deceased husband who rents the upstairs apartment in the applicant's house is a relative for purposes of the tax relief statutes and whose income therefore should be included in the application for tax relief; (2) the rent paid by the niece should be included as part of the applicant's income; and (3) a duplex house shared by an owner-applicant and a relative qualifies as a dwelling for purposes of the tax relief statutes.

Section 58.1-3210 provides that the governing body of any county, city or town may, by ordinance, provide for the exemption, deferral or a combination of exemption and deferral relief from taxation of real estate which is owned and occupied as "the sole dwelling of anyone at least sixty-five years of age or...anyone found to be permanently and totally disabled...." Section 58.1-3211 sets forth the restrictions and conditions on a locality's exemption or deferral program. This statute prescribes that the income of an owner-applicant be calculated "from all sources of the owners of the dwelling living therein and of the owners' relatives living in the dwelling...."

The statutes providing tax relief to the elderly and handicapped do not offer a definition of the term "relative." This term, when used with a restrictive meaning, refers to only those who are connected by blood. When used generically, it includes persons connected by ties of affinity (marriage), as well as consanguinity (blood). See 1982-1983 Report of the Attorney General at 687.

One of the evident purposes of the General Assembly in providing legislation for tax relief to the elderly and handicapped was to assist those persons living on small incomes with no other substantial resources. See 1981-1982 Report of the Attorney General at 354. Exemptions provided pursuant to § 58.1-3210 must be strictly construed. See 1982-1983 Report of the Attorney General at 579. The term "relative," therefore, must be construed in a broad sense so that only applicants with a very limited household income are eligible for tax relief. Accordingly, a niece related by affinity to the applicant for tax relief is a relative for purposes of the tax relief statutes, and her income must be included in the calculations required by § 58.1-3211.

With respect to your second question, this Office has held that "[t]he fact that the relative...pays rent does not make him any less a relative, for purposes of the [tax relief] statute." See 1982-1983 Report, supra, at 580. The conditions set forth in § 58.1-3211 are computed upon the applicant's income "from all sources of the owners of the dwelling living therein...." (Emphasis added.) The rent paid to the applicant by her niece, therefore, is included as part of the applicant's income. See also 1973-1974 Report of the Attorney General at 491 ("the amount of money coming in on a regular basis and thus available for expenses...[is] represented by the word 'income').
Your third question also has been addressed by this Office in an Opinion contained in the 1982-1983 Report of the Attorney General at 532. The question posed in that Opinion was whether property consisting of a store and a four-unit apartment building, one unit of which was occupied by the owner-applicant, qualified for exemption as "a dwelling" for purposes of the tax relief statutes. The Opinion held at 533 that "[u]se of a property as an apartment house...render[s] the exemption inapplicable unless it can be shown the persons occupying the other units are relatives of the owner and have an income less than the statutory amount...." See also 1382-1983 Report of the Attorney General at 579, 580 ("[u]se of a portion of the property by a relative of the owner is contemplated by [the tax relief statutes]...and would enable the property to retain its qualification for exemption, so long as the income limitations...are met"). Thus, a duplex, in which an applicant occupies one-half and an applicant's relative occupies the other half, is a dwelling within the meaning of the tax relief statutes.

In summary, I answer each of your questions in the affirmative.

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1Cf. 1982-1983 Report of the Attorney General at 687 (term "relative" is broadly construed so that persons connected by marriage are relatives for purposes of the Virginia Conflict of Interests Act).

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TAXATION. EXEMPTION. SECTION 58-12 NOT APPLICABLE TO PROPERTY NOT HELD BY EXEMPT ORGANIZATION ON EFFECTIVE DATE OF 1971 CONSTITUTION.

December 21, 1984

The Honorable Michael T. Soberick
County Attorney for Gloucester County

You have inquired whether certain real property in your jurisdiction owned by a nonprofit corporation is entitled to tax exempt status under Art. X, S 6(f) of the Constitution of Virginia (1971) or § 58.1-3606(5) of the Code of Virginia. You state that the property is a hospital and was acquired after July 1, 1971, although the nonprofit corporation existed and owned and operated a nonprofit hospital in a neighboring jurisdiction prior to that date.

The answer to your question is controlled by an Opinion found in the 1983-1984 Report of the Attorney General at 353 (the "Mapp Opinion").

Article X, § 6(f) provides:

"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."

Section 58.1-3606 provides, in pertinent part:

"The following classes of real and personal property, which were exempt from taxation on July 1, 1971, shall continue to be exempt from taxation under the rules of statutory construction applicable to exempt property prior to such date:

* * *
5. Property belonging to and actually and exclusively occupied and used by...hospitals...conducted not for profit but exclusively as charities (which shall include hospitals operated by nonstock corporations not organized or conducted for profit but which may charge persons able to pay in whole or in part for their care and treatment).

Article X, § 6(f) establishes the continuing right to exemption from taxation for property exempt on July 1, 1971. The classes of property which continue to enjoy exemption under Art. X, § 6(f) were closed on July 1, 1971. See Mapp Opinion at 362. That is, the specific parcel of property must have existed on July 1, 1971, and have been actually exempt or entitled to exemption on July 1, 1971.

In construing the exemptions from real property taxation provided under § 58-12, the Mapp Opinion recognized that the legislation has established a three-part test. An exemption under § 58-12 exists only "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." Id. at 362.

Based on the foregoing, it is my opinion that the property of the hospital in question is not exempt from taxation under Art. X, § 6(f) or § 58-12(5) (or its successor, § 58.1-3808(5), effective January 1, 1985) because the property was not held by the corporation on July 1, 1971. The only way for such property to gain exemption from taxation would be through the exercise of the power granted to the General Assembly under § 8(a)(6) of Art. X by following the procedures of § 30-19.04.²

¹This section is effective January 1, 1985, as part of the recodification of Title 58. See Ch. 675, Acts of Assembly of 1984. The predecessor and currently effective statute, § 58-12(5), is substantively identical.
²The only self-executing exemptions from property taxation are those for publicly owned property, church property, nonprofit cemeteries, public libraries and nonprofit institutions of learning pursuant to Art. X, § 6(a)(1)-(4).

TAXATION. EXEMPTION. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 EXEMPTS ACTIVE MILITARY SERVICEPERSON FROM LOCAL PERSONAL PROPERTY TAX BY VIRTUE OF MAINTAINING LEGAL DOMICILE ELSEWHERE.

June 10, 1985

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

You ask whether the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act") places any limitation on the length of time that an active duty military person may remain in a particular jurisdiction before he is considered a permanent resident. The taxpayer in question has been on active duty in your jurisdiction for eighteen years and has never left his current duty station on any other assignment. You note also that his leave and earnings statements show that taxes are withheld and paid to the State of North Carolina, which he continues to claim as his domicile.

Section 514 of the Act, codified as 50 U.S.C. App. § 574 (1982), provides, in pertinent part, as follows:
"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent....Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders...."

(Emphasis added.)

Nothing in § 514, nor any other part of the Act, places any limitation on the amount of time under which the serviceperson is exempted from local taxation by virtue of having his domicile elsewhere. Thus, in my opinion, the taxpayer who is the subject of your inquiry is exempt from personal property taxes in your jurisdiction so long as he continues to meet the requirements of the Act and maintains his legal domicile elsewhere.

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**TAXATION. INTANGIBLE PERSONAL PROPERTY. CAPITAL OF RADIO STATION DOES NOT INCLUDE ELECTRONIC EQUIPMENT WHICH TRANSMITS RADIO SIGNAL.**

May 16, 1985

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

You have asked for clarification of my Opinion to the Honorable Lacky G. Sempeles, found in the 1984-1985 Report of the Attorney General at 403, which held that tangible personal property used in radio broadcasting is classified for tax purposes as intangible personal property, subject to State taxation only, unless such equipment falls within one of the exceptions provided in §§ 58.1-1100 and 58.1-1101(A)(2) of the Code of Virginia for machinery and tools, motor vehicles and delivery equipment. You ask for guidance in determining what radio equipment may be classified as machinery and tools.

Section 58.1-1100 states, in relevant part, as follows:

"Intangible personal property, including capital of a trade or business of any person, firm or corporation, except for merchants' capital...is hereby segregated for state taxation only." (Emphasis added.)

Section 58.1-1101 provides, in pertinent part:

"A. The subjects of taxation classified by this section are hereby defined as intangible personal property:

* * *

2. Capital which is personal property, tangible in fact, used in...radio or television broadcasting...businesses. Machinery and tools, motor vehicles and delivery equipment of such businesses shall not be defined as intangible personal property..."
1984-1985 REPORT OF THE ATTORNEY GENERAL

for purposes of this chapter and shall be taxed locally as tangible personal property according to the applicable provisions of law relative to such property...." (Emphasis added.)

Whether certain radio equipment qualifies as machinery and tools is a factual determination to be made by the commissioner of the revenue. I concur, however, with the long-standing administrative interpretation as enunciated by the Honorable C. H. Morrissett, State Tax Commissioner, by letter to the Honorable Blair Zirkle, Commissioner of the Revenue for Shenandoah County, dated June 15, 1967, that broadcasting equipment itself takes the status of machinery and tools for local taxation, but tapes and records do not come within the meaning of machinery and tools. This interpretation is also consistent with an informal opinion of this Office in a letter to the Commissioner of Revenue for the City of Charlottesville, dated June 21, 1973, in which the following items used in broadcasting were classified as machinery and tools: (a) antennae, (b) monitoring and control equipment, (c) projection equipment, (d) synchro generating equipment, (e) radio and testing equipment, and (f) transmitter. I concur in the foregoing classification. Thus, antennae (not including the tower to which the antenna is affixed, which tower is assessed as real estate), monitoring equipment, and other electronic equipment which transmit the radio signal are properly classified as machinery and tools. See 39 Va. L. Rev. 249, 257 (1953). Items such as tapes, records, office furniture and equipment constitute the capital of the business and are also intangible personal property for purposes of § 58.1-1101 and, therefore, are not subject to local taxation.

The foregoing interpretation of the statute is long-standing and has remained undisturbed by many subsequent sessions of the General Assembly; hence, it is presumed to be the construction intended by the General Assembly. See Browning-Ferris v. Commonwealth, 225 Va. 157, 300 S.E.2d 603 (1983); Deal v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983).

TAXATION. INTANGIBLE PERSONAL PROPERTY. MANUFACTURER'S INVENTORY NOT TAXED LOCALLY.

January 11, 1985

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

You have asked whether the inventory of a certain business is subject to the local merchants' capital tax imposed under §§ 58.1-3509 and 58.1-3510 of the Code of Virginia.

The inventory of a business is subject to tax under one of two statutory schemes, depending on the classification of the business. Sections 58.1-1100 and 58.1-1101 set forth the general rule by which inventory "of a trade or business of any person, firm or corporation" is subject to taxation by the State. A second statutory scheme, found in §§ 58.1-3509 and 58.1-3510, is referred to in § 58.1-1100 as an exception to the general rule. This exception segregates merchants' capital, which includes "inventory of stock on hand" for local taxation only. Thus, an analysis of the question of whether the merchants' capital tax applies to the inventory of a certain business should focus on whether the business is mercantile in nature. If a business is determined to be mercantile in nature, the local merchants' capital tax applies. The inventory of all other types of businesses, including manufacturing and processing businesses, is subject to tax by the State.

You describe the business about which you ask as follows:
"A local company is engaged in the business of receiving steel in many forms and shapes and selling it to customers. A significant portion of the product is processed in some way before sale by cutting to a precise shape, bending, drilling and welding. A small portion of the business is manufacturing steel components which are then incorporated into another product by the purchaser."

The terms "merchant" and "manufacturer" are not defined in the Code; however, on several occasions the Supreme Court of Virginia has considered their meaning and discussed their applicability in various fact situations. See Prentice v. City of Richmond, 197 Va. 724, 90 S.E.2d 839 (1955); Commonwealth v. Meyer, 180 Va. 466, 23 S.E.2d 353 (1942); and Richmond v. Dairy Co., 156 Va. 63, 157 S.E. 728 (1931). In Meyer, "merchant" is defined as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit." Id. 180 Va. at 472, 23 S.E.2d at 356. On the other hand, "manufacture" is defined as "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery." Id. 180 Va. at 472, 23 S.E.2d at 355. See also Opinion to the Honorable Danny C. Ball, Commissioner of the Revenue for Wise County, dated August 20, 1984.

Every change does not constitute manufacturing. The Court in Prentice set forth three essential elements needed to constitute manufacturing: "(1) original material referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which...is different from the original raw material." Id. 197 Va. at 729, 90 S.E.2d at 843. The Court noted in Prentice that:

"The conflict in the authorities results largely in the different viewpoints as to the degree of change necessary to satisfy the third requirement. It may be said, however, that mere manipulation or rearrangement of the raw materials is not sufficient; there must be a substantial, well-signalized transformation in form, quality and adaptability rendering the material more valuable for man's use than it was before."

Id. 197 Va. at 730, 90 S.E.2d at 843.

In accordance with these guidelines, the business of buying fluid milk, pasturizing and selling it as fluid milk and cream was held not to be manufacturing. See Richmond v. Dairy Co., supra. The business of buying live poultry, slaughtering, picking and cleaning it was found not to be manufacturing. See Prentice, supra. In contrast, the business of purchasing hogs on the hoof, slaughtering, processing and selling the end products (hams, sausage, lard, etc.) was found to be manufacturing. See Meyer, supra.

The foregoing guidelines established by case law must be applied to your fact situation. I do not have sufficient information about the degree of change the steel undergoes in the business in question before it is resold to customers. "[C]utting...bending, drilling and welding" are terms which could describe a complicated process in which the raw material is significantly transformed, such that manufacturing would be considered to have occurred. On the other hand, those terms could just as conveniently be used to describe a simple process in which such a transformation has not occurred. The commissioner of revenue should make the determination based upon his more complete knowledge of this particular steel business.

Based on the foregoing, it is my opinion that if the commissioner of revenue determines that this steel company is a merchant, then the inventory is subject to the local merchants' capital tax. If the commissioner of revenue determines that the company's activities constitute manufacturing, then the inventory is not subject to the local merchants' capital tax. Note that the commissioner of revenue may determine that the taxpayer's business is of a dual nature and that only a portion of this business
constitutes manufacturing. In such a case, the company's manufacturing inventory will not be subject to the local merchants' capital tax, while the tax must be paid on the mercantile inventory.

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1For tax years beginning January 1, 1985, this State tax has been effectively eliminated through the repeal of the rate section. See Ch. 729, Acts of Assembly of 1984.

2When taxation of machinery and tools under §§ 58.1-3507 and 58.1-1101(A)(2) is at issue, the subtle distinction between "manufacturing" and "processing" becomes important. Distinctions between "manufacturing" and "processing" are unnecessary, however, when taxation of inventory is at issue. Therefore, for purposes of this Opinion, I will use the terms "manufacturing" and "processing" interchangeably.

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TAXATION. INTEREST. VIRGINIA EDUCATION LOAN AUTHORITY NOT AUTHORIZED TO ISSUE FEDERALLY TAXABLE OBLIGATIONS.

October 18, 1984

The Honorable Stuart W. Connock
Secretary of Finance

You have asked whether the Virginia Education Loan Authority ("VELA"), a political subdivision of the Commonwealth, is empowered to issue obligations, the interest on which is includable in the gross incomes of the holders thereof for federal income tax purposes. The pertinent statutory provisions, VELA's enabling act, are found at § 23-38.30 et seq. of the Code of Virginia (the "Act").

Section 23-38.33:1(5), a part of the Act, authorizes and empowers VELA to issue "obligations" for any of its purposes and in furtherance of any of its powers. Section 23-38.30(b) defines such "obligations" to mean "the bonds, notes, certificates and other evidences of indebtedness that the Authority may issue from time to time under the provisions of this chapter."

Section 23-38.40 of the Act exempts the income on VELA's obligations from taxation by the Commonwealth and its political subdivisions. Nothing else contained in the Act addresses the tax status of the interest VELA pays on its obligations. As has historically been the case with public authorities, however, interest on VELA's obligations is exempt from federal income taxation under § 103 of the Internal Revenue Code of 1954, as amended. The § 103 exemption existed when the General Assembly passed the Act in 1972, and when the Act was later amended in 1977 and 1980.

When considering the scope of VELA's delegated powers, several fundamental principles must be borne in mind. Virginia follows the Dillon Rule of strict construction concerning the powers of political subdivisions. See, e.g., Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980); Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). The Dillon Rule provides that political subdivisions such as VELA have only those powers which are expressly granted and which are necessarily or fairly implied from expressly granted powers. Bd. of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975); accord Hylton v. Prince William Co., 220 Va. 435, 258 S.E.2d 577 (1979); Fairfax Zoning Board v. Cedar Knoll, 217 Va. 740, 232 S.E.2d 767 (1977).

In construing a statute, the paramount objective is to discover the intention of the
General Assembly. In this connection we must, as far as possible, discover the legislature's purpose from the language used in connection with the attending circumstances. Franklin, Etc., Ry. Co. v. Shoemaker, 156 Va. 619, 159 S.E. 100 (1931).

In addition, where the language of a statute is not explicit, the intention of the General Assembly may be gathered from a comparison of the statute's parts with those of other acts in pari materia.

When the foregoing principles are applied to the present facts, it appears that VELA does not have the power to issue taxable obligations under the Act. Giving the statutory language its required strict construction, I cannot conclude that the grant of power to VELA to issue "obligations" encompasses the power to issue taxable debt. I am not aware of any evidence that the possible issuance of taxable student loan obligations was a circumstance which was before the General Assembly when the Act was enacted, or at the time of any of its amendments.

This conclusion is substantiated by legislative history concerning the Virginia Housing Development Authority ("VHDA"), a political subdivision whose enabling act was in pari materia with VELA's until 1983, insofar as the issuance of obligations is concerned. In 1983, the General Assembly enacted § 36-55.37:1 which authorizes VHDA to issue taxable debt. This enactment changed VHDA's existing law. Presumably, that section was enacted because the General Assembly had not previously intended VHDA to have the power to issue taxable debt and, only in 1983, concluded that it was appropriate for VHDA to have such authority. Because the VELA Act received no such amendment, I must conclude that VELA lacks the power to issue taxable obligations.

TAXATION. JURISDICTION. AGREEMENT BETWEEN UNITED STATES AND POLITICAL SUBDIVISION MUST NOT VIOLATE STATE LAW.

April 4, 1985

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

You have asked for my opinion whether certain language in a proposed agreement between the Commander of the Norfolk Naval Base and the City of Norfolk, in connection with the retrocession of exclusive federal jurisdiction over certain real property located within the confines of the Naval Base, would prevent you from exercising your duty to discover and assess property for tax purposes. The facts are as follows:

For many years, the United States exercised exclusive jurisdiction over large portions of the Naval Base, including portions which included housing for military servicepersons and their dependents. The federal courts are ill-equipped to handle juvenile and domestic relations matters, and access to the State courts was barred because the jurisdiction of the federal courts was exclusive. In order to resolve this problem, the United States and the Commonwealth of Virginia entered into an agreement by which the United States retroceded its right to exercise exclusive jurisdiction over certain portions of the Naval Base and accepted the concurrent right of the Commonwealth to exercise jurisdiction over those same areas.

Because of the resultant concurrent jurisdiction, the City of Norfolk is now obligated to tax tangible personal property owned by private contractors operating in some areas of the Naval Base. In order to implement working arrangements to operate under concurrent jurisdiction, the Naval Base Commander has presented a draft memorandum of understanding. It is that memorandum that gave rise to your inquiry.
Normally, the commissioner of the revenue is authorized by law to make investigations of the records and property subject to tax belonging to any taxpayer within his jurisdiction, without restriction. The proposed memorandum of understanding, however, contains a provision requiring a "demonstration that probable cause exists to believe that any such contractor [who owns property located on the Naval Base] is purposely evading taxes by secreting property upon the complex," whereupon the Commander will authorize a search of the affected premises by appropriate officials. You note that this provision would hinder a commissioner of the revenue in his assessment duties and ask whether it is enforceable against the commissioner of the revenue.

It is well-settled that the United States government and the various states may make mutually satisfactory arrangements as to the respective jurisdiction over territory within their borders. See Collins v. Yosemite Park & C. Co., 304 U.S. 518 (1938); see also Woltrip v. Commonwealth, 189 Va. 365, 53 S.E.2d 14 (1949) (holding that jurisdiction acquired from a state by the United States by cession may be qualified in accordance with agreements reached by the respective governments). It is clear, therefore, that agreements made pursuant to retrocession of jurisdiction are to be based upon mutual understandings between the respective parties.

I have examined the documents comprising the retrocession of jurisdiction agreement dated May 8, 1984, and executed by Leon Kahn on behalf of the Department of the Navy, accepted by Governor Charles S. Robb, on September 18, 1984. These documents were executed by the Department of the Navy under the authority of 10 U.S.C. § 2683. That federal statute authorizes the Department of the Navy to "relinquish...all or part of the legislative jurisdiction of the United States...." (Emphasis added.) I find no limitation on the relinquishment of jurisdiction in the documents of retrocession which would reserve to the United States the right to restrict access to the Norfolk Naval Base by the commissioner of the revenue to carry out his legislatively imposed duties, apart from the right of the United States to exercise concurrent legislative jurisdiction. I am unaware of any federal statute reflecting the exercise by the Congress of its concurrent legislative jurisdiction which authorizes a base commander to insist upon the "probable cause" restriction contained in the proposed agreement.

The Supreme Court of the United States held, in Howard v. Commissioners of Louisville, 344 U.S. 624 (1953), that the state cannot be prevented from exercising its powers over a federal enclave that is within its borders, provided that this exercise of power does not interfere with federal jurisdiction. Title 58.1, Ch. 31, Art. 1, § 58.1-3100 et seq. of the Code of Virginia sets forth the duties of the commissioner of the revenue. As long as the commissioner of the revenue does not interfere with the federal jurisdiction of the enclave and is not otherwise prohibited by federal law, he may proceed with his statutory duties.

Based upon the foregoing, I am of the opinion that any memorandum of understanding between the United States and the City of Norfolk which contained such a "probable cause" investigation restriction would be an ultra vires act upon its execution by the city, because the city is without authority to surrender the powers of the commissioner of the revenue. Of course, access to the Naval Base is still subject to such other reasonable controls as are necessary to regulate the movement of civilians not employed at the base. You indicate in your letter that you are sympathetic to and willing to abide by such reasonable restrictions as are grounded upon considerations of base security.
1 Article X, § 1 of the Constitution of Virginia (1971) provides, in part, that "[a]ll property, except as hereinafter provided, shall be taxed." None of the exceptions is applicable.


3 As to those powers delegated by the state to a political subdivision, such as local taxing powers, the political subdivision is acting under the legal authority of the state.

TAXATION. LAND USE. MATERIAL CHANGE IN FACTS MUST BE REFLECTED ON NEW APPLICATION; IF NOT, ORIGINAL APPLICATION VOID, SPECIAL USE VALUATION LOST.

April 3, 1985

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked whether a locality may void a use value assessment application authorized by §§ 58.1-3229 et seq. of the Code of Virginia under the following circumstances.

The taxpayer had timely applied for and participated in the land use assessment program with respect to a certain parcel of land for tax years prior to tax year 1984. In February 1983, a deed was recorded by which the taxpayer conveyed ten acres of the parcel to a new owner. In November 1983, as is required annually in the locality, the taxpayer reapplied for land use assessment for tax year 1984. In response to the question "Has there been any change in acreage or ownership by the recording since January 1 of this year?", taxpayer responded "No." Before the January 1, 1984 assessment date, the commissioner of the revenue discovered the February 1983 ten-acre conveyance in the deed book. Based on this information, he voided the application for special use assessment on the taxpayer's parcel. Accordingly, the taxpayer was assessed on January 1, 1984, for real property taxes on the portion of the parcel that he still owned on the basis of fair market value as applied to other real estate in the jurisdiction.

Section 58.1-3234 contains the pertinent statutory language as follows:

"An application shall be submitted whenever the use or acreage of such land previously approved changes...."

** In the event of a material misstatement of facts in the application or a material change in such facts prior to the date of assessment, such application for taxation based on use assessment granted thereunder shall be void and the tax for such year extended on the basis of the value determined under § 58.1-3236D [fair market value as applied to other real estate in the jurisdiction]." (Emphasis added.)

Note that the statute contemplates voiding an application, either because of a material misstatement or because of a material change in facts. According to the facts presented in the November 1983 application, no change in acreage had occurred. In fact, however, ten acres had been sold. An application reflecting the change was not submitted before the January 1, 1984 assessment date. Section 58.1-3234 clearly allows the locality to void the application and to value the property at fair market value as other real estate in the jurisdiction.

Based on the foregoing, it is my opinion that a locality may void a use value
assessment application when a material change in acreage occurs before the January 1 assessment date if the taxpayer does not submit a new application reflecting the change. The entire parcel loses the special use valuation and must be assessed at fair market value for that tax year.

1The taxpayer indicated that he so answered the question because he had assumed that the deed had been recorded in late 1982. In any event, however, the commissioner of the revenue apparently has no record that the taxpayer ever initiated a change of information concerning the change in facts.

2The application can be voided under the authority of § 58.1-3234 because there was a material change in the facts. The provisions in § 58.1-3238, relating to material misstatements and intentional misrepresentation, need not be considered in the circumstances you have presented.

TAXATION. LICENSE. DIRECTORS' FEES NOT SUBJECT TO LICENSE TAX UNLESS DIRECTORSHIP OCCUPATION.

November 30, 1984

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

You have asked whether a locality may impose a local license tax upon persons receiving directors' fees for service on corporate boards of directors.

Section 58-266.11 of the Code of Virginia provides, in pertinent part:

"The council of any city or town, and the governing body of any county, may levy and provide for the assessment and collection of city, town or county license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein...." (Emphasis added.)

This statute is drafted in broad, general terms without definitions to aid interpretation. Under these circumstances, a general rule of statutory construction provides that words in a statute should be given their usual, commonly understood meaning. See 1982-1983 Report of the Attorney General at 707. According to Webster's Seventh New Collegiate Dictionary 113 (1972), "business" is defined as "2a: occupation, calling." The same source, at 937, defines "trade" as "3a: the business or work in which one engages regularly: occupation." Similarly, at 680, Webster's defines "profession" as "4b: a principal calling, vocation, or employment"; at 584, "occupation" is defined as "1b: the principal business of one's life: vocation"; and at 119, "calling" is defined as "2: the vocation or profession in which one customarily engages."

All of the terms used in the statute suggest activity which is one's livelihood and means of support. A corporate directorship is not commonly thought of as requiring one's primary attention in the sense that it is his livelihood and means of support. Generally, corporate directors meet periodically to initiate action by, or to approve recommendations of, the corporate management. A person who sits on a corporate board generally is free to engage in, and does engage in, a "business[es], trade[s], profession[s], occupation[s] [or] calling[s]" in addition to his activities as a corporate board member. Such persons are not commonly thought of as being in the business of being a corporate director, even when their remuneration may be substantial.
Based on the foregoing, it is my opinion that a locality may not arbitrarily impose a local license tax upon all persons receiving directors' fees for service on corporate boards of directors. The license tax may be imposed only when corporate directorship is the taxpayer's business, trade, profession, occupation or calling. The commissioner of revenue must make that determination based on the law and facts on a case-by-case basis.

1Section 58-266.1 will remain in effect through December 31, 1984. On January 1, 1985, the recodification of Title 58 becomes effective. Provisions of § 58-266.1, quoted above, will appear at § 58.1-3703 without significant change.

TAXATION. LICENSE. DISTRIBUTOR OF NEWSPAPER AS PERSON PUBLISHING NEWSPAPER MAY BE EXEMPT FROM LOCAL LICENSE TAX.

May 8, 1985

The Honorable Lee T. Keyes
Commissioner of the Revenue for Loudoun County

You have asked whether the exemption from business license taxation for publishers of newspapers, found in § 58.1-3703(B)(3) of the Code of Virginia, applies to certain newspaper distributors. In the facts you have presented, the distributors are independent contractors who have contracted with a company which publishes a daily newspaper to distribute the newspaper as an agent (not an employee or servant). Under the contract, (1) the company sells newspaper subscriptions directly to subscribers, and (2) the distributors are retained (a) to deliver the newspaper to the newspaper subscribers, (b) to collect amounts owed to the company, and (c) to solicit new subscriptions to the newspaper.

The answer to your inquiry is governed by the meaning of "publishing" as used in § 58.1-3703. This section provides, in pertinent part:

"A. The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section.

B. No county, city, or town shall levy any license tax:

* * *

3. Upon the privilege or right of printing or publishing any newspaper...."

Title 58.1 does not define the terms "printing" or "publishing." However, § 58.1-3703 authorizes governing bodies of localities in Virginia to impose a license tax on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein, except as otherwise prohibited. As quoted above, subsection B prohibits the imposition of a local license tax on certain of these activities, including the printing or publishing of any newspaper. Clearly, the agent here is not "printing" the newspaper. Thus, the question is whether the agent's distribution falls within the term "publishing" in § 58.1-3703(B)(3).
A "publish" is "[o]ne whose business is the manufacture and sale of books, pamphlets, magazines, newspapers, or other literary productions." (Emphasis added.) Black's Law Dictionary 1109 (5th ed. 1979). The same source defines "publish" as follows: "To make public; to circulate; to make known to people in general." Id. Thus, publishing includes selling and circulating the newspaper.

In ascertaining the intent of the General Assembly in using the statutorily undefined term "publisher" for tax exemption purposes, it is helpful to look to other acts. In this regard, it is significant that the General Assembly has apparently recognized in § 58.1-3721 that the delivery of newspapers is an essential part of the "publishing" of newspapers. That section provides that the coin machine operator's license tax authorized by § 58.1-3720 shall not be applicable to operators of devices or machines for the delivery of newspapers.

The distribution services performed by the agent pursuant to the contract in question are analogous to the services of the traditional "paperboy" home delivery services, except for the possible distinction in contract terms. Rather than distributing through a servant or employee, the company has contracted with independent contractors to perform the delivery service and collect the monies due the company.

While the agent is "free to engage in any [other] activities...including services for other publications...so long as they do not interfere with his accomplishment of the results described in this agreement," it is manifest that the principal objective is to deliver the company's newspaper, collect the subscription price and solicit new accounts. The agent may not deliver any other material in the newspaper's tubes without the company's approval; nor may the agent deliver the newspaper accompanied by obscene or offensive material.

I am not unmindful of Art. X, § 6(f) of the Constitution of Virginia (1971), which requires that tax exemptions are to be strictly construed. See Solite Corp., v. King George Co., 220 Va. 661, 261 S.E.2d 535 (1980). Nevertheless, based on the facts of this case, I am constrained to conclude that the agent is engaged in a logical extension of the newspaper publication business, rather than the separate and independent business of home delivery of a product.

Based on the foregoing, I find that the independent contractors-distributors are "publishing" within the meaning of § 58.1-3703(B)(3). Therefore, the prohibition of that provision preventing any city, county or town from imposing a local license tax on the activity of publishing any newspaper would apply to such distributors.

TAXATION. LICENSE. FARM, DOMESTIC OR NURSERY PRODUCTS MAY BE SOLD BY PRODUCERS WITHOUT BUSINESS LICENSE.

April 9, 1985

The Honorable Henry L. Puckett
Commissioner of the Revenue for the City of Galax

You have asked whether the exemption from local business license taxation provided in § 58.1-3703(B)(2) of the Code of Virginia extends to persons selling (1) produce and fruit purchased from wholesale markets for resale, and (2) home baked products and homemade crafts.

Section 58.1-3703(B) provides, in pertinent part:
"No county, city or town shall levy any license tax:

(2) For selling farm or domestic products or nursery products, ornamental or otherwise, or for the planting of nursery products, as an incident to the sale thereof, outside of the regular market houses and sheds of such county, city or town; provided, such products are grown or produced by the person offering such products for sale." (Emphasis added.)

This Office has previously opined that this statute prevents a locality from levying a local business license tax on a person selling farm products grown or produced by such person. See 1969-1970 Report of the Attorney General at 268.

Farm products which are not produced or grown by the seller, however, do not fall within the exemption provided by the statute. See Hardin v. Radford, 112 Va. 547, 72 S.E. 101 (1911) (holding that a person selling cider manufactured by another is subject to license taxation). Vendors who purchase produce and fruit from wholesale markets for resale are, in fact, merchants, because they are engaged in the business of buying commercial commodities and selling them again for the sake of profit. See 1982-1983 Report of the Attorney General at 204. Thus, such vendors are subject to the merchants' capital tax or a business license tax in lieu thereof. See 1983-1984 Report of the Attorney General at 374.

With respect to home baked products and homemade crafts, the seller of such products is exempt if the products are actually produced by him. See Petersburg v. General Baking Co., 170 Va. 303, 307, 196 S.E. 597, 598 (1938) (holding that a manufacturer of baked goods, who transported such goods by truck to a city and then sold the baked goods directly to consumers, was exempt from the peddlers' license tax imposed upon peddlers selling "family supplies of a perishable nature grown or produced by them and not purchased by them for sale"). Similarly, crafts which are made by the seller fall within the purview of § 58.1-3703(B)(2). Cf. Carpel v. City of Richmond, 162 Va. 833, 175 S.E. 316 (1934) (holding a dealer in forest products exempt from the peddlers' license tax when selling rustic furniture which he himself has made).

Based upon the foregoing, I am of the opinion that a person selling baked products or crafts produced by him falls within the exemption from local business license taxation provided in § 58.1-3703(B)(2). Vendors selling products not grown or produced by them, however, are not entitled to the exemption.

TAXATION. LICENSE. FARM EQUIPMENT DEALER LICENSED AS "MOTOR VEHICLE DEALER" BY DIVISION OF MOTOR VEHICLES MAY SEPARATELY STATE AND ADD APPLICABLE LICENSE TAX TO SALES PRICE OF MOTOR VEHICLE.

January 28, 1985

The Honorable Willie H. Rountree
Commissioner of the Revenue for the City of Suffolk

You have asked whether a farm equipment dealer may be considered a "motor vehicle dealer" for the purposes of the business, professional and occupational license tax under § 58.1-3734 of the Code of Virginia.

Section 58.1-3734 provides, in pertinent part:

"Notwithstanding the provisions of § 58.1-605, whenever any county, city or town imposes a license tax applicable to motor vehicle dealers measured by the gross
receipts of such dealer, the dealer may separately state the amount of tax applicable to each sale of a motor vehicle and add such tax to the sales price of the motor vehicle." (Emphasis added.)

This section is limited in effect to "motor vehicle dealers." Accordingly, the answer to your question turns on whether the farm equipment dealer comes within the definition of "motor vehicle dealer."

The term "motor vehicle dealer" is not defined in Title 58.1. It is, however, defined in Ch. 7, Art. 1 of Title 46.1. The applicable section provides that a "[m]otor vehicle dealer" is one who buys and sells new or used motor vehicles, trailers or semitrailers. See § 46.1-516(a); 1982-1983 Report of the Attorney General at 548. Motor vehicle dealers are required to be licensed by the Virginia Commissioner of the Division of Motor Vehicles. See § 46.1-523 et seq.

Based on the foregoing, I find that a farm equipment dealer licensed as a "motor vehicle dealer" by the Division of Motor Vehicles would qualify as a "motor vehicle dealer" for purposes of § 58.1-3734. Accordingly, if on further investigation you find that the farm equipment dealer is so licensed, the provisions of § 58.1-3734 would apply.

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1A "[m]otor vehicle" is a vehicle "which is self-propelled or designed for self-propulsion." See § 46.1-1(15). Section 46.1-1(34) defines a "[v]ehicle" as a device by which people or property are transported upon the highway. A "[f]arm tractor" is a motor vehicle designed and used as a farm, agricultural or horticultural implement for drawing plows, mowing machines and other farm, agricultural or horticultural machinery and implements including self-propelled mowers designed and used for mowing lawns." (Emphasis added.) See § 46.1-1(7).

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TAXATION. LICENSE. GROSS RECEIPTS UNDER LOCAL LICENSE TAX MEASURED BY TOTAL RECEIPTS.

April 5, 1985

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You have asked whether a certain business with situs in Chesterfield County should be required to have a business license. If such a license is needed, you wish to know how to measure the gross receipts of this business. The business is established to acquire and sell various types of securities and commodities, as well as other properties. My response is limited to the activities of buying and selling securities and commodities. There is insufficient information to respond to that portion of the question relating to the business activity of acquiring and selling "other properties."1

Localities are authorized under § 58.1-3703 of the Code of Virginia to impose local license taxes on "businesses, trades, professions, occupations and callings...." Certain categories of business and rate limitations applicable thereto are set forth in § 58.1-3706. These sections are drafted in broad terms without definitions. Pursuant to § 58.1-3701,2 however, the Department of Taxation has promulgated guidelines which define certain categories of businesses.

The category most applicable to your fact situation is "financial services." This term is defined as:
"Any person rendering a service for compensation in the form of a credit agency, an investment company, a broker or dealer in securities and commodities or a security or commodity exchange is providing a financial service, unless such service is specifically provided for under another section of these guidelines."

*BPOL Guidelines* 3-2.3

The words "broker" and "dealer" are not defined. "Broker," as used in securities and commodities transactions, is commonly understood to mean:

"An agent of a buyer or a seller who buys or sells stocks, bonds, commodities, or services, usually on a commission basis."

*Black's Law Dictionary* 174 (5th ed. 1979). On the other hand, "dealer," in the same context, is defined as:

"[A]ny person engaged in the business of buying and selling securities for his own account...but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business."


Based on the foregoing, it is my opinion that the business you described falls within the term "dealer," because it intends to buy and sell securities and commodities on its own behalf as a regular business activity. Accordingly, the company would be required to obtain a local license, provided the county has an ordinance imposing a business license tax on every business providing financial services, including those of a dealer.

Assuming that the county has such an ordinance, I turn to your second question on how to measure the gross receipts. The focus of this question is whether the tax should be measured on the total sums paid to the company on sale of the securities or commodities or only on the gain thereon (sales price less cost to the company). The term "gross receipts" is not defined in the State statute. I am unaware whether your local ordinance provides a definition.

In the absence of a legislative definition, the words "gross receipts" must be given their ordinary meaning. The Supreme Court of Virginia has determined that "gross receipts" mean "whole, entire, total receipts." *Savage v. Commonwealth*, 186 Va. 1012, 1018, 45 S.E.2d 313, 317 (1947). The rationale of Savage was followed later in *Alexandria v. Morrison-Williams*, 223 Va. 349, 288 S.E.2d 482 (1982), with a finding that a taxpayer-advertising agency was subject to the local license tax of the City of Alexandria on total payments received from its client without any deductions for costs, including charges for placement in the media. In the *Morrison-Williams* case, the Court distinguished the taxpayer who receives payment for rendering advertising services from one who acts only as an agent procuring advertising services on behalf of its principal. The analogy to the dealer-broker distinction is persuasive for the limited purpose of defining "gross receipts."

It is my opinion that the gross receipts should be measured on the total sales price of the securities and commodities sold by the company acting on its own behalf.

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1 Note that persons engaged in more than one type of business activity may be subject to the local license tax for each of the activities. *See I(5), General Provisions,
Guidelines for Local Business, Professional and Occupational License Taxes ("BPOL Guidelines") (Jan. 1, 1984)

That section requires the Department of Taxation to promulgate guidelines defining and explaining the categories listed in § 58.1-3706(A).

See also BPOL Guidelines § 3-2.1.

See also § 58-290 (1974 Repl. Vol.) (repealed by Ch. 633, Acts of Assembly of 1982), which defined "stockbrokers" for State license tax purposes as those engaged in the business of buying or selling securities for others on commission or for other compensation.

Prior to 1930 (see Acts of Assembly of 1930 at 856), the predecessor of § 58-290 (repealed, see supra note 4) defined "stockbrokers" broadly to include those selling or buying for others and dealers in securities. "Dealing," in this context, was deemed by the Supreme Court of Virginia to mean the business of buying and selling securities with the object of gain. Richmond Mort. Corp. v. Rose, 142 Va. 342, 128 S.E. 604 (1925).

The limitations on the rate of license taxes are stated in terms of gross receipts. See § 58.1-3706. Sections 58.1-3707(A) and (D) and 58.1-3708(B) and (D) use the term "volume" as the measure of the local license tax. "Volume" is defined under § 58.1-3708(D) as "gross receipts, sales, purchases, or other base for measuring a license tax..." See also § 58.1-3705.

Section 58.1-3732, while not defining the term "gross receipts," generally does not exclude certain federal, State and local taxes from the calculation of gross receipts.

TAXATION. LICENSE. LOCALITY MAY ENTIRELY EXEMPT BUSINESSES FROM TAX IF JUSTIFIED BY REASONABLE MUNICIPAL POLICY.

October 19, 1984

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

You have asked three questions concerning a locality's authority to exempt or partially exempt the gross receipts of research and development firms. First, you have asked whether a locality has the authority to exempt entirely research and development firms from the local gross receipts license tax. You have also asked whether a locality may exempt from the tax only those revenues of research and development firms which are generated by work performed for the federal government. Your third question asks whether a locality may exempt from the tax revenues generated by work performed for all government agencies, State, local and federal.

A governing body imposing a gross receipts license tax does so by ordinance under the authority of § 58-266.1 of the Code of Virginia. Subsection (B) of that section classifies business enterprises into four categories and establishes a maximum rate for each category. Pursuant to subsection (E) of § 58-266.1, the Department of Taxation has promulgated Guidelines For Business, Professional and Occupational License Taxes ("BPOL Guidelines") (originally issued January 1, 1979, current edition issued January 1, 1984) which define and explain the categories listed in subsection (B). The BPOL Guidelines state on page ii that "[t]he final decision of whether or not to tax a business, profession, or occupation lies with the individual locality unless the tax is prohibited by some provision of law. A locality may impose a lower tax rate and provide for subclassifications within the categories...."

The statutory language of § 58-266.1 does not specifically prohibit or allow the exemption of businesses from the gross receipts tax. The legislatively authorized advisory language in the BPOL Guidelines, however, clearly indicates that localities can establish separate subclassifications for businesses and can tax the subclassifications at
different rates. Included within this authority to discriminate by taxing at different rates is the authority to exempt a subclassification from taxation entirely. *Langston v. City of Danville*, 189 Va. 603, 608, 54 S.E.2d 101, 104 (1949) (quoting *Caskey Baking Co. v. Commonwealth*, 313 U.S. 117, 121 (1941)).

Although a locality has the legal authority to subclassify and exempt businesses from the gross receipts license tax, such discrimination in favor of a certain class must not be arbitrary. Discrimination must be based upon a reasonable distinction in municipal policy. Historically, local governments have been accorded wide latitude in making taxing classifications which in their judgment produce reasonable systems of taxation. *Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Southern Railway v. Commonwealth*, 211 Va. 210, 219, 176 S.E.2d 578, 584 (1970). Determination by a court of whether a classification creates an arbitrary separation requires a case-by-case analysis which depends upon the purpose and subject of the particular ordinance creating the class and the circumstances and conditions surrounding its passage. *See Allied Stores v. Bowers*, 358 U.S. 522, 528 (1958); *Mandell v. Haddon*, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961); *Langston v. City of Danville*, supra. The governing body must consider the facts and determine that reasonable municipal policy justifies action favoring one subclassification of business over another.

Based on the foregoing, it is my opinion that a locality has the authority to exempt entirely research and development firms from the gross receipts license tax, provided that the local governing body properly has determined that reasonable municipal policy exists to justify the discriminatory action.

Your second and third questions may be answered together, as I find no distinction between State, local and federal agencies for purposes of your inquiry. You asked whether a locality may exempt from the gross receipts license tax revenues of research and development firms which are generated by work performed for governmental agencies. Section 58-266.1 does not specifically prohibit or allow ordinances which would permit gross receipts to be computed so as to exclude certain types of revenue. Therefore, I find that a locality can identify revenues that will be exempt from the tax. *See Southern Railway v. Commonwealth*, supra. It is important to note, however, that such discriminatory treatment must be justified, as previously discussed, by reasonable distinctions in municipal policies.

A locality considering exempting government revenues from the gross receipts tax from one subclassification of business must carefully consider whether the policy justifications are equally applicable to all businesses that receive revenue from governmental agencies. If such is the case, the different treatment must be extended to all businesses receiving governmental revenues.

Based on the foregoing, it is my opinion that a locality may exempt from the gross receipts license tax those revenues of research and development firms which are generated by work performed for governmental agencies, provided that such discriminatory treatment is justified by reasonable municipal policies formulated to apply to all the subclassifications of businesses to which the policy of the governing body is applicable.

1 You asked that I consider your questions in light of § 58.1-3705 (effective January 1, 1985, recodifying § 58-266.5(b)(ii)) which states that "the basis for such tax, whether it be gross receipts or otherwise, shall be the same for all persons engaged in the same business, trade, occupation or calling." (Emphasis added; the emphasized language was added by the recodification of Title 58.) That section requires uniformity of license taxation by prohibiting the use of different bases of taxation for the same classification
of business. For instance, it is prohibited to measure the tax on some firms by gross receipts and to measure tax on other firms engaged in the same classification of business by purchases. Because research and development firms may be regarded as a distinct business, this section does not control your question.

TAXATION. LICENSE. MORTGAGE CORPORATION WHICH IS SUBSIDIARY OF BANK LIABLE FOR GROSS RECEIPTS TAX.

July 20, 1984

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

You have asked three questions concerning local license taxation of banks and savings and loan associations. First, you ask 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. Second, you ask whether a mortgage corporation which is the wholly owned subsidiary of a bank is liable for the local gross receipts license tax. Finally, you ask whether a savings and loan association branch office which handles only mortgage services at that location is liable for the local gross receipts license tax. You have provided a portion of the local ordinance which appears to require 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.

Your first question was recently answered in an Opinion found in the 1983-1984 Report of the Attorney General at 364. That Opinion concluded 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 in accordance with § 58-266.1(A)(13). 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.

Your second question is essentially identical to your first question, except that the parent corporation is a bank rather than a savings and loan association. The analysis used in the Carmichael Opinion is applicable to the taxation of the subsidiary mortgage corporation, even when the parent corporation is a bank.1 A wholly owned subsidiary mortgage corporation is liable for the gross receipts tax. The extent of liability depends on the amount of gross receipts generated by transactions with third-party customers. See 1983-1984 Opinion, supra.

Your third question is whether a savings and loan association branch office which handles only mortgage services at that location is liable for the local gross receipts tax. I understand that the main office of the savings and loan association is located in another jurisdiction. Section 58-266.10 limits the license tax which a jurisdiction may impose on a savings and loan association to a maximum of fifty dollars and further provides that the tax may be levied only where the main office of the association is located. Thus, as a practical matter, your jurisdiction cannot levy such a license tax upon the branch of such an association when the main office is located outside the jurisdiction. I am not aware of any statutory provision that provides an exception to this general rule when the branch office provides mortgage services only.

In contrast to the fact situation in your previous questions, the savings and loan association is providing mortgage services through a branch office rather than through a
separate corporate subsidiary. A savings and loan association providing mortgage services to its customers may choose to do so by creating a separate corporate subsidiary, or it may simply open a branch office. Although identical mortgage services may be provided through either method chosen, liability for the gross receipts tax depends on the corporate organizational structure. Based on the foregoing, it is my opinion that a savings and loan association branch office which handles only mortgage services is not liable for the local gross receipts tax.

\[1\] Note, however, that taxation of the parent corporation is different, depending on whether the parent is a savings and loan association (amount of tax limited, see § 58-266.10) or a bank (generally not subject to gross receipts tax, see § 58-485.04).

TAXATION. LICENSE. PEDDLER'S LICENSE TAX OF § 58-266.8 APPLIES TO PERSONS SELLING MERCHANDISE AT RETAIL BUT NOT DURING ALL REGULAR BUSINESS HOURS.

September 11, 1984

The Honorable Marie W. Pollock
Commissioner of the Revenue for the City of Covington

This is in reply to your request for my opinion on a question related to local license taxes on peddlers and on the applicable procurement procedures for local constitutional officers.

Your first inquiry is whether persons who come into your city to sell seafood at retail only one day of the week would be subject to the merchant's license tax or to the peddler's license tax authorized by § 58-266.8 of the Code of Virginia. You explain that the persons in question sell their seafood from a truck parked at the same location each week and that the seafood is purchased by them for resale.

Section 58-340 classifies persons who sell goods but do not keep a regular place of business open at all times during regular business hours as peddlers. Under the facts you present, persons selling goods only one day a week would be classified as peddlers under the section. See 1956-1957 Report of the Attorney General at 257.

Your second inquiry is whether the offices of local constitutional officers come under State procurement guidelines or under separate guidelines adopted by the locality.

The Virginia Public Procurement Act, § 11-35 et seq. (the "Act"), sets forth competitive procedures for the procurement of goods and services from nongovernmental sources by public bodies in the Commonwealth. The term "public bodies" includes constitutional officers as well as cities, counties and towns. See § 11-37. Section § 11-35(D) of the Act, however, permits cities, counties and towns to adopt alternative procurement procedures so long as they are based on competitive principles. There is nothing in the Act to change the holdings of earlier Opinions of this Office requiring constitutional officers to comply with a locality's centralized procurement system, if such an alternative system has been adopted. See Reports of the Attorney General: 1982-1983 at 113, 1981-1982 at 96, and 1975-1976 at 82. The rationale of these Opinions is that because the General Assembly has authorized localities to adopt centralized purchasing procedures in recognition of the savings to be achieved thereby in contrast to piecemeal purchasing, and because localities make expenditures for the operation of constitutional offices, these officers must comply with.
centralized procurement procedures adopted by the locality. Accordingly, in answer to your inquiry, where a locality has adopted alternative procurement practices as authorized by the Act, constitutional officers therein would be required to comply with the locality's procedures.1

1For purposes of this Opinion, it is assumed that the City of Covington has adopted an ordinance imposing the license tax as permitted under § 58-266.8.

Section 58-340 defines peddlers. It provides, in pertinent part:

"Any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler.

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

The exclusion from the peddler's license tax provided in the second sentence of the second paragraph of § 58-340 requires that the seller of seafood sell only seafood caught by him. Because, as you state, the sellers in question purchase their seafood for resale, this exemption would not apply. Likewise, the exclusion for wholesalers in the last paragraph of § 58-340 is inapplicable because the sales under consideration are retail in nature.

Section 11-35(E) enumerates sections of the Act which remain applicable even where localities have adopted alternative procedures in accordance with § 11-35(D).

See also 1964-1965 Report of the Attorney General at 19, holding that a school board must purchase through its locality's central purchasing agency. This holding is left intact by the provision in § 11-35(D) which permits school boards to adopt alternative procurement practices if no centralized purchasing ordinance exists in the locality.


In the absence of such a local procurement system, the State procedures as set forth in the Act must be followed.

TAXATION. LICENSE. UTILITY OF INCORPORATED TOWN NOT SUBJECT TO GROSS RECEIPTS TAX.

July 9, 1984

The Honorable David L. Berry
Commissioner of the Revenue for Rockingham County

You have asked whether Rockingham County may impose a gross receipts tax upon a municipally owned electric utility of the Town of Elkton. The Town of Elkton is an incorporated town within Rockingham County. The pertinent portion of the county ordinance provides:

"There is hereby imposed and levied upon...every corporation providing heat, light, and power within the County, as defined by Article 10, Chapter 12, Title 58, of the Virginia Code, a license tax equal to one-half of one per centum of the annual gross receipts derived from such business in Rockingham County."

Section 7-52, Art. XII, Ch. 7.
Section 58-266.1(A)(1) of the Code of Virginia provides that "[n]o city, town or county shall levy any license tax...on any public service corporation except as permitted by other provisions of law...." Thus, it is necessary to determine whether any other provision of law permits such a license tax.

The only relevant statute is § 58-603 which provides, in pertinent part:

"Every corporation coming within the provisions of this article shall pay to the State for each tax year an annual state franchise tax....

* * *

(2) Any city, town or county may impose a license tax under § 58-266.1 upon such corporation for the privilege of doing business therein...."

This section is a component of Art. 10, Ch. 12 of Title 58 (§ 58-602 et seq.). Therefore, it is necessary to determine whether a municipally owned electric utility comes within Art. 10. Corporations subject to § 58-603 are set forth in § 58-602.

An analysis of all the provisions of Art. 10 reveals that the corporations subject to that article are those which are subject to the State Corporation Commission under the provisions of §§ 5 and 6 of Art. IX of the Constitution of Virginia (1971). Section 7 of Art. IX provides that the constitutional jurisdiction conveyed by §§ 5 and 6 shall not extend to municipally owned corporations.2

Section 7 does not prohibit the General Assembly from vesting the State Corporation Commission with jurisdiction over municipally owned corporations; nor does the Constitution prohibit the General Assembly from providing for the taxation of such corporations. Based upon my analysis, however, I do not believe the General Assembly has yet provided for local taxation of municipally owned corporations.3 Accordingly, I am of the opinion that Rockingham County may not impose its gross receipts tax on the municipally owned electric utility of the Town of Elkton.

1 See 1967-1968 Report of the Attorney General at 272, in which this Office held that the Town of Bedford, a municipal corporation, is not a public service corporation.

2 A "[m]unicipal corporation is a body politic and corporate, created to administer the internal concerns of the district embraced with its corporate limits, in matters peculiar to such place and not common to the state at large." Black's Law Dictionary 917 (5th ed. 1979). See also § 15.1-837, in which a municipal corporation is construed to include, inter alia, incorporated towns.

3 By way of comparison, note that in § 58-617.2(a), the General Assembly provided for a local tax on consumers of utility service provided by "any corporation coming within the provisions of [Art. 10]," and in § 58-617.2(c), provided for such a tax on consumers of municipally owned utilities.

The necessity to have a separate provision for municipally owned corporations indicates the General Assembly's conclusion that Art. 10 does not generally extend to such corporations.

TAXATION. LICENSE. WHOLESALER IN CEMENTITIOUS PRODUCTS NOT "MANUFACTURER" WITHIN § 58-266.1(A)(4) EXEMPTION.
November 5, 1984

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You have asked whether a wholesale dealer in various processed mixtures of cement-related ("cementitious") products may be afforded an exemption from the local business, occupational and professional license tax under § 58-266.1(A)(4) of the Code of Virginia because its operations constitute manufacturing.

Section 58-266.1(A)(4) provides, in part, as follows:

"No city, town or county shall levy any license tax on a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture...whether the same be measured by gross receipts or otherwise, any city or town charter provisions to the contrary notwithstanding."

You have described a dealer who sells at wholesale at the place of business a variety of products that it produces through two processes. In the first process, the dealer buys bulk quantities of sand, rock and cement which are dried and stored. Depending on the particular product to be made, these materials are mixed in predetermined amounts and then fed into bags in which form the mixture is sold.

In the second process, several "recipes" are used to render approximately fifteen products, e.g., grout and road patching material. The ingredients include fiberglass, sand, lime, cement, acrylic or vinyl resins, and a special concentrate material. All the particular ingredients are mixed, and the dry mixture is poured into bags, pails and boxes for sale.

In my opinion, neither of these processes is "manufacturing" within the meaning of § 58-266.1(A)(4) as it has been most recently interpreted by the Supreme Court of Virginia. In Solite Corp., v. King George Co., 220 Va. 661, 665, 261 S.E.2d 535, 537 (1980), the Supreme Court of Virginia held that "[t]he mere blending together of various ingredients, in the absence of a transformation into a product of substantially different character, is not manufacturing."

Here, as in Solite, after the processing of the raw materials has been completed, the raw materials are the very same raw materials, except that they are combined with other raw materials. See also Opinion to the Honorable Danny C. Ball, Commissioner of the Revenue for Wise County, dated August 20, 1984. They have not been transformed into products of substantially different character. I must, therefore, answer your inquiry in the negative.

As I noted previously in my Opinion to you, found in the 1983-1984 Report of the Attorney General at 372, it is appropriate for you to direct future questions concerning the determination of who is a manufacturer to the State Tax Commissioner under the authority of § 58-266.1(E).

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TAXATION. LICENSE FEES. COUNTY MAY REQUIRE TREASURER TO REFUSE TO ISSUE COUNTY VEHICLE LICENSE UNTIL PROOF OF PAYMENT OF PERSONAL PROPERTY TAXES GIVEN TO TOWNS WITHIN COUNTY. COUNTY AND TOWN MUST HAVE COOPERATIVE AGREEMENT AUTHORIZED BY § 46.1-65(d).
March 12, 1985

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

You have asked whether a local governing body of a county may, by ordinance, require the county treasurer not to issue the county vehicle license until proof of payment of personal property taxes owed to any town in the county on the motor vehicle has been presented. In particular, your question is directed to county treasurers operating in a locality which has adopted the county board form of government.

Prior Opinions of this Office have held that it is the duty of a county treasurer to issue local automobile licenses and collect the fees authorized by local ordinance. See Reports of the Attorney General: 1969-1970 at 298; 1955-1956 at 221. The holdings of those Opinions are based on the duties of treasurers as prescribed by general law in §§ 14.1-59 and 58.1-3127 of the Code of Virginia. Section 14.1-59 provides that county treasurer shall collect license fees. Section 58.1-3127 provides that the treasurer shall receive levies and other amounts payable into the treasury of the political subdivisions served by the treasurer.

The Opinion of this Office found in the 1980-1981 Report of the Attorney General at 252, is also instructive. That Opinion holds that a county may adopt an ordinance under § 46.1-65 providing that a county motor vehicle license will not be issued until proof has been given of payment of motor vehicular personal property taxes owed to a town within that county. The holding was limited to where the town and county have expressly agreed to cooperate in issuing a local license as permitted by § 46.1-65(d).

Based on the foregoing, it is my opinion that the governing body of a county, operating under a form of government which has a treasurer, may pass an ordinance requiring the treasurer not to issue the county motor vehicle license until proof of payment of personal property tax on the vehicle to towns within that county. This conclusion applies only where a county and any town within that county have an agreement to issue not more than one local license tag as provided in § 46.1-65(d).

The term "treasurer," as used in this section, includes both city and county treasurers. See § 58.1-3123.

Your question is written in terms of proof of payment of personal property taxes on the vehicle to be licensed. Section 46.1-65(c) authorizes the locality, by ordinance, to require proof that personal property taxes on any motor vehicle, trailer, or semitrailer assessable and owing against the applicant be paid prior to issuance of the local vehicle tag.

1This question is in addition to a separate request for an Opinion on the general topic of collection of personal property taxes on motor vehicles which you submitted on the same date.

2Certain other forms of county government have a director of finance performing the duties of a treasurer. See § 15.1-605(e) (county executive form), § 15.1-640(e) (county manager form), and § 15.1-766(e) (urban executive form). This response is not applicable to counties which have adopted these forms of government. The conclusions provided herein, however, would apply to the remaining two forms of Virginia county government where the office of treasurer is not abolished: traditional form (see §§ 15.1-37.4 to 15.1-130 and 15.1-527 to 15.1-558) and county manager plan (see §§ 15.1-674 to 15.1-688 and, in particular, § 15.1-685, providing that the office of treasurer may not be abolished).

3The term "treasurer," as used in this section, includes both city and county treasurers. See § 58.1-3123.
In the absence of an agreement between the county and a town therein, the county would have no authority to enforce the payment of the town personal property taxes. See 1983-1984 Report of the Attorney General at 342 (county treasurer is without authority to accept payment of town taxes). See also 1977-1978 Report of the Attorney General at 131 (county treasurer may collect town dog license tax where such taxing power is exercised jointly by the county and town under § 15.1-21(a)).

TAXATION. LOCAL LEVIES. TRANSIENT OCCUPANCY TAX MAY NOT BE LEVIED WHEN INDIVIDUALLY OWNED, SINGLE FAMILY HOMES OR CONDOMINIUMS RENTED THROUGH AGENT PROVIDING ADVERTISING, RESERVATIONS, HOUSEKEEPING, ACCOUNTING, AND CHECK-IN SERVICES.

May 29, 1985

The Honorable George F. Allen
Member, House of Delegates

You have asked whether the local transient occupancy tax authorized by § 58.1-3819 of the Code of Virginia applies when individually owned, single family homes or condominium units located throughout a resort area are rented through a real estate agency which provides advertising, reservations, housekeeping, accounting, and check-in services. I assume that the locality has adopted an ordinance levying the tax.

Effective July 1, 1985, the pertinent portion of § 58.1-3819 will read as follows:

"Any county, by duly adopted ordinance, may levy a transient occupancy tax on hotels, motels, boarding houses and travel campgrounds." (Emphasis added.)


The transient occupancy tax may be levied only on "hotels, motels, boarding houses and travel campgrounds." The Code does not define any of these terms for purposes of this tax. Therefore, we must turn to rules of statutory construction. It is well-settled that "statutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not to be extended by implication beyond the clear import of the language used." Commonwealth v. Appalach. El. Power Co., 193 Va. 37, 46, 68 S.E.2d 122, 127 (1951), cited in Com. Nat. Res. v. Commonwealth, 219 Va. 529, 537, 248 S.E.2d 791, 796 (1978). Another pertinent rule states that words in a statute should be given their usual, commonly understood meaning. See 1982-1983 Report of the Attorney General at 707; see also Commonwealth v. Orange-Madison Coop., 220 Va. 655, 261 S.E.2d 532 (1980).

In common usage, the term "hotel" or "motel" describes a group of single rooms or suites usually in one building, individually rented, but owned and operated by one entity as a single business. You have described individually owned, single family homes and condominiums, which are individually owned suites generally including the same amenities as a home. The terms "hotel" and "motel" are generally not used to describe condominiums or single family homes.

If the General Assembly had intended the tax to apply when condominiums or single family homes are rented to transient occupants, the statute would have so stated.

Based on the foregoing, it is my opinion that the local transient occupancy tax authorized by § 58.1-3819 does not apply when individually owned, single family homes or
condominiums located in a resort area are rented through a real estate agency which provides advertising, reservations, housekeeping, accounting, and check-in services.

1Until July 1, 1985, general authority for counties to levy the tax will not exist; rather, only eight specifically enumerated counties presently have the authority to levy such a tax under § 58.1-3819.

TAXATION. PERSONAL PROPERTY. EMPLOYEE WHOOwnS AND USES PROPERTY IN HIS WORK LIABLE FOR TAX UNDER § 58-829(M).

October 18, 1984

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

You have asked whether an individual is liable for the tangible personal property tax under § 58-829(M) of the Code of Virginia on property which he owns and uses in his trade or profession when he engages in that trade or profession as an employee of another. You cited three specific examples:

1. Office equipment (calculator and briefcase) of a research analyst for the Department of the Army.

2. Tools of a salaried automobile mechanic.

3. Books of a college professor used by him in his teaching.

You advise that a review of the federal and State tax returns of these individuals discloses that each is depreciating the property listed above as property used in a trade or business for federal and State income tax purposes, thereby obtaining a deduction for his income tax purposes.

Before addressing the merits of your question, it is appropriate that I note I am obligated to interpret the law as it has been enacted by the General Assembly. Where the statute is plain on its face, it must be given its meaning even though the legislature may not have been aware of its consequences.

Section 58-829 segregates tangible personal property for local taxation. The same rate must be applied to all tangible personal property. However, the statute allows localities to segregate property into several categories for valuation purposes. One such category is described in § 58-829(M) as follows:

"All tangible personal property employed in a trade or business other than that defined as intangible personal property under Chapter 6 (§ 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." (Emphasis added.)

Before addressing your specific examples, I will discuss the general question of whether one is liable for the tax on property he owns and uses in his trade or profession when he engages in that trade or profession as an employee of another. It is assumed for purposes of this general discussion that the property about which you ask is not
eliminated from subsection (M) of § 58-829 by the language following "other than that defined as..."

The statute is drafted in broad, general language which speaks of property "employed in a trade or business" without definition of the terms "a trade or business." It is a general rule that words in a statute should be given their usual, commonly understood meaning. See 1982-1983 Report of the Attorney General at 707. According to Webster's Seventh New Collegiate Dictionary 937 (1972), a "trade" is "the business or work in which one engages regularly: occupation." The same source at 113 defines "business" as "occupation, calling." Thus, the phrase "a trade or business" addresses one's occupation generally without regard to whether he is self-employed or an employee of another. In this regard, it is significant that the statute does not limit taxable property to that owned by the business as opposed to property owned by an employee.

It is helpful to look at similar statutory language in the Internal Revenue Code. In each of your examples, the individual claimed a depreciation deduction for the property on his individual income tax return. Section 162 of the Internal Revenue Code allows him to do this under statutory language that authorizes a deduction for "expenses paid... in carrying on any trade or business...." Like the Virginia Code, neither the Internal Revenue Code nor the pertinent Treasury Regulations define "trade or business." However, the term is commonly understood in this federal tax context to include services performed as an employee. The conclusion that the "trade or business" language in § 58-829(M) includes services of an employee is certainly supported by the similar conclusion under similar language in the Internal Revenue Code.

It is important to note that one's personal property tax liability under subsection (M) is not dependent upon his taking the depreciation deduction. However, if he does take the depreciation deduction under the federal tax provisions, he certainly has acted consistently with the conclusion that the property is used in his "trade or business." Commonwealth ex rel. Morrissett v. Manzer, 207 Va. 996, 1002, 154 S.E.2d 185, 190 (1967). If the employee does not claim an income tax benefit for the use of his own property in a trade or business, it is incumbent upon the commissioner of the revenue to determine whether the property is used in the employee's trade or business on a regular basis. In my opinion, infrequent or occasional use of tangible personal property in the employee's trade or business would not come within the meaning of § 58-829(M).

Based on the foregoing, it is my opinion that an individual may be held liable for the tangible personal property tax under § 58-829(M) on property which he owns and uses in his trade or profession when he engages in that trade or profession as an employee of another.

Applying these principles to your specific examples, I find that your first and third examples are taxable under § 58-829(M) unless and until the General Assembly changes the current law. I do note that because of the obvious difficulties in enforcing these provisions with respect to such items, I doubt that localities are presently applying the applicable statutes in an attempt to tax such items. Turning to your second example, tools of a salaried automobile mechanic are also taxable but fall into one of the "other than" categories described in subsection (M). Tools are segregated for local taxation only under § 58-405(C), and valuation is determined in the manner described in § 58-831.

1 Under the authority of Art. X, § 6(e) of the Constitution of Virginia (1971), wherein the General Assembly is permitted to exempt from taxation personal effects, such a distinction may provide the basis for legislative relief from the result reached herein.
1984-1985 REPORT OF THE ATTORNEY GENERAL

Although "books" are defined and classified by § 58-829.1 as "household goods and personal effects," such classification applies "only to such property owned and used by an individual or by a family or household incident to maintaining an abode."

TAXATION. PERSONAL PROPERTY. EXEMPTION BASED ON OWNERSHIP.

July 24, 1984

The Honorable Sam T. Barfield
Commissioner of the Revenue

You have asked whether vehicles and office equipment leased to churches under lease-purchase agreements are assessable for personal property taxes. Your office has determined the property's taxable status by the identity of the person who holds title to personal property and you have refused to exempt property leased by a church or other exempt entity from a nonexempt lessor.

Section 58-20 of the Code of Virginia requires that tangible personal property be taxed to its owner. Ownership is generally to be determined as of January first of each year. Accordingly, the answer to your inquiry turns on the factual determination of who holds the requisite ownership interest at that time.

An Opinion of this Office to the Honorable Kay W. Nichol, Commissioner of the Revenue for Madison County, dated June 21, 1984, discussed the indicia of ownership for purposes of Virginia's personal property tax law in the context of a lease-purchase agreement. The underlying consideration was whether the lease-purchase agreement constituted a "true lease" or a "sale" with retention of title in the seller merely to secure payment. The Nichol Opinion held, inter alia, that a lease in fact constitutes a sale, thereby conferring the ownership interest to the lessee, where the lessee becomes the title owner of the property at the end of the lease term for a nominal sum or for no additional consideration. Nichol also cites with approval earlier Opinions of this Office finding (a) that the holding of legal title in and of itself is not dispositive of ownership status for personal property tax purposes, and (b) that allocation of the risk of loss to one party is indicative of an ownership interest in that party.

From the information you have supplied, I am unable to resolve whether the lease-purchase agreements at issue are "true leases" or "sales." You must examine each lease-purchase agreement to determine whether the ownership interest rests with the lessor-titleholder or with the lessee-church, utilizing the indicia set forth in the Nichol Opinion. The personal property tax would then be applicable to such owner unless an exemption applies.

A determination that the ownership interest lies with a lessee-church would not necessarily mean that the property is exempt from the imposition of personal property taxes. A use requirement must also be met. See § 58-12.24 which provides an exemption from taxation for property owned by a church and "used exclusively on a nonprofit basis for charitable, religious or educational purposes...." (Emphasis added.) See also § 58-12.36 (providing an exemption for buses owned by churches and used for church purposes) and 1977-1978 Report of the Attorney General at 414 (holding certain vehicles owned and used by a religious organization for charitable purposes were exempt from personal property taxation under § 58-12.24). Thus, your office must make an additional factual determination that the use of the property by the church is one permitted under § 58-12.24 or § 58-12.36.
1984-1985 REPORT OF THE ATTORNEY GENERAL

1Cf. § 58-758.1 providing that where real property is exempt from assessment for taxation from the owner, the leasehold interest is taxable to the lessee. In other words, real property subject to a lease is taxable if either the lessor or lessee is a nonexempt entity. 1975-1976 Report of the Attorney General at 339. No similar statute exists where personal property is not assessable for taxation from the owner.

2See § 58-835. For fiscal year versus calendar year localities, ownership is determined as of July first of each year. See § 58-851.7. Moreover, pursuant to § 58-835.1, certain localities by ordinance may provide for the proration of personal property taxes on motor vehicles, trailers and boats. In this instance, ownership must be determined other than on January first or July first.

3Your letter mentions that the lessor and lessee both have their names on the title. Subsequent information provided by you indicates that the lessor is listed on the title as owner followed by the lessee's name clearly labeled as lessee under a lease-purchase agreement and not as co-owner. This set of facts merely alerts you to the existence of a lease-purchase agreement; it is not dispositive as to a determination of where the ownership interest lies.

4Article X, § 6(a)(2) of the Constitution of Virginia (1971) also provides exemption from taxation for property owned by churches and used as provided therein. The vehicles and office equipment do not appear to fall within the purview of this provision which requires use exclusively for religious worship or for the residence of the minister.

TAXATION. PERSONAL PROPERTY. EXEMPTION OF MOTOR VEHICLE JOINTLY OWNED BY MILITARY PERSON AND SPOUSE. EFFECT OF REGISTERING TO VOTE.

November 26, 1984

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

You have asked whether the registration to vote of the spouse of a military person will affect the personal property tax status of a motor vehicle jointly owned by a military person and his spouse.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act"), 50 U.S.C. 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 the locality where he is stationed. The Act does not, however, prevent such person from voluntarily changing his domicile to the state or locality in which he is physically present, pursuant to military orders. Thus, the protection afforded by the Act does not preclude a case-by-case determination as to whether a military person is in fact a Virginia domiciliary for purposes of local taxation. See 1975-1976 Report of the Attorney General at 115.

The Supreme Court of Virginia has stated that to establish a new domicile, two things must concur—first, residence in the new locality; second, the intention to remain there. The necessary intent to remain is a state of mind that must be proven by the surrounding facts. See State-Planters Bank v. Com., 174 Va. 289, 6 S.E.2d 629 (1940); Cooper's Adm'r. v. Commonwealth, 121 Va. 338, 93 S.E. 680 (1917). In an Opinion found in the 1983-1984 Report of the Attorney General at 412, I concluded that the military person involved did not establish domicile in Virginia for purposes of tangible personal property taxation solely by registering to vote a.. l subsequently voting. Other facts indicated the person intended to retain another state as his domicile.
The next pertinent inquiry is whether a military person evidences a change of his or her domicile to Virginia by the nonexempt spouse's registration to vote. The Supreme Court of Virginia, in Commonwealth v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (1933), decided that the domicile of an individual for Virginia tax purposes is not controlled by the fact that the individual's spouse is registered to vote in Virginia. Thus, the military person's domicile for tax purposes is not controlled by the spouse's registration to vote.

The final inquiry to be made is whether the joint ownership of the personal property is determinative of its taxable status. 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, property owned jointly by a military person and a nonexempt person is fully subject to taxation to the nonexempt person.

In the case of the jointly owned motor vehicle, a Virginia locality has authority under § 58-834 to assess a property tax in the name of the military person's spouse if the vehicle is "normally garaged, stored or parked" in the locality, unless the spouse is a domiciliary of another state and has paid a personal property tax on the vehicle to the state of her domicile. See § 58-834. Thus, domicile in another state is a condition which the nonmilitary spouse must satisfy in order to avoid taxation under § 58-834. Accordingly, because registering to vote is one of several factors to be considered in determining domicile, it follows that registration to vote may affect that person's domicile and, therefore, eligibility for tax exemption under § 58-834.

The exception for non-Virginia domiciliaries who pay taxes on vehicles to the state of domicile is available to all under § 58-834, not simply to the spouses of military persons.

TAXATION. PERSONAL PROPERTY. MACHINERY AND TOOLS MAY NOT BE CLASSIFIED AS BOTH TANGIBLE PERSONAL PROPERTY AND MACHINERY AND TOOLS USED IN MANUFACTURING.

September 20, 1984

The Honorable John Watkins
Member, House of Delegates
The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

Each of you has requested essentially the same opinion almost simultaneously. I am taking the liberty of synthesizing the statements of facts and questions presented in order to deliver a single opinion to you.

The facts are that the ABC Company ("ABC") operates a facility in Virginia for the purpose of manufacturing and repairing machinery. As indicated, a portion of the business operations includes repairs which do not constitute manufacturing.

The county in which the facility is located has, for several years, classified all of the machinery and tools at ABC's facility as machinery and tools used in a manufacturing business in accordance with §§ 58-405, 58-412 (now repealed) and 58-831 of the Code of Virginia. ABC paid the tax assessed on this tangible personal property at the rate of levy fixed for the separate classification of machinery and tools in the county. The Code sections cited prohibit the rate of levy under the separate classification of machinery and tools from exceeding the rate imposed upon tangible personal property. The county
levy on machinery and tools in this case is lower than that imposed on tangible personal property.\(^1\)

The commissioner of the revenue audited ABC's records for 1980, 1981, 1982 and 1983, and made an inspection of the facility. He then made findings of fact identifying the receipts from certain invoices as being attributable to manufacturing operations and receipts from other invoices as being attributable to repair operations not constituting manufacturing. From this audit, the commissioner determined the percentage of ABC's gross receipts attributable to manufacturing and the percentage of gross receipts attributable to nonmanufacturing.

For each year audited, the commissioner redetermined the tax owed by ABC. The amount of tax owed is normally calculated by multiplying a single rate of levy against the assessed value of the property.\(^2\) In this instance, because ABC's business activity is not exclusively manufacturing, the commissioner of the revenue believed he was required to apportion the assessed value of the property between manufacturing and nonmanufacturing business activity and apply different rates of levy to each such portion. He chose to apportion the assessed value of the property between manufacturing and nonmanufacturing use on the basis of the relationship between manufacturing and nonmanufacturing revenues. After recalculating the total tax payable by ABC in the manner described, the commissioner assessed ABC for omitted taxes for the years 1980, 1981, 1982 and 1983 for the amount by which the new tax bills exceeded the old tax bills which had been calculated exclusively at the lower rate of levy for machinery and tools.

Given this factual background, the following three questions are presented:

(1) Whether the commissioner of the revenue may assess tax on the same business equipment under both the classification of tangible personal property and the separate classification of machinery and tools used in manufacturing

(2) If so, whether the commissioner of the revenue may apply the two tax rates separately to the value of the property apportioned between its use in manufacturing and its use in nonmanufacturing.

(3) If not, whether the commissioner of the revenue must apply the lower rate of levy for the separate classification of machinery and tools used in manufacturing to the entire value of the business property even though the property is not used exclusively in manufacturing.

Former § 58-412, which was repealed effective January 1, 1983,\(^3\) provides, in part, as follows:

"Machinery and tools used in a manufacturing...business... shall be listed for local taxation exclusively and each...county shall make a separate classification for all such machinery and tools and fix the rate of levy thereon, but such rate shall not be higher than the rate imposed upon tangible personal property in such...county...."

This same concept was continued in the amendments to § 58-405 contemporaneously with the repeal of § 58-412, with no substantive change in the language.

No mention is made in § 58-405 or § 58-412 of any procedure for prorating or apportioning the tax on machinery and tools used in manufacturing between the machinery and tools levy and the tangible personal property levy based upon the use of the equipment in manufacturing versus nonmanufacturing activities. The General Assembly has granted very specific authority to apportion or prorate taxes in many situations codified in Title 58. See, e.g., § 58-151.02(e)(1)(ii) and § 58-151.033 et seq.
I am aware of no provision in Title 58 which allows a single piece of property to be subject to more than one ad valorem tax apportioned according to its use. Compare 1977-1978 Report of the Attorney General at 429. Accordingly, in answer to the first question, I am of the opinion that there is no authority to tax the property of the ABC Company, both as machinery and tools used in manufacturing and as tangible personal property, apportioned on the basis of the ratio of manufacturing revenues to nonmanufacturing revenues.

In light of the above-stated conclusion, it is unnecessary to answer the second question.

The third question relates to the power of the General Assembly to "define and classify taxable subjects." Article X, § 1 of the Constitution of Virginia (1971). This power is unquestioned and provides for classifications related to the subjects of taxation, the kinds of property to be taxed, and the rates to be levied or the amounts to be raised. Southern Railway v. Commonwealth, 211 Va. 210, 219, 176 S.E.2d 578, 584 (1970).

In defining and classifying machinery and tools used in manufacturing as a separate classification of tangible personal property, the General Assembly did not provide that the use in manufacturing must be exclusive. The only limitation in § 58-405 is that the machinery and tools be used in a manufacturing business. The question then becomes whether ABC's business operation is manufacturing for tax purposes.

I am aware of no Virginia decisions which address the precise question whether a corporation which conducts both manufacturing and nonmanufacturing activities is entitled to be classified solely as a manufacturing business for purposes of § 58-405. Case law in other jurisdictions is sharply divided. For an annotation titled "[w]hat constitutes manufacturing and who is a manufacturer under tax laws," see 17 A.L. R. 3d 7, 44 (1968). Section 11 of the annotation specifically discusses the "[e]ffect of engaging in both manufacturing and nonmanufacturing operations." Case law holding that a business is not a manufacturer tends to describe the manufacturing portion of the operation as "inconsequential" or "incidental" to the principal nonmanufacturing business activity. Id. at 45. Decisions favoring a broader interpretation of manufacturing do not preclude such a finding merely because the principal business is nonmanufacturing. These cases do, however, require something more than incidental manufacturing activity.

A very helpful decision of the Supreme Judicial Court of Massachusetts sets forth several principles which may be used to advantage in determining whether ABC Company is a manufacturer for purposes of § 58-405. See Fernandes Supermarkets v. State Tax Com'n, 371 Mass. 318, 357 N.E.2d 296 (1976). The Massachusetts statute interpreted in that case did not specify the degree of manufacturing activity required to classify a corporation as a manufacturing business. Relying upon legislative history of the statute, the Massachusetts Court stated that the purpose was "to promote the general welfare of the Commonwealth by inducing new industries to locate here and to foster the expansion and development of our own industries, so that the production of goods shall be stimulated, steady employment afforded to our citizens, and a large measure of prosperity obtained." 371 Mass. at 321, 357 N.E.2d at 298. It is reasonable to assume that the legislative purpose of the Virginia General Assembly is not dissimilar.
Conversely, the Massachusetts court quoted one of its earlier decisions as it sought to balance the interests lying behind the legislative purpose. It noted that manufacturing status is not available to nonmanufacturing corporations which engage in manufacturing "which is merely trivial or only incidental to its principal business." 371 Mass. at 323, 357 N.E.2d at 299. Applying the test of substantiality to specific indicators associated with the business, the Court stated:

"Corporations whose manufacturing operations are substantial, whether viewed with respect to the financial receipts they bring to the corporation, or the proportion of the entire corporate income that they comprise, or the percentage of the entire capital which is invested in them, or the number of persons employed in them as compared with the total number of employees of the corporations, or the ratio to the entire business activities of the corporation, must be regarded as manufacturing corporations within our statutory definitions specifying those that are exempted from local taxation of their machinery."

Id. at 322, 357 N.E.2d at 299. In the absence of further legislative definition or a decision in the Virginia courts, I find the reasoning of the Massachusetts Court to be persuasive.

The meaning of the term "substantial" is not susceptible of being reduced to mathematical precision. According to Black's Law Dictionary 1280 (5th ed. 1979), "substantial" is defined as:

"Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. [Citation omitted.] Something worthwhile as distinguished from something without value or merely nominal."

As suggested earlier in this Opinion, "substantial" may properly be defined as not "incidental" or "inconsequential." 17 A.L.R.3d, supra.

"Substantial" is not the same as "preponderance" as that term is used in the last sentence of the first paragraph of § 58-441.6 of the Code. For purposes of exemption from the sales and use tax at the time of purchase, that section provides that "[m]achinery, tools and equipment, or repair parts therefor or replacements thereof, shall be exempt if the preponderance of their use is used directly in....manufacturing...." "Preponderance" requires that the manufacturing use be greater than the nonmanufacturing use. See Black's Law Dictionary 1064 (5th ed. 1979). No such meaning can be attached to "substantial."

In conclusion, it is the responsibility of the commissioner of the revenue as the finder of fact to make the determination regarding the extent to which company activity is manufacturing. If the determination is that the manufacturing activity of ABC constitutes a "substantial" portion of its business activity, it is my opinion that the machinery and tools used by ABC in manufacturing must be classified within the separate classification of machinery and tools within the meaning of § 58-405(C), subject to the levy set by the county for machinery and tools at a rate not to exceed the rate imposed upon tangible personal property generally.
1 All but one of the 136 Virginia cities and counties levy a separate rate of taxation for machinery and tools. Thirty-eight cities and counties levy a lower rate of tax on machinery and tools than on tangible personal property generally. Virginia Department of Taxation Bulletin No. 151, Local Tax Rates, Tax Year 1983 (1984).

2 In this case, neither the rate of levy set by the board of supervisors nor the value of the property assessed by the commissioner of the revenue is in dispute.


4 There is no legislative history available in Virginia for either § 58-405 or § 58-412.

5 In Massachusetts, classification as a manufacturer results in a tax exemption. In Virginia, classification as a manufacturer may result in a lower rate of taxation on tangible personal property which is machinery and tools.

TAXATION. PERSONAL PROPERTY. MOTOR VEHICLE ASSESSED WHERE NORMALLY GARAGED OR PARKED.

November 30, 1984

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

You have asked whether a large tandem truck garaged in your jurisdiction most of the year is properly assessable for personal property taxes by you. You state that you assessed this vehicle and that the taxpayer has questioned that assessment on the basis that the truck is "titled in West Virginia and subtitled in Virginia," uses license tags of both States but that Virginia tags were used only three months of the tax year.

Previous Opinions of this Office have held that the place of issuance of the registration and license tags is not controlling in the determination of the situs of a vehicle for personal property taxation. See Reports of the Attorney General: 1982-1983 at 359, 1978-1979 at 283, and 1966-1967 at 205. Rather, situs, for purposes of personal property taxation of motor vehicles, is the locality "where the vehicle is normally garaged...or parked...." Section 58-834 of the Code of Virginia.

You have indicated that the truck in question is normally garaged throughout the tax year in your jurisdiction. Accordingly, it is my opinion that the tandem truck is subject to personal property tax in your jurisdiction.

1 For purposes of this Opinion, it is assumed that the description of the vehicle as being titled in West Virginia and subtitled in Virginia encompasses the issuance of a certificate of title and the recordation of such ownership with both States. In Virginia, for example, a registration number is assigned to the vehicle and owner, and a registration card is issued. See §§ 46.1-41, 46.1-54, 46.1-68 and 46.1-79.

2 This Opinion also assumes that the prohibitions of § 58-624 do not apply to the fact situation presented. This section prohibits the imposition of local levies on the rolling stock of motor vehicle carriers operating under a certificate of public convenience and necessity issued by the State Corporation Commission. If such a certificate has been issued for the truck in question, no personal property taxes would be assessable. See 1983-1984 Report of the Attorney General at 396.
TAXATION. PERSONAL PROPERTY. NEW CAR DEALER. DEMONSTRATOR CARS MAY BE INVENTORY AND TAXABLE AS MERCHANTS' CAPITAL; NOT TAXABLE AS TANGIBLE PERSONAL PROPERTY.

September 17, 1984

The Honorable G. Steven Agee
Member, House of Delegates

You ask my opinion whether certain demonstrator cars owned by a new car dealer are tangible personal property (taxable under § 58-829 of the Code of Virginia) or merchants' capital (taxable under § 58-833). You relate your question to the limited use of demonstrator cars by car salesmen in the following context:

"A new car dealer allows his sales staff and company employees to drive company owned cars between their homes and work while in the course of their employment. Such use is in conformity with the provisions of § 46.1-115 [dealer license plates]. These same cars are used by prospective customers for demonstration drives. If a customer expresses a desire to purchase one of these cars, no restriction from sale occurs due to its use as a demonstrator. Customers may decide to purchase these cars, as opposed to other cars in inventory because of color, equipment or to avoid waiting for a similar car ordered from the manufacturer. These cars are used in this capacity until driven a certain number of miles, at which time they are replaced by other inventory cars, thus avoiding excessive devaluation of a car. The demonstrator is then returned to the dealer's lot."

Section 58-833 defines merchants' capital as "inventory of stock on hand...and all other taxable personal property of any kind whatsoever, except...tangible personal property not offered for sale as merchandise, which tangible personal property shall be reported and assessed as such." Thus, the essence of your question is whether the demonstrator cars lose their character as inventory (i.e., become items which are "not offered for sale as merchandise") when used in the manner you describe.

In evaluating a particular case, it must be determined whether the dealer has essentially given his employee permanent use of a car. Permanent use is suggested by the user's significant degree of control over when and how the car is used. Also, use of a single car for an entire model year, regardless of the miles driven, suggests permanent use. In the particular circumstances you present, the cars apparently continue to be merchandise offered for sale during their use as demonstrators. It is my opinion, therefore, that demonstrator cars used in the manner you describe are taxable under § 58-833 as merchants' capital.

1In determining the appropriate property classification, the commissioner of the revenue is not bound by the taxpayer's classification of the property on tax returns. The commissioner of the revenue may act upon his own knowledge of relevant facts when he characterizes personal property as tangible personal property taxable under § 58-829, or inventory taxable as merchants' capital under § 58-833. See 1977-1978 Report of the Attorney General at 429.

TAXATION. PERSONAL PROPERTY. SITUS. BOAT NORMALLY KEPT EXACTLY SIX MONTHS OF EACH TAX YEAR IN ONE JURISDICTION AND SIX MONTHS IN SECOND ONE TAXED IN PLACE OF DOMICILE OF OWNER.
November 29, 1984

The Honorable John H. Dressler
Commissioner of the Revenue for the City of Poquoson

You have asked which of two Virginia localities (locality A and locality B) may properly assess the owner of a boat for personal property tax purposes under the situs provisions of § 58-834 of the Code of Virginia. You explain that the boat is kept in dry storage for approximately six (6) months (November-April) in one taxing jurisdiction (locality A), and moved for the remaining six (6) months to another taxing jurisdiction (locality B) where the owner is domiciled. You explain further that locality A has a proration ordinance authorized by § 58-835.1. Locality B does not prorate. It assesses as of January 1 of each year.

This Office has previously ruled that the former provision of § 58-834 referring to "the first day of the tax year" (subsequently amended to "the tax day" by Ch. 437, Acts of Assembly of 1981) means that the situs determination is to be made based upon facts which are known and exist as of that day. See 1979-1980 Report of the Attorney General at 353. Thus, the question is not where the vehicle or car is normally located on January 1, but where the property is normally located throughout the year, with the facts to be evaluated as they existed on January 1. As was noted in the above-referenced Opinion, the physical location of the property on January 1 is not conclusive of its situs for tax purposes under § 58-834. Thus, if facts existing on January 1 demonstrate that a boat is normally kept in dry storage in one jurisdiction between November 1 and March 31, but is used in a second jurisdiction for the longer period of April 1 through October 31, then for situs purposes of § 58-834, the boat would normally be docked, parked or garaged in the second jurisdiction. If the boat is not normally garaged, docked or parked in one jurisdiction, § 58-834 provides that it shall be taxed in the jurisdiction in which the owner is domiciled.

These principles must be applied to the facts that you have presented. Assuming that the boat is actually located in each jurisdiction for exactly six (6) months of the tax year, it is my opinion that it is not normally garaged, docked or parked in either jurisdiction. Accordingly, the boat would be assessable in locality B, the domicile of the owner.

The fact that locality A has proration authority does not change this result. Section 58-835.1(A) requires that the motor vehicle, trailer or boat acquire a situs within the proration locality. The boat at issue is not normally garaged, docked or parked in either jurisdiction because it is garaged or docked in each jurisdiction for an equal amount of time each year. Thus, no situs exists for the application of a prorated tax under a proration ordinance permitted by § 58-835.1.

1The pertinent portion of § 58-834 provides: "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, 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."

2In Hogan v. County of Norfolk, 198 Va. 733, 735, 96 S.E.2d 744, 746 (1957), the Court observed that "physically located," as used in § 58-834, involved more than "transitory or temporary" presence. The Court continued and stated that "[t]he 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 not 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."

"If the boat is regularly kept in one of the jurisdictions for more than a six-month
period, the requisite situs for personal property taxation would exist in that locality.

TAXATION. PERSONAL PROPERTY. VALUATION MAY NOT RELY ON APPRAISAL
SUBMITTED BY TAXPAYER.

January 29, 1985

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

You have asked whether a commissioner of the revenue must consider an
independent appraisal made by a private appraiser hired by a taxpayer when determining
the value of tangible personal property employed in the taxpayer's business. You note
that the taxpayer's appraisal contains a statement as to the condition of the property and
that the value established by the taxpayer's appraisal differs from the value you obtained
by applying the statutorily prescribed percentage of original cost method.

Section 58.1-3503 of the Code of Virginia classifies tangible personal property for
valuation purposes. Specifically, § 58.1-3503(A)(17) provides that tangible personal
property employed in a trade or business which is not subject to another classification
"shall be valued by means of a percentage or percentages of original cost."

Section 58.1-3503(B) provides, in pertinent part:

"Methods of valuing property may differ among the separate categories, so long as
each method used is uniform within each category, is consistent with requirements
of this section and may reasonably be expected to determine actual fair market
value. Nothing herein shall be construed to prevent a commissioner of revenue
from taking into account the condition of the property." (Emphasis added.)

This Office has held that it is solely the duty of the commissioner of the revenue to
General at 518. Whereas it is permissible for a commissioner of the revenue to engage a
professional appraisal firm to assist him in the appraisal function of his assessment
duties,1 he would be remiss to rely solely upon an appraisal made by an appraiser hired by
the taxpayer.

Furthermore, § 58.1-3503(A)(17) specifically requires the commissioner of the
revenue to assess tangible personal property employed in a trade or business by the
346. Section 58.1-3503(B) mandates the commissioner to apply the same method of
valuation uniformly to all property of all taxpayers within the category of property being
valued. Id.; see also Art. X, § 1 of the Constitution of Virginia (1971). A value produced
by a different method cannot be considered, so long as the percentage of cost method
may reasonably be expected to determine fair market value.

Lastly, § 58.1-3503(B) permits the commissioner to take into consideration the
option to consider the condition of the property is permitted to allow for the situation
where a specific piece of property is in better or worse condition than would ordinarily

A private appraisal may be considered to the extent that it casts doubt upon the accuracy of the percentage of cost method in reaching the actual fair market value of a specific piece of property. For example, where there is a wide disparity between the value of certain property as established in a private appraisal and the value obtained by the percentage of cost method, the commissioner of the revenue may consider the condition of the property and adjust the assessed value up or down if the condition of the property warrants such an adjustment. Whether an assessment based on the percentage of original cost of the property reflects the actual fair market value of the property is, however, a factual determination to be made by the commissioner of the revenue.


TAXATION. PROPERTY USED FOR EASTER SUNRISE SERVICES AND RECREATION MAY BE EXEMPT UNDER § 58.1-3617 IF USED EXCLUSIVELY FOR CHARITABLE, RELIGIOUS OR EDUCATIONAL PURPOSES.

March 12, 1985

The Honorable Mary N. Brown
Commissioner of the Revenue for Wythe County

You have asked whether a certain parcel of real property is exempt from property taxation. You describe the property as follows:

"An organized Church owns two parcels of real property in Wythe County. The Church and parsonage are located on parcel #1 and it is tax exempt. Parcel #2 is located some five miles away from #1 and contains approximately 15 acres. On this second parcel a picnic shelter is located and Easter Sunrise services are held there each year. Other activities held on this acreage are softball and picnics."

Based on the assumption that the property about which you ask, parcel #2, was acquired after 1971, the legal authority authorizing exemptions for such property arises from two sources, Art. X, § 6(a)(2) of the Constitution of Virginia (1971) and § 58.1-3617 of the Code of Virginia. Article X, § 6(a)(2) exempts the following property from taxation: "Real estate and personal property owned and exclusively occupied or used by churches or religious bodies for religious worship or the residences of their ministers." The property in question is not used exclusively for religious worship. Accordingly, parcel #2 would not be exempt under the foregoing provision. See 1974-1975 Report of the Attorney General at 494.

The only other possible source of authority under which exemptions can be claimed in the circumstances you present is § 58.1-3617 (former § 58-12.24) which states, in part, as follows:

"Any church, religious association or religious denomination operated exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby classified as a religious and charitable organization. Notwithstanding § 58.1-3609,
only property of such association or denomination used exclusively for charitable, religious or educational purposes shall be so exempt from taxation."

Property exempted under this statute must meet both the ownership and use tests. I will assume for purposes of this Opinion that the ownership test is met and that you are only concerned with the issue of use of the property. In determining whether the tests are met, the Constitution requires that the rule of strict statutory construction must be applied. See Art. X, § 6(f); 1974-1975 Report of the Attorney General at 491.

You have not furnished a sufficient description of the use of the property for recreation to determine whether the use is fulfilling a charitable, religious or educational purpose, but it is conceivable that its use could meet any one of those purposes. See 1984-1985 Report of the Attorney General at 329, 323. Whether the property in question is used exclusively for charitable, religious or educational purposes is necessarily a factual matter for determination by the commissioner of the revenue. I believe that the above-referenced Opinions will help in your resolution of this matter.

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1For explanation of applicable statute to property held prior to July 1, 1971, see 1983-1984 Report of the Attorney General at 353.
2Section 58.1-3609 provides as follows:
"A. The real and personal property of an organization classified in §§ 58.1-3610 through 58.1-3620 and used by such organization for a religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purpose as set forth in Article X, § 6(f) of the Constitution of Virginia, the particular purpose for which such organization is classified being specifically set forth within each section, shall be exempt from taxation, so long as such organization is operated not for profit and the property so exempt is used in accordance with the purpose for which the organization is classified.
B. Exemptions of property from taxation under this article shall be strictly construed in accordance with Article X, § 6(f) of the Constitution of Virginia."

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TAXATION. REAL ESTATE. REHABILITATED PROPERTY EXEMPTION APPLICATION MAY NOT BE REQUIRED PRIOR TO COMMENCEMENT OF REHABILITATION UNDER § 58-760.3.

July 6, 1984

The Honorable Alma Leitch
Commissioner of the Revenue for the City of Fredericksburg

You have asked three questions regarding your role in administering a local ordinance passed pursuant to § 58-760.3 of the Code of Virginia concerning a real estate tax exemption for certain rehabilitated property.

Section 58-760.3 states, in pertinent part:

"A. The governing body of any county, city or town may, by ordinance, provide for the exemption from taxation of real estate which has been substantially rehabilitated for commercial or industrial use, subject to such conditions as the ordinance may prescribe....

B. The exemption provided in subsection A shall not exceed an amount equal to the increase in assessed value resulting from the rehabilitation of the commercial or industrial structure as determined by the commissioner of revenue or other local
assessing officer and this amount only shall be applicable to any subsequent assessment or reassessment.

***

D. The governing body of any county, city or town may assess a fee not to exceed twenty dollars for processing an application requesting the exemption provided by this section. No property shall be eligible for such exemption unless the appropriate building permits have been acquired and the commissioner of the revenue or assessing officer has verified that the rehabilitation indicated on the application has been completed.

You have provided a copy of the local ordinance adopted by the Council of the City of Fredericksburg. Sections (b) and (d) in the ordinance are essentially identical to subsections (B) and (D) in S 58-760.3.

Your first question concerns whether your office may require an application and inspection prior to commencement of rehabilitation as a prerequisite to obtaining the tax exemption. Section 58-760.3(A) authorizes the city to set out conditions for the issuance of the tax exemption. The only prerequisites contained in the Code and ordinance are that building permits be acquired and that the commissioner of revenue verify that rehabilitation has been completed.

The State law clearly gives the local governing body the authority to impose conditions upon exemptions, and it appears reasonable that one such condition may be an inspection prior to commencement of rehabilitation. I must conclude, however, that the law vests such authority only in the governing body, and accordingly, your office does not have authority to impose such conditions.

Your second question is whether you must reassess the property before rehabilitation begins, or whether you may determine the amount of an exemption based solely on the increase in value of a piece of completely rehabilitated property over the value of that property on the land books at the time the rehabilitation began. Section 58-760.3(B) states that the exemption "shall not exceed an amount equal to the increase in assessed value resulting from the rehabilitation...as determined by the commissioner of revenue...." (Emphasis added.) No reference is made in the Code or the ordinance concerning where you are to obtain the information you need to determine the exemption amount. Prior inspection of the property is one source of information; however, if the necessary information may be obtained from other sources, such as building permits and land books, those sources may also be considered. Therefore, if you are satisfied that the value of the property on the land book reflects fair market value, it is my opinion that you may determine the amount of the exemption based solely on the increase in value of a piece of completely rehabilitated property over the value of that property on the land books at the time the rehabilitation began.

Your third question is whether city council could pass a special ordinance granting the exemption where the application is made after completion of the rehabilitation. It is unclear whether the city ordinance requires the application to be filed in advance of commencing rehabilitation and interpretation of the ordinance is a matter for local officials. See 1976-1977 Report of the Attorney General at 17. Until that question is resolved, it is unnecessary to address this question.

TAXATION. REAL ESTATE. SITUATE IN TWO JURISDICTIONS. NO AUTHORITY FOR COMMISSIONERS OF REVENUE TO AGREE ON ASSESSMENT OF PARCELS TRANSECTED BY JURISDICTIONAL BOUNDARY LINE.
You have asked whether the commissioners of the revenue in contiguous jurisdictions may enter into written agreements with respect to the assessment of parcels transected by the common jurisdictional boundary line. For instance, you wish to agree with the commissioner of the revenue of a contiguous jurisdiction that when a parcel is transected almost equally, one jurisdiction will tax the land and the other jurisdiction will tax the improvements. You have also proposed to agree that one jurisdiction could assess an entire parcel when the majority of the square footage or value lies in that jurisdiction.

"[T]axes can only be levied, assessed and collected in the mode pointed out by express statute." Marve v. Diggs, 98 Va. 749 752, 37 S.E. 315, 316 (1900); see also Drewry v. Baugh and Sons, 150 Va. 394, 143 S.E. 713 (1928). The subject of real estate assessment is addressed in the Code of Virginia in Title 58, Ch. 15, "Real Estate Assessments," and Ch. 18, "Commissioners of the Revenue and Returns Generally; Personal Property Books." I find no authority in those chapters that would allow you to assess property in the manner you have suggested pursuant to agreements with other commissioners of the revenue.

Section 58-854 states that "[t]he jurisdiction, powers and duties of commissioners [of the revenue] shall not extend beyond the bounds of their respective counties or cities...." Thus, a commissioner of the revenue has no authority to alter his jurisdiction by agreement. Section 58-796 provides that each commissioner of the revenue shall "ascertain all the real estate in his county...and the person to whom the same is chargeable with taxes...." Accordingly, each commissioner, in the situation you posed, must assess that portion of the parcel in his jurisdiction in the same manner that he assesses all other real estate.

Based on the foregoing, it is my opinion that commissioners of the revenue in contiguous jurisdictions may not enter into written agreements such as you have suggested with respect to assessment of parcels transected by the jurisdictional boundary line.¹

¹For prior Opinions of this Office reaching the same conclusion, see Reports of the Attorney General: 1955-1956 at 213; 1950-1951 at 196.
The owner of a certain parcel of real property recorded a plat of the parcel subdividing it into lots. This parcel is adjacent to another six-acre parcel held by the same owner. Also shown on the plat of the first mentioned parcel, however, is a strip of land which lies completely within the six-acre parcel, which strip is dedicated for a road. The road, which extends from one boundary of the six-acre parcel to the opposite boundary, is paved.

You have asked whether the existence of the roadway will allow your office to reassess the residue of the six-acre parcel. Section 58-772.1 of the Code of Virginia authorizes the commissioner of the revenue to assess or reassess "any lot, tract, piece or parcel of land upon or to which improvements have been made, such as hard surfacing of streets or roadways...which may add to the fair market value..." Additionally, § 58-763 permits the value of real estate as ascertained at a general reassessment to be changed to allow the addition of the value of improvements. See also 1978-1979 Report of the Attorney General at 262. Whether the roadway described has improved the residue is a determination of fact to be made by the commissioner of the revenue. If it is determined that the road is an improvement to the property, the parcel may be reassessed accordingly.

Your second question regarding the ownership of a certain piece of property states as follows:

"[Person A and person B enter into a deed as tenants in common. Both persons are married. Person A has a child by a previous marriage. Sometime subsequent to the purchase A and B desire to partition the tract of land. They enter into a deed of partition in which person A and his wife are grantors and convey their interest in 1/2 of the parcel to person B as grantee. In the second part of the deed, person B and his wife convey to person A, as grantee, their interest in the other 1/2 of the parcel. A and B and their wives sign at the bottom of the deed. Subsequent to the recording of the deed in the Clerk's Office, person A dies and leaves his real estate, by will, to his son by the previous marriage."

You then ask whether it is A's son or A's surviving spouse who owns the property.

In this case, the property was initially owned by A and B together as tenants in common. As a result of the deed of partition, however, the property was, in effect, split into two parcels: A, owning one parcel exclusively, and B, owning the other parcel exclusively. In his will, A devised his parcel to his son by a previous marriage. Unless a contrary intention appeared in the will, the parcel passed to A's son in the interest which A had power to dispose of in such real estate. See § 55-11. In other words, if A held the property in fee simple, then A's son took the property in fee simple. The property is, however, subject to the surviving spouse's dower rights under § 64.1-19 and the surviving spouse's rights upon renunciation of the will pursuant to §§ 64.1-13 and 64.1-16.

Note that the first permissible date for assessing the improvements is the first day of January of the year next succeeding the improvements. See 1977-1978 Report of the Attorney General at 405.
January 28, 1985

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

You have asked my opinion on the proration of real estate taxes on property taken under eminent domain by a water and sewer authority under the following circumstances:

"On July 25, 1983, the Scott County Water and Sewerage Authority filed a Certificate of Deposit and Guarantee of Payment for Taking of Land in the Scott County Circuit Court Clerk's Office pursuant to Section 33.1-122, Virginia Code (the so-called "quick take" or right of entry statute used by the Virginia Highway Commissioner which is also authorized by Section 15.1-1250(f)...for use by Virginia water and sewer authorities). The Certificate was filed to acquire a 75.37 acre tract of land in Scott County for the installation and operation of a regional sewerage treatment plant and sewerage sludge disposal facility....

The landowners, however, denied the Authority entry to the property and contested the condemnation. They did not withdraw any of the deposit made by the Authority for the attempted taking by Certificate and they continued in possession, use and enjoyment of the entire tract. In the subsequent condemnation proceedings in the Circuit Court instituted by petition of the Authority, the Court ruled the Authority had not shown a necessity for a take of the entire 75.37 acres but the Court allowed the Authority to amend its petition to take a 27.05 acre portion of the tract. On April 2, 1984, the Commissioners returned their Report and the Court entered its Order on June 25, 1984, confirming the Report and vesting fee simple title to the 27.05 acres in the Authority....Throughout the proceedings until the Court's Order was entered in June, 1984, the landowners remained in possession of the entire 75.37 acres, grazing cattle and raising and harvesting hay."

Section 58.1-3360 of the Code of Virginia (§ 58-822 prior to January 1, 1985) provides that a taxpayer whose property is taken by the United States, the Commonwealth, and others, including any political subdivision, shall be relieved of tax on the property taken from and after the date upon which the title was or shall be vested in the taking authority.

Section 33.1-122 states, in part:

"Upon...recording [of the certificate with the clerk], the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested [defeasibly] in the [Authority]...."

The rights and interests of the owner are transferred to the fund represented by the certificate. See Norfolk Southern Ry. v. American Oil, 214 Va. 194, 198 S.E.2d 607 (1973).

In the 1964-1965 Report of the Attorney General at 127, the following opinion on this subject was given:

"[R]ecording of the certificate operates to transfer both legal title and beneficial ownership from the property owner to the [Authority]....While the property owner retains interest in the property until indefeasible title is vested in the [Authority]...by the final order, I do not feel that this interest is sufficient to prevent the operation of § 58-822 at the time of the recording of the certificate....[T]he tax credit provided by § 58-822...should be computed from the date of the recording of the certificate pursuant to [§ 33.1-122]...."
As a consequence, I am of the opinion that the real estate tax abated on the entire 75.37 acres from the date of the filing of the certificate.

From the copy of the certificate, it appears that the fee simple title to the 75.37 acres was taken on July 25, 1983, the date of recordation. The sum of $82,500 was deposited pursuant to that certificate. You did not indicate whether an amended certificate was recorded at the time the amended petition was filed, as provided in § 33.1-125, or if the amount on deposit was changed to reflect the reduction of land taken in fee, together with an easement through the remaining portion. The order confirming the Commissioner's report, however, confirmed title to 27.05 acres in the Authority, together with a perpetual easement of right-of-way over 75.37 acres. The order also awarded interest on the sum of $12,500, the difference between the award of Commissioners and the amount deposited originally.

Under these circumstances, I do not have sufficient information before me to determine when the acreage in excess of the 27.05 acres reverted to the landowners. In absence of a reversion, the landowners are not liable for taxes on that portion of the land. Clearly as to the 27.05 acres, title to which was confirmed, the landowners were relieved of the tax obligation from July 25, 1983. As to the acreage not condemned in fee, it will be necessary to determine when it reverted to the landowners before taxes can be assessed against them. The tax should be based on the value of the 48.32 acres, as encumbered by the permanent easement, from the date of reversion.

That amendment process can be done pursuant to § 33.1-125, or as part of the final order pursuant to § 33.1-127, as long as the referenced lands taken and not taken are adequately described and reference is made to the original certificate as set out in § 33.1-125.

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TAXATION. RECORDATION. ASSESSED VALUE GREATER THAN CONSIDERATION PAID AT FORECLOSURE SALE MAY REPRESENT ACTUAL VALUE OF PROPERTY FOR BASIS OF § 58-54 GRANTEE TAX.

September 6, 1984

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

You have asked upon what value the recordation tax under § 58-54 of the Code of Virginia should be based when the deed recites $35,700 as the consideration paid for the property at public auction in a foreclosure sale, but the assessed value of the property for real property tax purposes is $45,100.

Section 58-54 imposes the grantee's tax and provides, in part:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." (Emphasis added.)

In order to determine whether "consideration of the deed" or the "actual value" is greater, you must first determine the "actual value." The term "actual value" is synonymous with the term "fair market value." Fair market value is determined by the price negotiated by a seller under no obligation to sell and a buyer under no obligation to
buy. See Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958), citing Seaboard Air Line v. Chamblin, 108 Va. 42, 60 S.E. 727 (1908); 1982-1983 Report of the Attorney General at 593. Thus, the price paid at a forced sale, such as the foreclosure sale in your fact situation, may not represent the fair market value. When such is the case, fair market value must be determined by other means.

The prior Opinion cited above noted several recognized methods for determining fair market value. One of the recognized methods is use of the value at which the property has been assessed for real property tax purposes. You have correctly suggested that assessed value may be considered in determining actual value. Indeed, Art. X, § 2 of the Constitution of Virginia (1971) and § 58-760 require that all real property be assessed at 100% of fair market value.

Based on the foregoing, it is my opinion that the recordation tax under § 58-54 should be based upon actual value as determined by recognized means. If you determine actual value to be greater than the consideration which was paid for the property in a foreclosure sale, the recordation tax must be based upon that greater value.

TAXATION. RECORDATION. ASSIGNMENT OF LESSOR'S INTEREST EXEMPT FROM TAX UNDER § 58-58(ii) WHEN OWNER/LESSOR SIMULTANEOUSLY CONVEYS PROPERTY SUBJECT TO LEASE TO SAME PARTY.

July 11, 1984

The Honorable Franklin P. Hall
Member, House of Delegates

You have asked whether the recordation tax applies to the assignment of the lessor's interest in the transaction described by you as follows:

"A deed from XY Partnership to X, a 50% partner, is exempt from certain recordation taxes pursuant to the provisions of § 58-54(10). The property conveyed, however, is subject to a recorded lease of more than five (5) years to an unrelated third party. As part of the conveyance from XY Partnership to X, the partnership assigns its rights under the lease to X. Tax on the lease was paid at the time of its recordation."

Although the same document contains the property conveyance and the lease assignment, each transaction must be considered and taxed separately under the recordation tax statutes. See 1972-1973 Report of the Attorney General at 435. Therefore, the fact that the deed in your transaction may be exempt from recordation tax is irrelevant in determining whether recordation of the lease assignment is exempt.

Section 58-58 of the Code of Virginia provides that:

"On every contract or memorandum thereof relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every $100 or fraction thereof of the consideration or value contracted for; however...[(ii)] the tax for recording an assignment of the lessor's interest in a lease, or memorandum thereof, shall be taxed according to the provisions of this section, unless the assignment of the lessor's interest in the lease is to provide additional security for an obligation of the lessor on which the tax has been previously paid, or the assignment of the lessor's interest is made to the person who owns the property which is subject to the lease, in which cases there shall be no tax for recording the lessor's assignment of the lease." (Emphasis added.)
The language in § 58-58(ii) was added by the 1982 General Assembly. See Ch. 630, Acts of Assembly of 1982.\(^1\) The underlined language operates to exempt from the tax the assignment of a lessor's interest to one who owns the property subject to the lease. In the transaction you described, the property will be conveyed and the lessor's interest will be assigned to X. Even though the conveyance and the assignment are executed simultaneously, the lease assignment will have been made to the "person who owns the property which is subject to the lease...."

It is, therefore, my opinion that when the person who is both owner and lessor of property conveys that property to a party and simultaneously assigns to the same party his interest as lessor, the assignment of the lessor's interest is exempt from the recordation tax under § 58-58(ii).

\(^1\)A prior Opinion of this Office, found in the 1981-1982 Report of the Attorney General at 366, addressed the recordation tax consequences for an assignment of a lessee's interest. This Opinion was issued prior to the 1982 amendment to § 58-58, but its result is not changed by the amended language.

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TAXATION. RECORDATION. CLERK HAS DUTY TO COLLECT.

November 30, 1984

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

You have asked for my opinion on a number of issues regarding the recordation of a document containing many easements for the placement of cable television lines in Fairfax County. Specifically, you ask whether the cable television company may record, as one document, a series of easements for cable television lines from the individual property owners of several subdivisions. In connection with this problem, you also ask (1) when may a clerk refuse to record a document; (2) where a series of easements are presented as one document but the clerk believes they should be recorded individually, must the clerk record the easements as one document; (3) if so, and it is later shown that the documents should have been recorded and taxed separately, what liability does the clerk have, and what recourse does the clerk have against the property owner who owes the recordation tax?

First, I will address the recordation requirements and, secondly, the taxation questions.

In my Opinion to you dated October 17, 1984, found in the 1984-1985 Report of the Attorney General at 37, I discussed the propriety of annexing one document to another for the purpose of recording several documents as one. In that Opinion, the question was whether an assignment of a deed of trust may be annexed to a deed of trust and whether a memorandum of a mechanic's lien, and affidavit, and notice of a mechanic's lien could be annexed and recorded as one document. The analysis in the Opinion was that a document of lesser dignity could be annexed to one of greater dignity, but that documents of equal dignity could not be annexed to each other for recording purposes. See 1977-1978 Report of the Attorney General at 329.

The analysis of the earlier Opinion applies with equal force in this instance. A series of easements are of equal dignity and should be recorded separately.
Turning to your related questions, a clerk's authority to refuse to record an instrument is very limited. Section 17-59 of the Code of Virginia requires a clerk to record "[e]very writing authorized by law to be recorded." Section 55-106 requires a clerk to record any signed writing, properly acknowledged or proved as provided by law. There are some limitations on this broad mandate not here mentioned. This Office has previously opined that a clerk is required to record any writing which may be recorded if it is properly signed and acknowledged. It is not the duty of the clerk to assess the legal sufficiency of the writing. See Opinion to you dated October 17, 1984, supra; Reports of the Attorney General: 1983-1984 at 41; 1982-1983 at 75.

Turning now to the tax questions, § 58-58 provides, in part, "[o]n every contract or memorandum thereof relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every $100 or fraction thereof of the consideration or value contracted for...." Each easement is a distinct contract with its own grantor and grantee concerning particular and specific real property and is subject to the recordation tax. See Reports of the Attorney General: 1978-1979 at 285; 1963-1964 at 295; and 1961-1962 at 260.

Your remaining questions concern a clerk's liability and remedies for an erroneous underassessment of recordation tax. Section 58-65 requires the clerk to "assess and collect" the recordation tax. Sections 58-969 and 58-970 require a clerk to account for "all taxes and other money belonging to the Commonwealth...collected or which should be collected." Thus, a clerk is responsible for the proper assessment, collection and accounting of recordation taxes. If the clerk fails to assess, collect and account for the proper amount of recordation tax, the clerk becomes personally liable for the tax deficiency. Lucas, Sergeant, & C. v. Clafflin & Co., 76 Va. 269, 281 (1882). The remedies available to the clerk for additional amounts owed by a taxpayer are set forth in Arts. 8 and 9 of Ch. 20, Title 58, not all of which are applicable to the collection of recordation tax.
Previous Opinions of this Office have held that when a single document performs more than one function, which would each be subject to recordation tax if presented in separate documents, then each of the functions performed by the single document is subject to recordation tax. See Reports of the Attorney General: 1984-1985 at 378 (conveyance and lease assignment); 1978-1979 at 285 (deed of trust and subordination agreement); 1972-1973 at 435 (sales contract and lease); 1969-1970 at 283 (deed of trust and assignment), 280 (deed and assignment); and 1963-1964 at 295 (deed of trust and assignment).

It is clear from the prior Opinions that the deed of foreclosure presented to you for recordation is separately taxable under §§ 58.1-801 and 58.1-802 as to the deed of conveyance from the trustee to the Administrator of Veterans Affairs and as to the assignment from the buyer to the Administrator. I concur in the prior Opinions.

Section 58.1-802 imposes the grantor's tax "[i]n addition to any other tax...on each deed, instrument, or writing by which lands, tenements, or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser, or any other person, by such purchaser's direction." Inasmuch as the deed and the assignment are writings "by which lands...sold [are] granted [or] assigned," both are subject to the grantor's tax provisions.

It should be noted, however, that although a writing may be determined to be subject to the grantor's tax provisions, it may escape taxation if it qualifies as a supplemental writing under § 58.1-809. That section provides, in part, that no tax is imposed upon the recordation of instruments which are supplemental to prior taxed and recorded instruments "when the sole purpose and effect...is to...modify the...parties...of such prior instruments."

In the situation which you present, the effect and purpose of the assignment is to substitute the Administrator of Veterans Affairs for the original noteholder in the deed of trust. An Opinion to the Honorable V. Elwood Mason, Clerk, Circuit Court of King George County, dated September 24, 1984, held an assignment to be exempt from taxation where its sole effect was to modify the parties to a deed of trust upon which recordation tax had been paid. See also 1981-1982 Report of the Attorney General at 366. It is my opinion that the same exemption would apply to the assignment included in the deed of foreclosure presented to you, so long as the proper recordation tax was paid on the original deed of trust.

Section 58.1-801 imposes the grantee's tax "[o]n every deed admitted to record, except a deed exempt from taxation by law...." (Emphasis added.) The grantee of the deed of foreclosure is the Administrator of Veterans Affairs. The Supreme Court of Virginia held in Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935), that a State recordation tax may not be collected on the recordation of deeds to the federal government or to federal instrumentalities, unless such a tax is allowed by federal law. There being no statute authorizing states to impose such a tax,2 the Administrator of Veterans Affairs is exempt from the imposition of the grantee's tax.

In summary, although both functions of the document, i.e., the deed and the assignment, are subject to recordation taxes, the assignment is a supplemental writing exempted from any tax by § 58.1-809, and the federal instrumentality is exempt from the grantee's tax on the deed. The grantor's tax, however, would apply to the deed.

1Previous Opinions of this Office have held that in such three-party conveyances, there is only one deed admitted to record, that from the first party to the third party. See 1954-1955 Report of the Attorney General at 236.
Although 38 U.S.C. § 1820(a)(6) makes property held by the Veterans Administration subject to real property taxes, the power to tax the real property does not include the power to tax the recordation of the deed to that property. See Federal Land Bank, supra, 163 Va. at 864.

TAXATION. RECORDATION. DEED OF GIFT WHICH DOES NOT CONTAIN STATEMENT TO THAT EFFECT SUBJECT TO TAX UNDER § 58-54.

September 6, 1984

The Honorable D. Bruce Patterson
Clerk, Circuit Court of Rockbridge County

You have asked whether a certain deed, a copy of which you enclosed with your letter, is subject to the recordation tax imposed under § 58-54 of the Code of Virginia. You state that while no consideration was involved in the current transaction, you believe the deed is subject to the recordation tax imposed by § 58-54 and should be calculated upon the current fair market value of the property conveyed.

You note further that the conveyance is made in compliance with an earlier recorded agreement. An examination of the deed shows that: (a) the agreement was between the grantor of the deed, Washington and Lee University, and another party, now deceased, who gave the property to the University; (b) the agreement required the University, if and when it no longer desired to retain the property for the purposes set forth therein, to convey such property to the then living next of kin of the donor; and (c) the deed conveys the property to such person as determined by the United States Court of Appeals for the Fourth Circuit in Fletcher v. Washington and Lee University, 706 F.2d 475 (4th Cir. 1983).

Your inquiry is whether the deed is exempt from the recordation tax imposed by § 58-54 because (a) the property is conveyed pursuant to the provisions of an earlier recorded agreement, and (b) the transaction is a conveyance without consideration, i.e., a deed of gift.

Section 58-54 imposes a tax on every deed which is admitted to record except those exempt by law from such tax. The tax imposed under this section is based on the greater of the consideration of the deed or the actual value of the property conveyed. Sections 58-60 through 58-64.1 provide circumstances in which a deed will be exempt from recordation taxes.

I have examined the exemption provisions and find none that would apply to the recordation of a deed where the conveyance was made pursuant to the type of recorded agreement presented. Although an exemption exists for deeds of gift, for the reasons set forth below, I also conclude that this exemption is not applicable.

Section 58-61(B) provides an exemption for deeds of gift. This section reads:

"No recordation tax shall be required for admitting to record any deed of gift between an individual grantor or grantors and an individual grantee or grantees when no consideration has passed between the parties; however, any such deed shall state therein that it is a deed of gift." (Emphasis added.)

The deed contains no statement that it is a deed of gift. Accordingly, by the plain words of the statute, the deed is not exempt from the tax pursuant to § 58-61(B).
Furthermore, this exemption provision is limited to deeds between an individual grantor or grantors and an individual grantee or grantees. The grantor in the deed is Washington and Lee University, a Virginia nonstock corporation and not an "individual grantor" as required by § 58-61(B). Thus, for this additional reason the exemption of § 58-61(B) is not applicable to the instrument under consideration.

Based on the foregoing, I am in agreement with your conclusion that the deed in question is subject to the recordation tax imposed by § 58-54. Because no consideration was involved, the amount of the tax should be calculated on the fair market value of the property at the time of conveyance.

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1 Section 58-64(A)(12) does not apply because, inter alia, the transfer is not pursuant to a will or trust instrument. Rather, the underlying agreement appears to have created a fee simple subject to a future interest in the then living next of kin of the University's grantor upon the occurrence of the conditions set forth in the agreement. Nor is the deed the type of supplemental writing exempted by § 58-60.

2 See 1982-1983 Report of the Attorney General at 593. Only in transactions solely between husband and wife is no statement required in the deed that the conveyance is a deed of gift. See § 58-61(A)(3).

3 The term "individual" is defined as "[o]f or relating to a single human being." The American Heritage Dictionary 670 (1981).

4 See 1975-1976 Report of the Attorney General at 385 which implies that individual grantors or grantees are required in order for the exemption now set forth in § 58-61(B) to apply. See also 1982 Legislative Impact Statement of the Department of Taxation on House Bill 82 noting that the original version of this bill deleting the word "individual" would have broadened this exemption provision to include entities other than individuals.

5 The time of conveyance is the date the deed was delivered to the grantee, which may or may not correspond to the date of recordation or the date of the deed. See 1973-1974 Report of the Attorney General at 408.

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TAXATION. RECORDATION. DEED OF TRUST. VARIABLE RATE MORTGAGE WITH STATED MAXIMUM AMOUNT OF FUTURE ADVANCES FOR POTENTIAL NEGATIVE AMORTIZATION ESSENTIALLY OPEN DEED OF TRUST. TAX BASED ON MAXIMUM WHICH MAY BE OUTSTANDING AT ANY ONE TIME.

September 13, 1984

The Honorable Ronald P. Livingston
Clerk, Circuit Court for Chesterfield County

You have inquired as to the proper basis for calculating the recordation tax imposed by § 58-55 of the Code of Virginia on recordation of a deed of trust securing an adjustable rate housing loan which has a provision which allows for negative amortization. Such documents are popularly called adjustable rate mortgages. More specifically, you have asked whether the recordation tax should be based on the amount borrowed at the outset or on a greater amount to include the potential negative amortization.

You included in your letter a deed of trust securing an adjustable rate of interest note for purposes of illustration. This instrument provides that the borrower owes the lender the principal sum of $68,000.00. The document, however, contains the following language explaining the significance of the $68,000.00 amount:

[Deed Language]

You have inquired as to the proper basis for calculating the recordation tax imposed by § 58-55 of the Code of Virginia on recordation of a deed of trust securing an adjustable rate housing loan which has a provision which allows for negative amortization. Such documents are popularly called adjustable rate mortgages. More specifically, you have asked whether the recordation tax should be based on the amount borrowed at the outset or on a greater amount to include the potential negative amortization.

You included in your letter a deed of trust securing an adjustable rate of interest note for purposes of illustration. This instrument provides that the borrower owes the lender the principal sum of $68,000.00. The document, however, contains the following language explaining the significance of the $68,000.00 amount:
"Note in the amount of $53,650.00 with the balance representing potential negative amortization ($14,000.00)."

Section 58-55 provides, in pertinent 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.)

For the reasons set forth below, I am of the opinion that the greater amount, including potential negative amortization, would constitute the proper basis for calculating the recordation tax and not the initial loan amount.

The instrument presented is essentially an open deed of trust. That is, the deed of trust secures the original principal amount of $53,650.00, plus future potential advances in the maximum amount of $14,000.00, if and when negative amortization occurs. See 1983-1984 Report of the Attorney General at 408.

The note obligating the grantor of the deed of trust assumes that inflation of interest rates could cause negative amortization of as much as $14,000. After that figure is reached, the monthly payments may be adjusted at any time to avert subsequent negative amortization. See supra note 2. Although it is unlikely that the entire $14,000.00 amount will ever accrue, except under the worst economic conditions, it remains true that the grantor has agreed to be obligated for that amount.

Pursuant to § 58-55, the basis of the tax on an open deed of trust is the maximum amount of obligation which may be outstanding at any one time. Applying this basis of computation to the facts at hand, I find that the maximum amount which may be outstanding is $14,000.00, plus the remaining balance on the original $53,650.00 loan at the first point in time that the interest rate may be changed (August 1, 1985, in the sample document provided). Accordingly, I am of the opinion that the recordation tax should be computed on this amount.

1Negative amortization consists of the addition of accrued but unpaid interest to the outstanding balance on the principal of a loan. See Financing Real Estate During the Inflationary 80's 34 (B. Strom ed. 1981).

2The principal amount ($53,650.00) plus the potential negative amortization amount ($14,000.00) does not total $68,000.00. There is no explanation for this discrepancy.

The $14,000.00 represents the maximum amount of additional money the lender has agreed to lend the borrower, if necessary, as future advances for negative amortization. Negative amortization causes unpaid, accrued interest to be added to the outstanding principal balance. The document provides that such additional amounts loaned as advances are part of the indebtedness secured by the deed of trust.

Under the sample instrument provided, negative amortization may occur because the interest rate may be increased (or decreased) on a given date, August 1, 1985, approximately 13 months from the date of the note, and every twelve months thereafter. The monthly installment payments are level dollar amounts through September 1, 1987, approximately 38 months from the date of the note, with adjustments every 36 months thereafter. The monthly payments are set at an amount sufficient to pay the loan in full over its remaining term assuming the then current interest rate does not change. Thus, if the interest rate increases prior to the time an adjustment in monthly payments may occur, the combined principal and interest due may exceed the then current monthly payment. Once a total of $14,000.00 has been advanced and added
to principal as negative amortization, the document permits adjustments to the monthly payments at any time.

The instrument is not a revolving deed of trust, such as that described in the 1975-1976 Report of the Attorney General at 386. That Opinion held that the recordation tax on a revolving deed of trust should be based upon the fair market value of the property because the amount to be secured by the deed of trust was not ascertainable over the life of the instrument. This result was changed by 1978 amendments which require the use of the maximum amount potentially outstanding at one time. See Ch. 85, Acts of Assembly of 1978.

The instrument also is not a supplemental or "wrap around" deed of trust, nor does it refinance or modify the terms of an existing debt with the same lender. Thus, the provisions of the fifth and sixth paragraphs of § 58-55, respectively, do not apply to the facts given. No other provision of § 58-55, apart from the language quoted in the text herein, is applicable for purposes of determining the proper basis for calculating the recordation tax under consideration.

This result follows from the fact that no negative amortization is possible until the first adjustment is made to the interest rate. Therefore, during this constant interest rate period, the monthly payments are not only paying interest due but are reducing the principal as well. The monthly payment does not change until approximately 24 months after the first occasion when the interest rate is changed (September 1, 1987, in the document provided). Once such an interest rate increase is realized (assuming an increase), potentially all of the $14,000.00 representing negative amortization may be advanced and added to principal over time. Thus, the maximum amount of obligation which may be outstanding at any one time will never exceed the outstanding principal on the original $53,650.00 loan at the time portions of the $14,000.00 may first be advanced, plus $14,000.00.

TAXATION. RECORDATION. DEED OF TRUST GIVEN BY OWNERS OF CORPORATION SECURING PERSONAL GUARANTY WHICH SECURES LINE OF CREDIT BY LENDER TO CORPORATION TAXED ON MAXIMUM AMOUNT OF OBLIGATION OUTSTANDING AT ANY ONE TIME.

June 27, 1985

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

In your letter, you state that a bank has extended a line of credit to a corporation in the amount of $350,000, and the corporation gave its note to the bank in that amount. The corporation is owned by two individuals. In order to secure the bank's interest, the two individuals gave a guaranty to the bank and secured the performance of their obligations under their guaranty by a deed of trust. The deed of trust does not, itself, secure the corporation's note. The deed of trust has been presented for recordation and your question concerns the value upon which the recordation tax may be computed under § 58.1-803 of the Code of Virginia.

The pertinent portion of § 58.1-803 provides:

"A recordation tax on deeds of trust or mortgages is hereby imposed at a rate of 15¢ on 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 the obligation for purposes of this section shall be the maximum amount which may be outstanding at any one time. In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed...."
A prior Opinion, found in the 1983-1984 Report of the Attorney General at 408, considered the tax to be placed on the extension of a line of credit, and held that the recordation tax should be calculated upon the maximum amount of credit authorized by the instrument, instead of the actual amount of debt secured at the time the instrument is submitted for admission to record. Although the question presented in that Opinion concerned circumstances in which the same party was both the beneficiary of the line of credit and the grantor on the deed of trust, it is my opinion that the same principle applies to the question here. The proper tax should be based upon the maximum amount for which the owners may be held liable under their guaranty. That maximum is the same maximum amount which is authorized under the line of credit and not the fair market value of the property conveyed. The instrument recites that it is a credit line deed of trust and identifies the note in the amount of $350,000. A typed notation on the printed form reads as follows: "The above-described obligations of the Grantors under the Guaranty are hereinafter called the 'Note' and the recipient of the Guaranty is hereinabove and herinafter called the Noteholder."

Accordingly, it is my opinion that the tax assessable upon the recordation of the instrument is $1.50 on every $100 of the maximum amount of the obligation which may be outstanding at any one time, which amount is recited in the deed of trust to be $350,000.

TAXATION. RECORDATION. GRANTOR'S TAX OF § 58-54.1 CALCULATED BY APPORTIONING LIEN AMONG PROPERTIES CONVEYED IN PROPORTION TO VALUES.

December 21, 1984

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

You have asked whether, in calculating the grantor's tax on a deed of conveyance under § 58-54.1 of the Code of Virginia (recodified as § 58.1-802), the entire value of an outstanding deed of trust lien is to be excluded from the consideration or value of the interest conveyed when the owner of the improvements and the owner of the underlying realty each separately conveys to one purchaser his interest in the real property subject to the deed of trust lien covering the entire property. The facts leading to this question are as follows:

X is the owner of land leased to Y, who is the developer of the land. X joined Y by mortgaging his land for a $30 million loan for the use of Y to erect improvements on the land. Y is the owner of the improvements. The present outstanding balance of the mortgage, for which X and Y are jointly liable, is $22 million. Now, X and Y are selling their respective interests in the property to Z, by two separate deeds. Owner X's deed will contain language: "Landowner sells his interest to purchaser Z for $26 million subject to a $22 million mortgage." Owner Y's deed will provide: "Tenant-operator sells his interest for $120 million to purchaser Z subject to an existing mortgage of $22 million."

Section 58-54.1 provides that the grantor's tax is imposed on the consideration or value of the interest of realty sold "exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale..." Under the facts you have provided, in separate deeds of conveyance, two sellers convey to the same purchaser their individual property interests, each of which is subject to a common deed of trust. Thus, the computation of the grantor's tax on the two deeds requires that the value of the balance of the indebtedness remaining on the interests conveyed be taken into account.
The joint deed of trust previously entered into by the sellers in the present transaction is an encumbrance on both of the interests in the real property, without distinction as to primary and secondary liability. It has been held by the Supreme Court of Virginia that "where part of a tract of land subject to a mortgage, or other charge is conveyed, the residue is primarily liable for the whole debt." Miller v. Holland, 84 Va. 652, 654, 5 S.E. 701, 702 (1888). The Court, citing a New Hampshire opinion, further stated that "[i]n the case of the sale by the mortgagor of all the mortgaged property to different purchasers at the same time, their equities must be regarded as equal, and each must contribute ratably to the discharge of the common burden...." Id. at 655, 5 S.E. at 702 (emphasis added), quoting Brown v. Simons, 44 N.H. 475 (1863).

Although I am not aware of an Opinion of this Office that has specifically addressed your situation, an Opinion found in the 1970-1971 Report of the Attorney General at 379 is analogous. That Opinion addressed the recordation of a deed conveying property from a liquidating corporation to its stockholders where liabilities were assumed by the stockholders. The Opinion states that "[e]ach prior secured debt should be allocated to its collateral property and apportioned among such property in proportion to fair market value."

In the facts you have described, one of the property interests conveyed is land and the other is the improvements to that land. In my opinion, the tax imposed by § 58-54.1 should be calculated by apportioning the outstanding secured debt ratably among the property interests conveyed in proportion to the consideration or fair market value of each property conveyed.

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TAXATION. RECORDATION. GRANTOR'S TAX OF § 58-54.1 SEPARATE TAX FROM GRANTEE'S TAX OF § 58-54. FORMER TAX NOT CONSTRUED AS SUBSECTION OF LATTER SO AS TO FALL WITHIN EXEMPTIONS OF § 58-64.

July 19, 1984

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

You have asked several questions concerning the recordation tax imposed on deeds of conveyance under § 58-54.1 of the Code of Virginia. Specifically, you have inquired:

1. Whether § 58-54.1 should be construed as a subsection of § 58-54 so as to fall under the exemptions of § 58-64 until Title 58.1 becomes effective January 1, 1985;

2. Whether § 58-54.1 would apply to both the transfer from a parent corporation to a subsidiary corporation acting only as a "straw man" and from the subsidiary to a third party corporation where the transfers are all part of the same transaction;

3. Whether § 58-54.1 would apply to a transfer where a single group of investors forms two close corporations and then at a later time one corporation transfers real estate to the other with no consideration stated in the deed; and

4. What constitutes the "value of the interest" for purposes of the tax imposed by § 58-54.1, especially when no consideration is stated in the deed?

I will answer your questions seriatim.

1. Section 58-64 provides for exemptions from the State recordation taxes imposed by §§ 58-54 and 58-55. There is no reference in § 58-64 to the tax imposed by
Section 58-54.1. Section 58-54.1 is a recordation tax imposed on the grantor of a deed of conveyance admitted to record. On the other hand, § 58-54 is imposed on the grantee in such a transaction. See 1982-1983 Report of the Attorney General at 590, n.1. It is clear that §§ 58-54.1 and 58-54 constitute distinct taxes imposed on different parties. Accordingly, § 58-54.1 cannot be construed as a subsection of § 58-54 so as to fall within the exemption provisions of § 58-64. See Memorandum of the Department of Taxation to all Clerks of Courts dated June 23, 1970, at 3.

The recodification of Title 58, effective January 1, 1985, neither changes the separate nature of the taxes imposed by §§ 58-54 and 58-54.1 nor makes § 58-54.1 subject to the exemptions of § 58-64. See §§ 58.1-802 and 58.1-811(C), Ch. 675, Acts of Assembly of 1984, the successor statutes to § 58-54.1. Cf. §§ 58.1-801 and 58.1-811(A) and (B), Ch. 675, Acts of Assembly of 1984, the successor Code provisions to §§ 58-54 and 58-64. Chapter 397, Acts of Assembly of 1984, effective July 1, 1984, however, amends § 58-54.1 to exempt those transactions described in subsections 6 through 12 of paragraph (A) of § 58-64.

2. Determination of the answer to your second question, whether transfers of real estate from a parent to a subsidiary corporation acting as a "straw man" and then to a third corporation are both taxable under § 58-54.1, is dependent on facts which you have not set forth. Section 58-54.1 applies only to "realty sold." See 1973-1974 Report of the Attorney General at 406. If no consideration changes hands, the tax does not apply. See 1982-1983 Report of the Attorney General at 570. Thus, in the absence of consideration passing on the transfer from the parent corporation to the subsidiary, the tax imposed by § 58-54.1 would not apply. Conversely, if consideration exists in this transaction, the tax would be applicable. The same rule pertains to the transaction with the third party corporation.

3. The answer to your third question is controlled by the rule set forth in my response to your second inquiry. That is, if no consideration was involved in the transfer between the corporations, the tax imposed by § 58-54.1 would not be applicable, whereas, if consideration exists, the tax would apply to the transaction. You must determine whether consideration did or did not change hands. The fact that the deed did not state any consideration is not conclusive on this point.

4. Finally, it is my opinion that the "value of the interest" is the fair market value of the property interest conveyed. See 1982-1983 Report of the Attorney General at 593 considering the analogous terms "the actual value of the property conveyed" used in § 58-54. Fair market value may be determined by looking at comparable sales, the assessed value or the ratio sales study published by the Virginia Department of Taxation. Id. Of course, the value of the interest is irrelevant if no consideration is present in the transaction because the tax in § 58-54.1 applies only to realty sold. The value of the interest is utilized for calculating the grantor's tax only where the actual consideration cannot be definitely determined.

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1Section 58-54.1 provides: "In addition to any other tax imposed under the provisions of this article, there is hereby imposed on each deed, instrument, or writing by which any lands, tenements or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest exceeds $100, a tax at the rate of 50¢ for each $500 or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale, whether such lien is assumed or the realty is sold subject to such lien or encumbrance."

2See 1975-1976 Report of the Attorney General at 385 (holding that a straw man's conveyance to the purchaser of realty was not subject to the tax imposed under
§ 58-54.1. The straw man took title in its name for the convenience of the purchaser. The Opinion notes that the facts recited indicate that there was no consideration for the deed from the straw man to the purchaser.)

See § 58-33.2(C) requiring the State Tax Commissioner to publish annually the findings of the Department's assessment sales ratio studies.

See 1972-1973 Report of the Attorney General at 434 holding that "[t]he tax imposed by § 58-54.1 is computed upon the actual net consideration if it can be definitely determined, or the actual net value of the building if the consideration cannot be determined. The net consideration or the net value is the gross consideration or gross value less the amount of any liens or encumbrances upon the building existing before the sale and not removed thereby.")

TAXATION. RECORDATION. LEASE AND PURCHASE OPTION AGREEMENT. TAX ON OPTION BASED ON STATED CONSIDERATION IN INSTRUMENT.

June 10, 1985

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

You have asked for my opinion on three issues regarding the recordation of an instrument which is styled, "Lease and Purchase Option Agreement." Specifically, you ask (1) whether the instrument should be treated as an option contract or a sales contract; (2) whether the recordation tax should be based on the stated consideration or the purchase price; and (3) if the instrument is an option contract, whether it is proper not to credit the tax paid on the instrument toward the recordation tax required on the deed of conveyance if the option is exercised.

The instrument in question contains two separate agreements. One portion of the instrument is a lease for a term of two years. The other portion I construe to be an option contract. Each of these agreements is taxed separately although they are contained in the single instrument. See 1972-1973 Report of the Attorney General at 435.

None of your questions relates to that portion of the instrument concerning the lease agreement. As to the option contract contained in the agreement, it is a unilateral offer by the lessor to sell the land to the lessee within a limited time, the term of the lease. The agreement is binding on the owner-lessee only and does not become an absolute contract of sale until accepted by the lessee. Merely because the agreement outlines the terms of the potential contract of sale does not make it a valid contract of sale between the parties.

Section 58.1-807(A) of the Code of Virginia expressly states that "on every contract or memorandum...relating to real or personal property admitted to record, a recordation tax is hereby levied at the rate of 15¢ on every $100 or fraction thereof of the consideration or value contracted for." (Emphasis added.) It is my opinion that the recordation tax should be based on the value of the option, not on the purchase price. This is supported by a prior Opinion of this Office. See 1951-1952 Report of the Attorney General at 162. The Opinion states, in pertinent part:

"The [option]...is unquestionably a contract relating to real property....The question is what is 'the consideration or value contracted for....If the instrument were a binding contract for the sale of the land, I would say that the tax should be based upon the value thereof....But the instrument offered for recordation is not such a contract; it merely grants a right to purchase the land at a stated price. Certainly,
a right to purchase property, which the grantee may never exercise, cannot be said to be as valuable as the property itself, and the value contracted for is not the value of the land itself because the land is not contracted for. The only thing contracted for is a right to purchase the land, which does not have to be exercised and may never be exercised.

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Normally, I would say that in cases of options to purchase real estate the consideration or value contracted for is nominal, and it follows that the recordation tax would be nominal. (Emphasis in original.)

Given the conclusion that the instrument in question is an option agreement, you are correct in the belief that it would not be proper to credit the tax paid on the instrument toward the recordation tax required on the deed of conveyance arising out of the exercise of the option. In a prior Opinion, it was stated:

"The proper basis for the determination of the recordation tax on this option is the consideration paid for the option. If the person should exercise his rights under the option and purchase the property, then the recordation tax on the deed would be based on the consideration recited therein or the actual value of the property conveyed, whichever is the greater."


It is, therefore, my opinion that the instrument should be treated as an option to purchase agreement, the recordation tax should be based on the value of the option, and no credit should be allowed against the recordation taxes for recording the deed of conveyance in the event the option is later exercised to purchase the property.

TAXATION. RECORDATION. PARTNERSHIP AGREEMENT, AFFIDAVIT, OR OTHER DOCUMENTATION MAY BE REQUIRED BY CLERK TO DETERMINE PARTNERS' PERCENTAGE PARTICIPATION IN PROFITS AND SURPLUS FOR EXEMPTION UNDER § 58.1-811(A)(10) AND (11).

January 25, 1985

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

You have asked a question concerning the exemptions from recordation tax provided in § 58.1-811(A)(10) and (11) of the Code of Virginia for deeds conveying real property to or from a partnership. Specifically, you have asked how the clerk should determine the individual partner's percentage participation in "profits and surplus" of a partnership. For purposes of this Opinion, I will assume that you are concerned with general partnerships which are governed by Chs. 1 and 3, Title 50.

In a conveyance to a partnership, § 58.1-811(A)(10) authorizes an exemption when "the grantors are entitled to receive not less than fifty percent of the profits and surplus of such partnership." Section 58.1-811(A)(11) authorizes an exemption in a conveyance from a partnership "when the grantees are entitled to receive not less than fifty percent of the profits and surplus of such partnership." Thus, conveyances are exempt if they are between a partnership and one or more of its partners who, in the aggregate, are "entitled to receive not less than fifty percent of the profits and surplus." The general legislative intent is to allow tax-free transfers when the grantors and grantees in a
particular transaction are essentially identical parties.

The exemptions allowed by § 58.1-811(A)(10) and (11) are dependent upon determinations of the partners' interests in "profits and surplus" of the partnership. A partner's percentage interest in profits and surplus is not necessarily the same as his percentage interest in partnership assets. These two percentage interests relate to different aspects of the partnership and many times are not equivalent. The critical factor for purposes of the exemption statutes is percentage participation in profits and surplus. The partnership agreement, if one exists, will typically contain a provision which memorializes each of the partner's percentage participation in profits and surplus. If no partnership agreement exists, however, § 50-18(a) provides that each partner will share equally in profits and surplus.

The Code authorizes the clerk to require that information relevant to the valuation of the property conveyed be submitted to him "by inquiry, affidavit, declaration or other extrinsic evidence acceptable to the clerk." Section 58.1-812(B). Information relevant to an exemption also may be obtained by the clerk using the same methods.

Based on the foregoing, it is my opinion that the clerk may require such documentation as he believes is necessary, under the circumstances, to allow him to determine a partner's percentage participation in "profits and surplus" for purposes of § 58.1-811(A)(10) and (11).

TAXATION. RECORDATION. REFUNDS MAY BE ORDERED ONLY BY STATE TAX COMMISSIONER.

May 2, 1985

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

You asked for my opinion whether recordation taxes lawfully assessed and collected on a deed of trust filed in your office on November 7, 1984, may be refunded, due to the factual situation posited by you. The answer is that you may not make such a refund because you are not empowered with the authority to refund State recordation taxes. That duty rests with the State Tax Commissioner because the recordation taxes are State taxes administered by the Department of Taxation. See Title 58.1 of the Code of Virginia.

The remedy of a person seeking a refund of the recordation taxes appears in Title 58.1, Ch. 18, Art. 2. An application for correction of erroneous assessment must be submitted to the State Tax Commissioner. See, e.g., §§ 58.1-1821, 58.1-1823 and 58.1-1824.1. If the State Tax Commissioner rules that the State recordation tax was erroneously assessed and Fairfax County assesses a local recordation tax under the authority of § 58.1-814, then it would be appropriate for you to certify to the Fairfax County Treasurer that the local recordation tax was erroneously assessed and should be refunded.

At the conclusion of your letter, you have asked for a definition of "supplemental trust," as used in the second paragraph of § 58.1-803(C). Prior Opinions of this Office deal either directly or indirectly with the concept of a supplemental deed of trust or mortgage. The statute itself also defines the term.

Section 58.1-803(C) denotes that the deeds of trust referred to thereon are "supplemental," because they relate back to "existing deeds of trust" and because they
secure a bond or obligation "which is in addition to the amount of the existing debt secured by [the original]... deed of trust or mortgage on which tax has been paid." (Emphasis added.) Please note, however, that the meaning of "supplemental," as used in § 58.1-803(C), is to be distinguished from its meaning in § 58.1-809 where no additional recordation tax is to be imposed "when the sole purpose and effect of the supplemental instrument or writing is [to make certain changes in the original instrument]...other than to increase the amount of the principal obligation secured thereby." (Emphasis added.)

1A "return" for recordation tax purposes is deemed to be filed on the date of recordation. Cf. § 58.1-1812 (omitted recordation taxes may be assessed within three years after the date of recordation). Strictly speaking, no taxpayer remedy is now available under § 58.1-1821, because more than ninety days have elapsed since the deed of trust was recorded on November 7, 1984. Remedies under §§ 58.1-1823 and 58.1-1824 remain available.


TAXATION. RECORDATION. SECTION 58.1-802 GRANTOR'S TAX COMPUTED ON BID PRICE IN FORECLOSURE SALE, NOT ON HIGHER FAIR MARKET VALUE.

February 14, 1985

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

You have asked what value serves as the base for determining the grantor's tax imposed by § 58.1-802 of the Code of Virginia when the bid price on real estate in a foreclosure sale is $85,000, but the actual value of the property is $95,000.

Section 58.1-802 imposes the grantor's tax

"on each deed...by which lands, tenements or other realty sold is granted....The rate of the tax, when the consideration or value of the interest exceeds $100, shall be 50¢ for each $500 or fraction thereof, exclusive of the value of any lien or encumbrance thereon at the time of the sale...." (Emphasis added.)

The language quoted above has remained essentially unchanged since 1970 when the grantor's tax was originally imposed. See Ch. 772, Acts of Assembly of 1970. Prior Opinions of the Attorney General have consistently held that the grantor's tax applies only when a real property interest is "sold." In order for a "sale" to occur, consideration or value must be given for the transfer. (For example, in conveyances between husband and wife, no money is exchanged, as a general rule.) The amount of consideration is the value upon which the tax is computed (the price, less the value of liens or encumbrances). See Reports of the Attorney General: 1982-1983 at 590; 1974-1975 at 517; 1973-1974 at 406, 407; 1971-1972 at 433; and Virginia Recordation Tax Regulations § 630-14-802(D)(4) (1985). Obviously, a sale occurs at a foreclosure on a real estate loan. If the sales price exceeds the amount necessary to satisfy the lien, that excess goes to the owner.

Based on the foregoing, it is my opinion that the grantor's tax under § 58.1-802 should be based upon the $85,000 bid price, which is the consideration given in the foreclosure sale, less the amount of the encumbrance.
1If you use the term "actual value" in the same sense that it is used in the § 58.1-801 grantee's tax statute to mean "fair market value," see Opinion dated September 6, 1984, to the Honorable Paul C. Garrett, Clerk, Circuit Court of the City of Charlottesville.

The former federal stamp tax on conveyances was discontinued effective January 1, 1968, by Act of Congress. See Pub. L. No. 89-44. The Commonwealth then imposed an additional recordation tax modeled, in part, on the federal tax formerly appearing at §§ 4361 and 4362 of the Internal Revenue Code of 1954, as amended. Thus, interpretations of § 58.1-802 (and its antecedent sections) by this Office and by the Department of Taxation have relied upon the federal tax regulations formerly appearing at §§ 47.4361-1 and 47.4361-2. Those federal regulations were adopted by former State Tax Commissioner C. H. Morrissett in his letter to the clerks of courts dated May 23, 1968. The Department of Taxation has recently incorporated the provisions of Commissioner Morrissett's letter into the Virginia Recordation Tax Regulations, § 630-14-800 et seq. (January 1985).

2"Consideration" and "value" are synonymous in the context of the grantor's tax. Note that the term used is "value," not "actual value," as is used in § 58.1-801 (grantee's tax).

TAXATION. RECORDATION. TAX ON DEED OF TRUST BASED ON TOTAL REAL AND PERSONAL PROPERTY CONVEYED TO SECURE DEBT.

November 28, 1984

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

You have described a situation in which a deed of trust for $300,000 is presented for recordation. The deed of trust is secured by real property having a value of $150,000, and by personal property having a value of $150,000. You asked whether the tax imposed upon the recordation of deed of trust under § 58.1-803 of the Code of Virginia should be based solely on the amount of real property conveyed to secure the obligation or on the total amount of property, both real and personal, conveyed by the deed of trust.

Section 58.1-803(A) provides, in pertinent part:

"A recordation tax on deeds of trust or mortgages is hereby imposed at a rate of 15¢ on every $100 or portion thereof of the amount of bonds or other obligations secured thereby."

Section 58.1-803 applies to deeds of trust which are given to secure debts. See 1949-1950 Report of the Attorney General at 229 concerning § 58-55. A debtor may convey real or personal property to a trustee by deed of trust to secure the debt. The statute contains no language which limits its application to conveyances of real property.

Based on the foregoing, it is my opinion that the tax imposed upon the recordation of deeds of trust under § 58.1-803 should be based on the total amount of property, both real and personal, conveyed to secure the debt.

1Section 58.1-803 becomes effective January 1, 1985, as part of the recodification of Title 58. The predecessor statute, § 58-55, which remains effective until December 31, 1984, contains similar language.
TAXATION. RECORDATION. TAX ON SUPPLEMENTAL INDENTURE COLLECTED IN OFFICE OF FIRST RECORDATION.

September 6, 1984

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

You have asked for guidance regarding the computation of State recordation tax on a corporate supplemental indenture securing corporate bonds. Your inquiry arises from the following circumstances.

The corporation owns property in several localities in Virginia. It seeks to record the supplemental indenture in all the localities within the Commonwealth in which there is property securing the bonds to be issued under the indenture. In so doing, it has determined the value of the property in each locality and has submitted to each locality the proportionate amount of State tax based upon the respective values located therein. You ask whether in computing the State recordation tax each such locality should apply the rate based upon the amount of the obligation secured by all property located within the Commonwealth or the rate based only upon that portion of the amount secured by property in the particular locality.¹

In order to answer your question, it is necessary to test the corporation's assumption that it is, in fact, permissible for the corporation to pay a portion of the State recordation tax to each locality in which it seeks to record the supplemental indenture.

Section 58-55 of the Code of Virginia imposes a tax upon the recordation of deeds of trust or mortgages which provide for an initial issue of bonds and permit the issuance thereafter of additional bonds under a supplemental indenture. Although this statute imposes a State tax, it is collected by the clerk of the circuit court where the instrument is first presented for recordation. See § 58-62.²

This Office has held that the measure of recordation tax under § 58-55 is the value of the security described. See Reports of the Attorney General: 1981-1982 at 388 and 1975-1976 at 387. Pursuant to § 58-62, the entire amount of State recordation tax should be collected by the clerk in whose office the instrument is first presented for recordation. See 1975-1976 Report of the Attorney General at 390. As an abstract proposition, it would be improper to apportion the State tax in any manner among a number of localities enumerated in that instrument, because such a procedure would conflict with § 58-62.³

Assuming that such tax was collected by the clerk of the first office in which the supplemental indenture is offered for recordation, the rate of tax to be applied by that clerk is governed by the provisions of § 58-55, which provide as follows:

"On and after July 1, 1978, the maximum tax on the recordation of any deed of trust or mortgage or on any indenture supplemental thereto shall be determined in accordance with the following schedule:

On the first $10,000,000 of value as determined pursuant to this section, 15¢ upon every $100 or portion thereof;

On the next $10,000,000 of value as determined pursuant to this section, 12¢ upon every $100 or portion thereof;
On the next $10,000,000 of value as determined pursuant to this section, $ upon every $100 or portion thereof;

On the next $10,000,000 of value as determined pursuant to this section, 6$ upon every $100 or portion thereof; and

On all over $40,000,000 of value as determined pursuant to this section, 3$ upon every $100 or portion thereof."

Although it appears from your letter that the corporation has improperly submitted the recordation tax, it is harmless error if the aggregate amount of tax collected by each locality equals the amount of tax that originally should have been collected in the first office of recordation. To refund each amount and recollect that tax in one office now would be administratively burdensome and serve no useful purpose.

I have been advised that the corporation consulted with an individual of the Virginia Department of Taxation and received approval for the method of calculating the tax due before presenting the supplemental indenture for recordation. Accordingly, I have advised the Auditor of Public Accounts, who concurs with this Opinion, that as long as the tax collected in each jurisdiction was appropriate in relation to the value of the secured property in that jurisdiction, he should not hold the clerks involved accountable for the improper manner in which the tax was collected.1

1The clerk collects the State tax and submits it to the State. The locality does not derive any benefit from this particular tax.

2Section 58-62 provides: "The tax on every deed, contract or other instrument shall be determined and collected by the clerk in whose office it is first offered for recordation and such instrument may thereafter be recorded in the office of any other clerk without the payment of any tax." (Emphasis added.)

3Compare the situation in which a single obligation is secured by several deeds of trust on property lying in several different jurisdictions within the Commonwealth. The total tax owed for recordation of all the deeds of trust may not exceed the tax otherwise imposable upon the maximum amount of the obligation secured. The tax payable to each of the jurisdictions in which a separate deed of trust is recorded would be the proportionate tax based upon the value of the property in the jurisdiction which secures the deed of trust recorded.

4It is my understanding that the tax rate used by the corporation was the effective rate calculated in accordance with § 58-55 as if all the tax had been paid in one locality. Thus, the total amount of tax collected should equal the amount required by that section.

TAXATION. RECORDATION. VIRGINIA HOUSING DEVELOPMENT AUTHORITY EXEMPT FROM GRANTOR'S TAX ON DEED CONVEYING REAL ESTATE.

May 21, 1985

The Honorable Margaret W. White
Clerk, Circuit Court of the City of Staunton

You have asked whether § 58.1-811(C)(3) of the Code of Virginia enables the Virginia Housing Development Authority ("VHDA") to claim an exemption from the grantor's tax for a deed by which it conveys real estate to an individual.
Section 58.1-811(C)(3) expressly provides that a political subdivision of the Commonwealth which conveys real estate by deed is not subject to the grantor's tax imposed by § 58.1-802. Section 36-55.27 provides that the VHDA is a political subdivision of the Commonwealth which exercises public and essential governmental functions.

In a prior Opinion of this Office, it was held that a deed of trust given to a trustee to secure a loan made by the VHDA is subject to the State recordation tax. See 1975-1976 Report of the Attorney General at 96. That Opinion should not, however, be extended to deeds by which the VHDA conveys real estate. The facts in the Opinion are distinguishable because the VHDA was not the grantor on the deed of trust, and it did not bear the economic burden of the tax.

Accordingly, a deed given by the VHDA to an individual is not subject to the grantor's tax imposed by § 58.1-802 because of the express exemption for political subdivisions of the Commonwealth in § 58.1-811(C)(3).

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TAXATION. SALES AND USE. INMATE PURCHASES FROM NONPROFIT COMMISSARY OPERATING IN LOCAL CORRECTIONAL FACILITY NOT EXEMPT.

May 13, 1985

The Honorable M. Wayne Huggins
Sheriff for Fairfax County

You have asked whether the Virginia Retail Sales and Use Tax (the "sales tax") applies to sales of personal merchandise made to inmates by a nonprofit commissary operating within a local correctional facility.

Exemptions from the sales tax are found in § 58.1-608 of the Code of Virginia. Paragraph (18) of that statute exempts sales of "[t]angible personal property for use or consumption by the Commonwealth [or] any political subdivision of the Commonwealth...." The situation you have described does not come within this exemption because the purchaser, user and consumer is the inmate rather than the government. In addition, there is no general tax exemption for sales made by nonprofit organizations.

A general rule of strict construction has been applied in all cases involving the sales tax exemption statute since the adoption of the 1971 Constitution of Virginia. See, e.g., Jefferson v. Tax Comm., 217 Va. 988, 234 S.E.2d 297 (1977). Accordingly, there being no exemption for the commissary situation you have described, the sales tax statutes would be applicable.

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TAXATION. SECRECY OF INFORMATION. NOT VIOLATED BY COMMISSIONER OF REVENUE IN REVEALING TO COUNTY TREASURER SOCIAL SECURITY NUMBERS FOR COLLECTION OF PERSONAL PROPERTY TAXES.

March 21, 1985

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County
You have asked two questions concerning the confidentiality of personal property tax information. First, you ask whether the tax ticket mailed to the taxpayer may contain a description of the motor vehicle assessed. Second, you ask whether you may divulge the social security numbers of all taxpayers to the county treasurer for collection of delinquent taxes under the Setoff Debt Collection Act (the "Act"), §§ 58.1-520 through 58.1-534 of the Code of Virginia.

Section 58.1-3, the statute protecting certain information provided to tax or revenue officers, states, in part:

"[T]he...commissioner of the revenue, treasurer, or any other state or local tax or revenue officer or employee...shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation....The provisions...shall not be applicable, however, to:

** * * *

2. Acts performed or words spoken or published in the line of duty under the law."

In answer to your first question, the statute is intended to protect the taxpayer from disclosure of confidential tax information to third parties. It is my opinion that you are not in violation of § 58.1-3 if you describe the owner's personal property on the tax ticket which is sent to him. Such description, however, should not be entered on the personal property book which is prepared and made a matter of public record according to §§ 58.1-3115 and 58.1-3118, except to the extent required to satisfy the requirements of § 58.1-3115. See 1981-1982 Report of the Attorney General at 380.

In answer to your second question, the prohibition contained in § 58.1-3 does not apply to "[a]cts performed or words spoken or published in the line of duty under the law...." Previous Opinions of this Office have found that the "line of duty" exclusion from the otherwise applicable provisions of § 58.1-3 allows local tax or revenue officers or employees to divulge information to other such officers or employees. See, e.g., Reports of the Attorney General: 1982-1983 at 603 (revenue officer may disclose tax information to attorney collecting delinquent taxes); 1975-1976 at 394 (commissioner of revenue may transfer personal property tax return to treasurer).

You are not prohibited from sharing with the treasurer information that is necessary for the performance of the treasurer's duties. Under § 58.1-3103, the commissioner is required to assess the fair market value of all nonexempt personal property. Section 58.1-3919 requires the treasurer to collect all taxes not paid when due "by distress or otherwise." In order to utilize the Act administered by the Department of Taxation, the treasurer must submit taxpayer identifying information, including social security numbers, as authorized by §§ 58.1-521 and 58.1-533.

In light of the complementary nature of the duties of the offices of commissioner of the revenue and treasurer, and the necessity for social security numbers in order to utilize the Act, your transfer of these numbers to the treasurer for use in the collection of taxes is "in the line of duty under the law." While the provisions of § 58.1-3 are applicable to a treasurer, he may provide information to the Department of Taxation necessary to trigger the Act, because that would be in the line of his duties.

TAXATION. SETOFF DEBT COLLECTION ACT. ADMINISTRATIVE FEE OF COUNTY LIMITED BY § 58.1-3958.
January 21, 1985

The Honorable R. W. Arnold, Jr.
County Attorney for Louisa County

You have asked whether Louisa County may add a four percent administrative fee to any tax due and owing when collection is made pursuant to the Setoff Debt Collection Act, § 58.1-520 et seq. of the Code of Virginia. Costs of collection may only be imposed pursuant to express statutory provision. See, e.g., §§ 58.1-3013, 58.1-3952, 58.1-3969 and 58.1-3974.

I find no authority to support recovery by the county of the entire cost of collection of delinquent taxes, such as by the addition of a four percent charge. 1

In the circumstances you present, § 58.1-3958 limits the cost recoverable to a fee not to exceed $10.00, unless a judgment has been obtained, and then the fee shall not exceed $15.00.

1 Section 58.1-3013 permits the governing body to authorize the treasurer to accept credit cards for payment of local taxes. The governing body may also impose a service charge not to exceed four percent of the taxes, penalty and interest paid by credit card.

TAXATION. SITUS. TRACTOR TRAILER ASSESSABLE FOR PERSONAL PROPERTY TAXES IN JURISDICTION WHERE NORMALLY GARAGED OR PARKED. IF NO SUCH PLACE, TAXED IN JURISDICTION OF OWNER'S DOMICILE.

August 20, 1984

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County

You have asked two questions concerning matters of local taxation. Your first question is whether a tractor trailer owned by a resident of Wise County, used for cross-country transit and garaged in many different localities throughout the year, is assessable for personal property taxes in Wise County.

The answer to this question is governed by § 58-834 of the Code of Virginia. The pertinent statutory language reads:

"The situs for the assessment and taxation of...motor vehicles...as personal property shall be the county, district, town or city where the vehicle is normally garaged...or parked...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."

Section 58-835 establishes January one as the annual date of reference for taxation of personal property. This Office has consistently held that under § 58-834 the property situs for taxation is the place where the vehicle is ordinarily garaged or parked as of January one of the tax year. See 1982-1983 Report of the Attorney General at 615. Situs for taxation under this statute would not, however, include the casual presence of property in a locality while in the course of transit. Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957). If it cannot be determined where the vehicle is normally kept, the situs is the domicile of the owner of such personal property. See
The determination of situs is a factual one which you must make in light of the principles set forth above. If the tractor trailer is normally kept and garaged in Wise County when not in use, the property would have the requisite situs in that jurisdiction and would be taxable there. If it cannot be determined where the tractor trailer is normally garaged or parked, the situs is the domicile of the owner, and again, because the owner's domicile is in Wise County, the tractor trailer would be assessable for personal property taxes in Wise County.

Your second question is whether a certain business would be considered a merchant subject to the local merchants' capital tax or a manufacturer exempt from this local tax. You have explained that the business at issue crushes and compacts scrap metals, grades and packs herbs for sale and shipment to other locations, and sells scrap metal or junk items, including parts from cars, to walk-in customers. You were unable to advise whether the process involving herbs begins with a plant or some dried or crushed product.

The key to answering this question is the difference between the terms "merchant" and "manufacturer." These terms are not defined in the Code, however, on several occasions the Supreme Court of Virginia has considered their meaning. See Prentice v. City of Richmond, 197 Va. 724, 90 S.E.2d 839 (1956); Commonwealth v. Meyer, 180 Va. 466, 23 S.E.2d 353 (1942); and Richmond v. Dairy Company, 156 Va. 63, 157 S.E. 728 (1931). In Meyer, "merchant" is defined as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit." Id. 180 Va. at 472, 23 S.E.2d at 356 (citation omitted). On the other hand, "manufacture" is defined as "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery...." Id. 180 Va. at 472, 23 S.E.2d at 356 (citations omitted).

Every change does not constitute manufacturing. The Court in Prentice set forth three essential elements needed to constitute manufacturing: (1) original material referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which...is different from the original raw material." Id. at 197 Va. at 729, 90 S.E.2d at 843. The Prentice Court noted that:

"The conflict in the authorities results largely in the different viewpoints as to the degree of change necessary to satisfy the third requirement. It may be said, however, that mere manipulation or rearrangement of the raw materials is not sufficient; there must be a substantial, well-signalized transformation in form, quality and adaptability rendering the material more valuable for man's use...."

Id. 197 Va. at 730, 90 S.E. 2d at 843.

The foregoing guidelines established by case law must be applied to your fact situation. If the process related to the herbs consists only of grading and packing, it is my opinion the company would be a merchant as to this portion of its business because no substantial change in the original materials occurs. Accordingly, this part of the company's business would be subject to the local merchants' capital tax. See 1976-1977 Report of the Attorney General at 283 (holding that the blending of fertilizer ingredients is not manufacturing). If, however, the raw materials consist of plants which are dried, crushed, graded and packaged, such an operation would appear to meet the criteria for manufacturers exempt from the tax.

As to the other activities of the company, I find that the selling of scrap metal or junk items, including parts from cars, is a merchant's activity subject to the local tax on merchants' capital, because the items are not transformed in any way prior to their
sale. By way of contrast, the crushing and compacting of scrap metals results in a substantial transformation in the form and adaptability for use of the original material. I, therefore, conclude that this part of the business is manufacturing exempt from the local tax on merchants' capital.

1 The January one tax day is not controlling as to fiscal year localities (see § 58-851.7) or localities which prorate personal property taxes as authorized under § 58-835.1.
2 Sections 58-9, 58-10 and 58-832 segregate for local taxation the capital of merchants. Section 58-833 defines merchants' capital to include "inventory of stock on hand...and all other taxable personal property of any kind whatsoever, except money on hand and on deposit and except tangible personal property not offered for sale as merchandise...."
3 The inventory of manufacturers is subject to a State tax on intangible personal property pursuant to § 58-405. For tax years beginning January 1, 1985, this State tax is effectively eliminated via repeal of the rate section. See Ch. 729, Acts of Assembly of 1984.
4 But see § 58-441.3(p) which defines "[m]anufacturing, processing, refining, or conversion" for purposes of Virginia's sales and use tax law. I am of the opinion that this definition has no applicability to the question at hand. See 1983-1984 Report of the Attorney General at 372, holding that the meaning of "manufacturer," for purposes of § 58-268.1(A)(4), is not governed by § 58-441.3(p).
5 The degree of change needed can be illustrated by the contrast between a packing plant for hogs where the original product (the hog) comes out as hams, sausage, etc., and butchers or slaughterers who sell fresh meat without curing or changing the texture of the meat. The packing plant has been deemed a manufacturer, while the butchers and slaughterers have not. Prentice, supra, 197 Va. at 729, 90 S.E.2d at 842. See also 1976-1977 Report of the Attorney General at 284 (holding that a business producing ice cream from raw materials for sale to customers on the same premises is a manufacturer).

TAXATION. SPECIAL SERVICE DISTRICTS. DEFINITIONS. CITY GOVERNING BODY MAY DESIGNATE SPECIAL SERVICE DISTRICTS PURSUANT TO § 15.1-18.3 AND EXERCISE POWERS AND DUTIES LISTED IN § 15.1-18.2 WITHOUT CREATION OF DISTRICTS BY COURT ORDER; NO FIXED LEGAL MEANING OF "DOWNTOWN."

July 10, 1984

The Honorable Glenn B. McElhanan
Member, House of Delegates

This is in reply to your letter concerning Ch. 385, Acts of Assembly of 1984, which amends and reenacts § 15.1-18.3 of the Code of Virginia, relating to the designation of downtown service districts by localities.

Section 15.1-18.3, as amended and reenacted, states:

"The governing body of any city, or any town with a population of more than 30,000, by duly adopted ordinance, may designate primary and secondary downtown service districts for the purposes set forth in subsection (a) of § 15.1-18.2 and may exercise any or all of the powers and duties with respect to such service districts set forth in subsection (b) of § 15.1-18.2."

You ask my opinion on the following questions:
1. Does the bill authorize a local governing body to 'create' such districts, or by the use of the word 'designate,' does the General Assembly intend that a local governing body may only identify the geographical boundaries of such service districts with the creation of same being accomplished by order of the Circuit Court pursuant to § 15.1-18.2?

2. In that the term 'downtown' is not defined in the bill, may a local governing body designate any area within its jurisdiction as a 'downtown service district'? Specifically, does the bill authorize the designation as a 'downtown service district' of the commercial resort strip at the Virginia Beach oceanfront?

3. Is [Ch. 385] constitutionally valid?

A brief review of the history of § 15.1-18.3, as well as § 15.1-18.2, will be helpful in analyzing your questions. Section 15.1-18.2 authorizes the city council of any city resulting from the consolidation of two or more counties, cities or towns to establish service districts, and that section provides the mechanism by which such districts may be established. That procedure includes the necessity of presenting a petition to the circuit court and obtaining a court order to establish the district. Section 15.1-18.2 has been in the Code at least since 1962.

In 1981, the General Assembly adopted § 15.1-18.3 which established a new and different mechanism by establishing a special downtown service district. As passed in 1981, the section embraced a population bracket which limited the effect of the section to the City of Winchester. In 1982, a bill was introduced in the General Assembly to broaden the population bracket to include the City of Staunton. See House Bill No. 109, 1982 Session of the General Assembly. That bill prompted the Honorable C. Richard Cranwell to request my opinion concerning the constitutionality of § 15.1-18.3. I concluded that the section, as it then existed, was of doubtful constitutionality. See 1981-1982 Report of the Attorney General at 385. I recommended that the bill include amendments setting forth the purposes and uses for which the separate assessment districts may be created, and I implied that with those suggested amendments the section would be constitutional. House Bill No. 109 was amended prior to its passage in accordance with my suggestions and signed into law as Ch. 36, Acts of Assembly of 1982. In 1984, the General Assembly further amended § 15.1-18.3 by deleting the population bracket following "any city."

Turning now to your first question, in my opinion the General Assembly intended to authorize the governing body of any city or any town with a population in excess of 30,000 to create a downtown service district. The governing body creates the district when it adopts an ordinance designating the district and specifying the purposes for which it is designated and the powers and duties of the service district. As you know, it is necessary for the governing body to hold an advertised public hearing prior to adopting such a permanent ordinance. The procedure required under § 15.1-18.3 is different from that specified for creation of a service district under § 15.1-18.2. A court proceeding is not required under § 15.1-18.3, although one is required under § 15.1-18.2.

Turning to your second question, the term "downtown" is not defined in the statute, nor am I aware of any fixed legal meaning of that term. In common usage, the word connotes "the business center of a city," which phrase, in itself, would not necessarily preclude the existence of more than one "downtown" in a city. The statute itself allows the designation of "primary and secondary downtown service districts." Accordingly, I am of the opinion that a governing body has the discretion to designate one or more business areas within the city as a downtown service district. With respect to the particular area to which you make reference in Virginia Beach, your letter does not disclose any facts why the commercial resort strip at the Virginia Beach oceanfront would not qualify as a downtown service district. This is a matter, however, which must
be resolved after full consideration of all the facts.

In your last question you inquire whether § 15.1-18.3 is constitutional. As indicated above, I suggested in 1982 that § 15.1-18.3, as it then existed, was of doubtful constitutionality. Following my opinion discussed above, the General Assembly amended the section to resolve the doubts concerning the section's constitutionality, and I am now of the opinion that it is constitutional.

1See, e.g., Webster's Third New International Dictionary of the English Language 628 (1968).

TAXATION. TANGIBLE PERSONAL PROPERTY. LEASED COMPUTER EQUIPMENT SUBJECT TO LOCAL TAXATION AND TAXED TO OWNER.

February 6, 1985

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

You have asked whether computer equipment leased to a local manufacturer is to be taxed by the City of Martinsville as tangible personal property, or whether it is to be taxed as capital defined as intangible personal property not subject to local taxation. The manufacturer leased the computer equipment during tax year 1984 from a corporation located in California. It is your position that the California corporation, the owner-lessee, is the party liable for local tangible personal property tax on this equipment. I concur.

For purposes of taxation, the character of the use of tangible personal property by a person, other than the owner of the property, is a factor that may only be considered when there is a specific statute authorizing such consideration. For example, tangible personal property owned by the federal government is generally exempt from state or local taxation. See 1969-1970 Report of the Attorney General at 293. Section 58-831.2 of the Code of Virginia, however, authorizes the taxation of tangible personal property owned by the federal government when it is being used by a private, profit-making business. In an Opinion to the Honorable Sam T. Barfield, Commissioner of the Revenue for the City of Norfolk, dated July 24, 1984, I concluded that the character of the use of tangible personal property leased by a church is not a factor in determining the property's tax status if the indicia of ownership under the leasing agreement place actual ownership in the nonexempt lessor. Therefore, unless there is specific statutory authority to do so, the character of the use of tangible personal property by a person other than the owner is not a factor to be considered when establishing the proper classification of the property or its exempt or nonexempt status.

The computer equipment in question is owned by a corporation which leases it to the manufacturing business. The lessor corporation, therefore, is in the rental business, not in the manufacturing business. Cf. 1982-1983 Report of the Attorney General at 364 (holding that an automobile manufacturer which rented vehicles to certain of its employees did not qualify as a business engaged in the daily rental of passenger cars). Thus, the computer equipment is not being "used in manufacturing" by its owner, and is not classified as intangible personal property under § 58-405. Such equipment is properly assessed as tangible personal property subject to local taxation. This conclusion is in accord with the long-standing administrative interpretation, as enunciated by the Honorable C. H. Morrissett, State Tax Commissioner, by letter to Mr. Frank A.
Abernathy, Jr., dated December 12, 1969 (holding that the inventory of a rental business is taxable as tangible personal property and not as capital of the business).

Under § 58-20, tangible personal property is taxable to its owner. This is true, even where the property is leased to another. See 1983-1984 Report of the Attorney General at 400; but see § 58-831.2. Accordingly, it is my opinion that the computer equipment is tangible personal property subject to local taxation and is taxed to its owner.

1Each of the Code sections referred to by you and in this Opinion is the section in effect for tax year 1984 as it appeared prior to recodification in Title 58.1, effective January 1, 1985. The recodification made no substantive changes to these sections.

2See 1978-1979 Report of the Attorney General at 285, which held that a holder of a leasehold interest in federally owned tangible personal property shall be taxed as if the lessee of such interest were the owner of the property when the property is used by the lessee in a profit-making business.

3Contra 1976-1977 Report of the Attorney General at 274, which held that the use to which machinery and tools are put by a lessee determines whether they are taxable as machinery and tools, as tangible personal property, or as capital. I disagree with that conclusion to the extent that it differs from the conclusion expressed herein.

TAXATION. TANGIBLE PERSONAL PROPERTY. OFFICE FURNITURE AND EQUIPMENT OF RADIO STATION NOT INCLUDED.

December 3, 1984

The Honorable Lacky G. Sempeles
Commissioner of the Revenue for the City of Winchester

You have asked whether any radio equipment belonging to a radio station is personal property subject to local taxation.

Article X, § 4 of the Constitution of Virginia (1971), provides that tangible personal property is to be segregated and made subject to local taxation only. Article X, § 1 provides, however, that the General Assembly may define and classify taxable subjects.

Section 58-4051 of the Code of Virginia provides in (A)(2) that intangible personal property includes the capital of a trade or business and is segregated for State taxation only. The subjects of taxation classified by this section are defined as intangible personal property and include "[c]apital which is personal property, tangible in fact, used in...radio or television broadcasting...except machinery and tools, motor vehicles and delivery equipment...."

If the equipment in question falls within one of the exceptions provided by statute, it would be subject to local taxation. Items such as office furniture and equipment, however, are not taxable by localities as tangible personal property but, rather, constitute the capital of a business. See 1950-1951 Report of the Attorney General at 287. Such items are classified as intangible personal property and are not subject to local taxation. See 1977-1978 Report of the Attorney General at 411.

Accordingly, certain tangible personal property used or employed by a taxpayer engaged in the business of radio broadcasting has been determined by the General Assembly to be capital. Capital is defined as intangible personal property in § 58-405, unless otherwise excepted by statute. Intangible personal property, except merchants'
capital, is not subject to the local tangible personal property tax. I am, therefore, of the opinion that, unless it falls within the exceptions set forth in § 58-405(A)(2), radio equipment used in radio broadcasting is not subject to local taxation.

1This section has been recodified under § 58.1-1101 of Title 58.1. The effective date of § 58.1-1101 is January 1, 1985.
2See §§ 58-405(A) and 58-833.

TAXATION. TREASURERS. LOCAL VEHICLE LICENSE MAY BE DENIED IF NO PROOF OF PAYMENT OF CERTAIN PERSONAL PROPERTY TAXES FOR ALL YEARS NOT BARRED BY STATUTE OF LIMITATIONS.

March 12, 1985

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

A locality may enact an ordinance under § 46.1-65(c) of the Code of Virginia providing that an applicant for a local motor vehicle license must produce evidence of payment of certain personal property taxes before the license will be issued. You have asked whether a county treasurer who issues licenses under § 46.1-65(c) must examine evidence of payment (1) for all prior years not barred by the statute of limitations, or (2) only for those prior years which the treasurer is required to pursue tax collection.

Section 46.1-65(c) provides:

"A county...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...." (Emphasis added.)

Delinquent local personal property taxes, as a general rule, remain a collectible legal debt of the taxpayer for five years following December 31 of the year for which the taxes were assessed. See § 58.1-3940(A). The lien of a judgment for delinquent taxes is not subject to the five-year limitation. See § 58.1-3940(C). At the option of the local governing body, treasurers may be held responsible for collecting delinquent taxes for a maximum period of approximately four of those five years. See § 58.1-3933. Localities are not without a remedy when the treasurer is excused from the collection process. The local governing body then may pursue collection of delinquent taxes by several other methods until barred by the five-year statute of limitations. For example, the locality may turn the accounts over to the sheriff, hire a delinquent tax collector, or seek to collect through the operation of statutes such as § 46.1-65(c). See § 58.1-3934.

The language of § 46.1-65(c) clearly states that the condition to licensing is payment of all personal property taxes upon the vehicle to be licensed and any delinquent vehicle property taxes owing which have been properly assessed or are assessable against the applicant. Section 46.1-65(c) is subject to the general five-year statute of limitations applicable to collection of local taxes (other than real estate). No other time limitations are stated or implied.
As mentioned previously, after certain events, § 58.1-3933 operates to relieve the treasurer of his duty to pursue actively collection of delinquent accounts. Section 46.1-65(c) is not in conflict with § 58.1-3933, however, because § 46.1-65(c) requires the treasurer only to inspect evidence that is presented to him, placing no active collection responsibility upon him. Although the treasurer may have been relieved by the local governing body of his duty to pursue actively collection of taxes, he continues to have a duty under § 46.1-65(c) to examine evidence of payment of delinquent taxes when he receives an application for a vehicle license.

Based on the foregoing, it is my opinion that a treasurer issuing local motor vehicle licenses under a § 46.1-65(c) ordinance must require production of satisfactory evidence of payment of the pertinent personal property taxes for all prior years not barred by the statute of limitations.

1This question is separate and distinct from the question of your other inquiry of this same date concerning collection of local personal property taxes on vehicles.

2When a delinquent taxpayer discovers from the treasurer that he will not receive a license, it is hoped that the taxpayer will tender payment to the treasurer. The treasurer has a duty to accept all payments tendered, regardless of whether the local governing body has relieved him of his active collection responsibilities. In addition, § 58.1-3913 requires that payments must be applied against the most delinquent account which is not barred by the statute of limitations. See 1982-1983 Report of the Attorney General at 517.

TAXATION. TREASURERS. TAXES FOR WHICH BILL SENT AND INSUFFICIENT PAYMENT MADE, LEAVING BALANCE DUE LESS THAN $5.00, NOT INCLUDED IN § 58.1-3921(4) LIST OF UNCOLLECTED TAXES LESS THAN $5.00.

October 16, 1984

The Honorable Mary Arline McGuire
Treasurer for Chesterfield County

You have asked two questions relating to a treasurer's duties under §§ 58.1-3912, 58.1-3921(4) and 58.1-3924 of the Code of Virginia.1

In your letter, you note that treasurers are not required by law to send a tax bill when the tax assessment or levy is less than five dollars. You inquire whether the Code provisions relating to such a situation are also applicable to a situation in which the original bill exceeds five dollars but the taxpayer pays less than the billed amount so that he still owes a balance of less than five dollars. For example, if the bill is for $101.25 and the taxpayer pays $100, he still owes $1.25.

Your first inquiry is whether the treasurer may include these amounts in the list referred to in § 58.1-3921(4). You also ask whether the governing body has the authority to remove these accounts of less than $5.00 pursuant to § 58.1-3924 without previously adopting an ordinance.

Section 58.1-3912 provides that, inter alia, the treasurer shall send out by United States mail, a bill or bills to every taxpayer assessed with taxes or levies amounting to "five dollars or more."

Section 58.1-3921(4) requires a treasurer to make out "[a] list of the uncollected
taxes amounting to less than five dollars each for which no bills were sent..." (Emphasis added.) This section does not provide for the inclusion of taxes for which a bill has been sent but the payment tendered is deficient, thereby rendering due an amount less than $5.00. 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 Reports of the Attorney General: 1980-1981 at 209; 1978-1979 at 243. Accordingly, taxes owed in an amount less than $5.00 which arise from the circumstances presented in your letter may not be included in a list prepared pursuant to § 58.1-3921(4). They would be included, however, in a list prepared pursuant to either subsection (2) or (3) of § 58.1-3921. The former subsection provides for a list of real estate which is delinquent because of the nonpayment of taxes thereon. The latter subsection provides for a list of taxes which the treasurer is unable to collect on subjects other than real estate. If the legislature wishes to extend the provisions of the relevant Code sections to include such incidents of payment resulting in small balances due, then it will be necessary for the General Assembly to make such a change.

Because the answer to your first question is in the negative, it is unnecessary to address your second inquiry.

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1The effective date of these sections is January 1, 1985.

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TAXATION. WILLS AND ADMINISTRATION. FORM USED FOR PROBATE TAX RETURN.

June 27, 1985

The Honorable Ronald P. Livingston
Clerk, Circuit Court of Chesterfield County

You have asked whether a form used by the clerk of court, known as a "Memorandum of Facts," may be used as a probate tax return for purposes of § 58.1-1714 of the Code of Virginia. The "Memorandum of Facts" form is used to gather information for probate orders and includes, inter alia, the value of a decedent's personal and real estate.

Section 58.1-1714 provides:

"When the value of an estate exceeds $1000, a return shall be made and filed with the clerk of court at the time the will is offered for probate or the grant of administration is sought in such court. Such return shall state, to the best of the knowledge and belief of the persons submitting the will for probate or requesting the grant of administration, (i) the value of the decedent's real estate as set forth in § 58.1-1713 based on the actual value, if known, or if actual value is not known, the appraised value of such property for local real estate tax purposes, and (ii) the estimated value of the decedent's personal property as of the date of the decedent's death. Such return shall be subject to the provisions of § 58.1-11, and the information set forth therein shall be entitled to the privilege accorded by § 58.1-3. For the purpose of § 58.1-3, the information set forth in such return shall not be deemed to be required by law to be entered on any public assessment roll or book."

Generally, a "return" is a schedule of information required by governmental bodies. See Black's Law Dictionary 1184 (5th ed. 1979). Unlike other statutes regarding
tax returns, § 58.1-1714 does not prescribe a specific form to be used as a probate tax return.1 It does require, however, that the probate return reflect the value of the decedent's real estate (such value to be determined pursuant to § 58.1-1713) and the estimated value of the decedent's personal property.

The Department of Taxation provides a probate tax return form which meets the requirements of § 58.1-1714 and is available upon request. Any alternate form should include in its title the words "Probate Tax Return" so that it is clear on the face of the form that it is the return required to be filed pursuant to § 58.1-1714.

Based on the foregoing, I am of the opinion that if the "Memorandum of Facts" form is also designated as a probate tax return, and if the values stated on the form reflect the information required by § 58.1-1714 and are calculated in accordance therewith, such form meets the requirements of a probate tax return.²

1 Cf. §§ 58.1-3517 (forms of returns for reporting tangible personal property, machinery and tools, and merchants' capital either shall be prescribed and furnished by the Department of Taxation, or a local form may be used in lieu of the form prescribed by the Department), 58.1-3905 (the Department of Taxation shall prescribe and furnish the necessary forms for the assessment of omitted taxes), 58.1-3923 (the Department of Taxation shall prescribe the form for delinquent property lists).

²The form would be subject to the provisions of §§ 58.1-3 and 58.1-11 as provided in § 58.1-1714. Note that § 630-8-1714 of Virginia Tax Regulations, Virginia Department of Taxation (January 1, 1985), requires that a probate tax return be filed by the person submitting the will for probate or requesting the grant of administration.

TAXATION. WRT TAT. SECTION 58.1-3809 APPLICABLE TO HABEAS CORPUS PROCEEDINGS FILED IN CIRCUIT COURT AND TO CONDEMNATION PROCEEDINGS, BUT NOT APPLICABLE TO NONADVERSARIAL APPLICATION FOR CHANGE OF NAME.

November 28, 1984

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

You have asked whether the writ tax provided in § 58.1-3809 of the Code of Virginia is applicable to actions filed in a circuit court pertaining to change of name, habeas corpus, condemnation proceedings, and miscellaneous petitions such as an appointment of a church trustee. You also have asked whether the clerk of a circuit court may exercise some discretion in charging the fees set forth in § 14.1-112.

Section 58.1-3809 imposes a tax of five dollars upon "the commencement of every action, in law or chancery, in a court of record," subject to specific exceptions. This section is derived primarily from former § 58-71. The recodification updates the language of § 58-71 and includes the actions originally set forth in §§ 58-72 and 58-73 among those subject to the writ tax. See Code Commission comments to § 58.1-3809, 1984 House Document No. 16 at 443.

This Office has previously opined that the writ tax is imposed only upon the institution of an adversary proceeding. See 1970-1971 Report of the Attorney General at 396. Accordingly, the writ tax is imposed upon habeas corpus proceedings and condemnation proceedings, unless the petition is filed by the Commonwealth or a
political subdivision. See 1972-1973 Report of the Attorney General at 141\textsuperscript{2} and 455. An application to a court for a change of name is not an adversary proceeding and is not, therefore, subject to a writ tax. See 1969-1970 Report of the Attorney General at 296. Similarly, other proceedings which are not adversarial in nature, such as a petition for the appointment of a church trustee, would not be subject to the writ tax.

With respect to your second inquiry, § 14.1-112 sets forth a list of fees which "[a] clerk of a circuit court shall, for services performed by virtue of his office, charge...." (Emphasis added.) It further states that the provisions of the section "shall control the fees charged by clerks of circuit courts for the services...." While it is possible to use "shall" in a nonmandatory manner, a reading of this provision clearly indicates that the legislature intended to use "shall" here in its mandatory sense. Thus, the language of this statute is mandatory and thereby obliges the clerk to charge the stated fees.

Additionally, § 14.1-140.1 provides that the excess amounts collected by a clerk above the clerk's authorized expenses and maximum compensation are required to be paid into the State treasury; two-thirds of this excess is paid by the State Treasurer into the treasury of the political subdivision served by the clerk. Because the Commonwealth has an interest in the fees charged for a clerk's service, the clerk is not entitled to alter these fees. See 1972-1973 Report of the Attorney General at 75. Accordingly, the answer to your second inquiry is in the negative.

\textsuperscript{1}The effective date of this section is January 1, 1985. Until that time, the applicable statutes are §§ 58-71, 58-72 and 58-73.

UNIFORM STATEWIDE BUILDING CODE. LOCALITIES MAY NOT REQUIRE PRIVATE PROPERTY OWNERS TO PASS EXAMINATION TO SECURE BUILDING PERMIT TO WORK ON OWN PROPERTY.

October 29, 1984

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

You have asked whether §§ 36-98, 15.1-11.4 or 54-138 of the Code of Virginia authorize localities to require a homeowner to pass an examination prior to obtaining a building permit to perform work on property which he owns. You also ask if I am aware of any other laws, other than those about which you specifically inquire, which authorize such a practice.

Section 36-98 provides that the Board of Housing and Community Development shall adopt a Uniform Statewide Building Code ("Building Code") which shall supersede the building codes and regulations for the local governments; § 15.1-11.4 deals with the administration of examinations by localities in various specified types of contracting; § 54-138 states that a locality shall, prior to issuing a building permit, require the applicant to submit an affidavit that he is either licensed or exempt from the licensure.

The stated purpose of the Building Code is "to protect the health, safety and
welfare of the residents of this Commonwealth...." Section 36-99. This purpose is not inconsistent with the practice about which you inquire. It is also true that the Building Code should be broadly construed. *VEPCO v. Savoy Construction Co.*, 224 Va. 36, 294 S.E.2d 811 (1982).

The language in the pertinent statutes leads me to answer your question in the negative. A number of factors leads me to this conclusion. First, § 15.1-11.4 states, in pertinent part, that a local government may "require any person who engages in...for the general public for compensation, plumbing, building-related mechanical or electrical work" in such locality to take an examination. (Emphasis added.) Thus, by negative inference, a local government presumably cannot require a person who seeks to do work on his own property, not for compensation, to take an examination. Second, § 54-113 defines "[c]ontractor" for state licensure purposes as a person or entity that performs construction or related activities on "any building or structure permanently annexed to real property owned, controlled or leased by another person...." (Emphasis added.) Section 54-128 provides that a person must be licensed to engage in contracting. Thus, the General Assembly clearly set forth its intent to limit its licensure scheme for contractors to persons or entities doing contracting work on another's property, and to exempt persons doing such work on their own property.

Finally, § 54-138 provides, as noted above, that a person seeking a building permit shall provide the building official with an affidavit stating either that he is licensed or exempt from licensure. Section 54-129.3 provides that the holder of a Class B contractor's license may engage in contracting only in those localities in which he has complied with all local licensing requirements. This would require such contractors to take examinations where the localities administer them pursuant to § 15.1-11.4. Reading §§ 15.1-11.4, 54-129.3 and 54-138 together, however, indicates that persons performing work on their own property are exempt from licensure and, therefore, could not be required to take such examinations.

While neither §§ 15.1-11.4, 54-113, 54-128, 54-138 nor § 54-129.3 deals specifically with the Building Code, all deal with the regulation of contracting and are instructive in establishing the limits the General Assembly intended in this area of regulation. I find nothing in the enactments of the General Assembly which evinces the intention to authorize localities to require property owners to pass examinations prior to securing permits to work on their own property.  

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1. Section 15.1-11.4 states in its entirety:

"A. The governing body of a county, city or town may, subject to the limitations of paragraph D, herein, by duly adopted ordinance, require any person who engages in, or offers to engage in, for the general public for compensation, plumbing, building-related mechanical or electrical work in such county, city or town, to obtain a certificate from the county, city or town.

B. The ordinance shall require the applicant for such certificate to furnish evidence of his ability and proficiency; shall require the examination of every such applicant to determine his qualifications; shall designate or establish an agent or board for the county, city or town to examine and determine a person's qualifications for certification; and shall refuse to grant a certificate to an applicant found not to be qualified.

C. In accordance with the Administrative Process Act (Chapter 1.1:1 (§ 9-6.14:1 et seq.) of Title 9 of the Code of Virginia), the Director of the State Department of Housing and Community Development shall establish standards to be used in determining an applicant's ability, proficiency and qualifications.

D. No person certified pursuant to this section or certified or licensed pursuant to § 36-99.1 shall be required to obtain any other such certificate or to pay a fee, other than the initial certification fee, in any county, city or town in which he practices his
trade. After a person has been certified under an apprenticeship program which is approved by the Virginia Apprenticeship Council, he shall not be required by the governing body of any county, city or town to obtain a certificate from or to pay a fee to such county, city or town.

E. Any such ordinance adopted by a county, city or town may provide for penalties not exceeding those applicable to Class 3 misdemeanors.

2 This is not to say that a locality cannot assure that work being done by a homeowner on his own property is not competently done. The building official's authority to review plans allows him to require sufficient information to assure competent work.

UNIFORM STATEWIDE BUILDING CODE. MEANING OF FARM BUILDING EXEMPTION.

November 23, 1984

The Honorable Edward J. Finnegan
County Attorney for Loudoun County

You have requested my opinion on several questions focusing on §§ 36-97(12) and 36-97(18) of the Code of Virginia, which exempt farm buildings and farm structures from the requirements of the Uniform Statewide Building Code (the "USBC"), §§ 36-97 through 36-119, under different conditions.

Section 36-97(12) defines "[b]uilding" as:

"[A] combination of any materials, whether portable or fixed, having a roof to form a structure for the use or occupancy by persons, or property; provided, however, that farm buildings not used for residential purposes and frequented generally by the owner, members of his family, and farm employees shall be exempt from the provisions of the Uniform Statewide Building Code, but such buildings lying within flood plain or in a mudslide-prone area shall be subject to flood proofing regulations or mudslide regulations, as applicable...." (Emphasis added.)

The exception for farm buildings was added by the 1974 Session of the General Assembly. As you have observed, this provision conditions the exemption upon the requirement that the building be "frequented generally by the owner, members of his family, and farm employees...." In November 1974, an Opinion of this Office addressed this provision. See 1974-1975 Report of the Attorney General at 545.

In 1975, the General Assembly adopted § 36-97(18), which defines the word "[s]tructure" as:

"[A]n assembly of materials forming a construction for occupancy or use including stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks, trestles, piers, wharves, swimming pools, amusement devices, storage bins, and other structures of this general nature; provided, however, that farm structures not used for residential purposes shall be exempt from the provisions of the Uniform Statewide Building Code, but such structures lying within a flood plain or in a mudslide-prone area shall be subject to flood proofing regulations or mudslide regulations, as applicable...."

Manifestly, structure is an all inclusive word which includes facilities "for occupancy or use...." Thus, it also presumably includes the more restrictive class of structures which have roofs and which are defined as buildings.
Under the well-recognized rule of statutory construction, a statute is read as a whole, and all of its parts must be examined so as to make it harmonious, if possible. *McDaniel v. Commonwealth*, 199 Va. 287, 99 S.E.2d 623 (1957); 1973-1974 Report of the Attorney General at 220.

Giving meaning to the two paragraphs in question would require the exemption in (12) to be read as relating specifically to farm buildings (those structures with roofs and designed for occupancy by people or property), and the exemption in (18) to be read as relating to all other farm structures not used for residential purposes. Such a construction is illogical, for it is apparent that the latest pronouncement of the General Assembly was intended to exempt all farm structures from the requirements of the USBC when not used for residential purposes, whether or not the structure is a building or is frequented generally by anyone.

The goal of statutory construction is to determine legislative intent and give meaning to that intent as far as possible. In this instance, I am unaware of any document or study which may be used as a guide in determining the legislature's rationale in 1975 in adding a generalized exemption in § 36-97(18) during the next ensuing Session, after having added the more restrictive exemption in paragraph (12) in the 1974 Session. Obviously, the General Assembly was aware of the earlier amendment which exempted farm buildings from the USBC only if they are not used for residential purposes and are frequented generally by the owner, members of his family, and farm employees. See 1974-1975 Report of the Attorney General, supra.

Statutory repeal by implication is not favored. See Reports of the Attorney General: 1982-1983 at 482; 1975-1976 at 89. Nonetheless, it is clear that the 1975 enactment superseded the 1974 amendment to § 36-97, for it exempts all farm structures from the USBC, which are not used for residential purposes. In such cases, where the first statutory enactment is fully covered by the second, the last enactment must prevail. *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938).

I am, therefore, of the opinion that paragraph (12) of § 36-97 has been superseded by paragraph (18). Consequently, in order to be exempt from the USBC, it is not necessary to determine if farm buildings, not used for residential purposes, are frequented generally by the owner, members of his family, and farm employees, for that requirement has been effectively deleted by § 36-97(18). Accordingly, the condition imposed by § 36-97(12), pertaining to "visitation," need not be considered in determining whether a farm structure or building is exempt from the USBC.

In view of the foregoing, it is unnecessary to answer your specific questions applying paragraph (12) to farm structures frequented by the owner and others.

USURY. SAVINGS AND LOAN ASSOCIATIONS. APPLICABILITY OF VIRGINIA LAW TO OUT-OF-STATE SAVINGS AND LOAN ASSOCIATIONS.

April 10, 1985

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

You have asked whether a Maryland savings and loan association supervised by the State of Maryland falls within the phrase "state...savings and loan associations" in §§ 6.1-330.25 and 6.1-330.48 of the Code of Virginia, so as to exempt its loans from Virginia usury laws.
Sections 6.1-330.25 and 6.1-330.48 provide that certain loans are exempt from various usury limitations in the Code. Both sections exempt loans made by lenders licensed by and under the supervision of the State Corporation Commission or the federal government. Each section also exempts "loans made by state and national banks, state and federal savings and loan associations and state and federal credit unions."  

The predecessor to § 6.1-330.25 did not refer to state and national banks, state and federal savings and loan associations and state and federal credit unions. See § 6.1-330.3 (Repl. Vol. 1973), repealed by Ch. 448, Acts of Assembly of 1975. By adding the language, a change in existing law is presumed intended. Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913). Moreover, the statute should not be interpreted in a manner which would render a portion of it meaningless. Commonwealth v. Community Motor Bus, 214 Va. 155, 198 S.E.2d 619 (1973). Because Virginia banks, savings and loan associations and credit unions were already included in the language of repealed § 6.1-330.3, and are included in §§ 6.1-330.25 and 6.1-330.48, by virtue of references to lenders licensed or supervised by the State Corporation Commission, it appears that the purpose of the additional reference to "state...savings and loan associations" in those latter sections was to extend the statute to additional savings and loan associations from other states.

This interpretation is consistent with the provisions of § 6.1-195.58 which prohibit an out-of-State corporation from conducting a savings and loan business in Virginia. That section does allow for an out-of-State entity to make certain loans in Virginia. It states, in part:

"Nothing in this chapter [the Virginia Savings and Loan Act] shall prevent any person from lending money on real estate or personal security or collateral...."

Thus, a Maryland savings and loan association, although not authorized to conduct a savings and loan business in Virginia, may have loans lawfully outstanding in Virginia in certain circumstances.

Under this interpretation of §§ 6.1-330.25 and 6.1-330.48, all of the loans exempted would be loans made by lenders regulated by one of the states or the federal government. Such lenders are, therefore, likely to be subject to government scrutiny similar to that which permits the exemption of Virginia lenders' loans. Because out-of-State savings and loan associations may make loans in Virginia under § 6.1-195.58, it is appropriate to construe the statutes to exempt those loans from the same usury statutes as similar loans made by Virginia savings and loan associations in order to assure equal treatment of borrowers and lenders which are similarly situated.


To summarize, I am of the opinion that the language of §§ 6.1-330.25 and 6.1-330.48, exempting certain loans made by state savings and loan associations from various usury statutes, includes savings and loan associations chartered by the other states, as well as Virginia.
Section 6.1-330.25 provides, in its entirety, and § 6.1-330.48 provides, in essence:
"Sections 6.1-330.16, 6.1-330.24 and 6.1-330.31 shall not apply to loans made by any lender licensed by, and under the supervision of the State Corporation Commission or the federal government, or to loans made by state and national banks, state and federal savings and loan associations and state and federal credit unions."

Although the Virginia Code Commission Report on the change states that its purpose was to clarify existing law, the fine line between clarification and substantive change was also noted. Report of the Virginia Code Commission to the Governor and the General Assembly of 1975, Sen. Doc. No. 38 at 3.

UTILITIES. RADIO COMMON CARRIERS. CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY TO SERVE SAME AREA.

October 5, 1984

The Honorable Gladys B. Keating
Member, House of Delegates

You have asked whether § 56-508.6 of the Code of Virginia, as amended by Ch. 297, Acts of Assembly of 1984, permits more than two radio common carriers to serve the same area.

Subsection (A) of § 56-508.6 provides, in pertinent part:

"The Commission may grant a certificate for a proposed radio common carrier operation or extension thereof into an established service area which will be in competition with or duplication of another certificated radio common carrier if it shall find the proposed application justified by public interest, and under such terms, limitations and restrictions as may be prescribed by the Commission."

The use of the word "another" in subsection (A) is not always interpreted to connote only the singular. Section 1-13.15 provides, in part, that "[a] word importing the singular number only may extend and be applied to several persons or things, as well as to one person or thing...." Thus, the words "another...carrier" in § 56-508.6 might also be read "other...carriers."

The Missouri courts have dealt with the precise question you raise. In State ex rel. Crown Coach Co. v. Public Service Commission, 238 Mo. App. 287, 179 S.W.2d 123, 127 (1944), the question was whether three bus lines could be certified to serve the same area under a statute addressing the issuance of a certificate for service in the territory of another carrier. The court held that the use of the word "another" did not limit the commission to a grant of only two certificates in each service area.

The Supreme Court of Virginia has recently reached the same result, although it did not expressly discuss the question you raise. In RCC, Inc. v Roanoke & Botetourt, 223 Va. 342, 288 S.E.2d 476 (1982), the Court interpreted language in § 56-265.4:3 which is almost identical to the language of § 56-508.6. It held that the General Assembly intended by such language to change the regulatory structure to allow limited competition. As a result, it considered and rejected an argument that "the public interest is not served if a third carrier is allowed 'to drain off business from the two certificated carriers.'" 223 Va. at 348.

It is, accordingly, my opinion that § 56-508.6 permits the certification of more than two radio common carriers in the same service area, provided that compliance with all of the other requirements of the statute is maintained.
You have asked three questions concerning the regulation of radio common carriers ("RCCs") and cellular mobile radio communications carriers ("cellular carriers"). You ask whether (1) all public service corporations are public utilities; (2) RCCs and cellular carriers are public service corporations; and (3) the State Corporation Commission (the "Commission") would still have jurisdiction over their rates if RCCs and cellular carriers are removed from the rate regulation of Ch. 10 of Title 56 of the Code of Virginia. I will answer each question separately.

First, all public service corporations are not public utilities for purposes of the Code. See Iron Company v. Pipeline Company, 206 Va. 711, 146 S.E.2d 169 (1966). The basic definition of a public service company is contained in § 56-1, and the term "public utility" is defined in § 56-232, among other sections. Although the definitions overlap substantially, they are not identical.

Second, under current law, RCCs and cellular carriers are both public service corporations and public utilities. Section 56-508.1 defines these entities to include public service corporations and other persons "owning, operating, controlling or managing a mobile radio telephone utility system except a public landline message telephone service or a public message telegraph service." The RCCs and cellular carriers own, manage or control plants and equipment for the conveyance of telephone messages. Thus, they are also squarely within the definition of "public utility" contained in § 56-232. Finally, they are within the definition of "public service corporation" in § 56-1, which includes telephone companies. Section 56-508.4 requires RCCs and cellular carriers to be, or to become, public service corporations before they may be certificated to do business.

I next address your third question. As a result of the provisions of §§ 56-232, 56-508.1 and 56-508.4, RCCs and cellular carriers are regulated as public utilities under Ch. 10 of Title 56. Your letter indicates that a proposed exemption from the provisions of Ch. 10 would be accomplished by new statutory language excluding RCCs and cellular carriers from the definition of "public utility," as that term is used anywhere in the Code. The intent of such an exemption would be to release RCCs and cellular carriers from the rate base/rate of return ratemaking methodology of Ch. 10 of Title 56, but to retain some ratemaking jurisdiction in the Commission.

It should be noted that the definition exemption mechanism of the type suggested in your letter may release RCCs and cellular carriers from other regulatory provisions in addition to the rate base/rate of return requirements of Ch. 10. For example, Chs. 3 and 4 of Title 56, regulating respectively the issuance of public utility securities and transactions between a utility and its affiliates, apply only to utilities subject to rate regulation under Ch. 10. Any exemption from Ch. 10, therefore, is also an exemption from Chs. 3 and 4.

I assume that the proposed exemption would be written so that RCCs and cellular carriers would not be public utilities, but would remain public service corporations under § 56-1. On the surface, such a result would seem to retain ratemaking jurisdiction with the Commission under § 56-35, which reads:
"The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies."

For reasons hereinafter stated, I am of the opinion that this section may not give the Commission effective control over the rates of RCCs and cellular carriers unless the proposed exemptive provisions are accompanied by language stating a new standard by which to measure acceptable rates. See, e.g., § 56-481.1.

Arguably, § 56-35, standing alone, might be broadly interpreted to require "reasonable" rates. That standard is functionally the same as the "just and reasonable" formulation now contained in Ch. 10, and would be adequate to empower the Commission to regulate, without more. Cf. DuVal and Ridgill v. VEPCO, 216 Va. 226, 217 S.E.2d 844 (1975), involving rate regulation under § 56-245. The most recent history of § 56-35, however, is contrary to this interpretation. It formerly contained express language requiring just and reasonable rates, but that language was removed. See Ch. 377, Acts of Assembly of 1973. The proper interpretation of the statutes in these circumstances is that the General Assembly intended to eliminate the just and reasonable standard. A contrary conclusion would have to be based on a presumption that the omission was inadvertent. Such a conclusion would not be sustained by the courts. Godlewski v. Gray, 221 Va. 1092, 277 S.E.2d 213 (1981). Thus, § 56-35 now provides no ratemaking standard. Without a standard, the Court would likely say the statute is "too vague, indefinite and uncertain to furnish any yardstick or standard by which the rates...may be measured or determined." Mundy Motor Lines v. Du Pont, 199 Va. 933, 938, 103 S.E.2d 245, 248 (1958).

In view of the 1973 changes to § 56-35 and the absence of other statutory standards by which to regulate rates, the Court could likely conclude that even if the General Assembly intended these organizations to be subject to rate regulation under § 56-35, its failure to provide adequate standards renders regulation unenforceable. For these reasons, it is my opinion that the proposed exemption of RCCs and cellular carriers from Ch. 10 of Title 56 must be accompanied by statutory provisions specifically governing the regulation of their rates if the General Assembly wishes to assure a continuation of rate regulation by the Commission.

1 Recently, the Supreme Court of Virginia has said that the Commission has a duty to regulate rates under Art. IX, § 2 of the Constitution of Virginia (1971) and § 56-35 of the Code. See VEPCO v. Corp. Comm., 219 Va. 894, 252 S.E.2d 333 (1979); CVEC v. State Corporation Commission, 221 Va. 807, 273 S.E.2d 805 (1981). In each of those cases, however, the utilities were also subject to Ch. 10 of Title 56. There was, therefore, no question concerning the applicable standard.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES.
REGISTRATION OF MATERIAL AS SPECIALTY FERTILIZER DOES NOT PRECLUDE REGULATION BY OTHER AGENCIES.

September 4, 1984

The Honorable David T. Stitt
County Attorney for Fairfax County
You ask whether processed residue from a sewage treatment plant which has been registered as a specialty fertilizer with the Virginia Department of Agriculture and Consumer Services ("VDACS") may be applied to farm land in Virginia without obtaining authorization from any other State agency. Specifically, you inquire whether such an activity is subject to regulation by the State Water Control Board.

The Virginia Fertilizer Law of 1970, §§ 3.1-74 through 3.1-106 of the Code of Virginia, governs the manufacture and distribution of fertilizer. A "specialty fertilizer" is defined in § 3.1-75.1(o)(3) as "a commercial fertilizer distributed primarily for nonfarm use, such as home gardens, lawns, shrubbery, flowers, golf courses, municipal parks, cemeteries, greenhouses and nurseries." Under § 3.1-76.1(d), a specialty fertilizer may not be distributed in Virginia unless it is registered with VDACS. You advise that the residue under consideration is registered as a specialty fertilizer in accordance with that statute.

The Virginia Fertilizer Law of 1970 does not address health or water pollution concerns which may arise when fertilizers are applied to Virginia land. The focus of that law is to ensure the efficacy of fertilizers manufactured and distributed in the State by requiring a guaranteed analysis of the minimum percentage of plant nutrients contained in each fertilizer. Nothing in the Virginia Fertilizer Law of 1970 suggests that it was intended to supersede or substitute for other provisions of the Code relating to regulation for the purpose of protecting the public health and ensuring water quality. Therefore, it is my conclusion that registration of a material as a fertilizer with VDACS does not preclude regulation by other agencies.

The General Assembly has assigned the State Water Control Board and the State Department of Health the responsibility for jointly supervising all sewerage systems and sewage treatment works. See § 62.1-44.18. The State Water Control Board has broad authority to regulate sewage disposal and protect water quality under §§ 62.1-44.15 through 62.1-44.19, including the specific authority in Ch. 3.1 of Title 62.1 to "issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to...state waters under prescribed conditions." Section 62.1-44.15(5). The State Board of Health also has broad authority to regulate sewage under § 32.1-164; specifically, the Board of Health has the authority to establish "[s]tandards governing disposal of sewage on or in soils" and to require "a permit from the [Health] Commissioner prior to the construction, installation, modification or operation of a sewerage system or treatment works except in those instances where a permit is required pursuant to chapter 3.1 of Title 62.1 of the Code of Virginia." The term "[t]reatment works" is defined to include land that is or will be "used for ultimate disposal of residues or effluents resulting from such [sewage] treatment." Section 32.1-163(6). Both boards, therefore, have broad authority to regulate all aspects of sewage collection, treatment and disposal, including the authority to require certificates or permits to dispose of or discharge sewage on land.

Recognizing these broad and complementary powers, the General Assembly charged the State Department of Health and the State Water Control Board with the duty to promulgate sewage regulations. See § 62.1-44.19(8). In accordance with that requirement, the State Water Control Board and the Department of Health jointly promulgated Sewerage Regulations which became effective February 1, 1977. Those regulations define a sewage sludge as "the solids separated from waste water by unit processes." See Sewerage Regulations, § 101.01(v). I understand "unit processes" to mean the individual steps, such as dewatering, clarification, sedimentation, etc., which comprise an overall treatment process. Thus, the definition of "sewage sludge" encompasses all solid residues from a sewage treatment plant, which is one type of treatment works.
In view of the above, it is my opinion that the processed residue about which you inquire is a sewage sludge, that the land disposal of that sewage sludge is subject to joint regulation by the State Water Control Board and the State Department of Health, and that such land disposal requires a permit or certificate as required by their joint regulations.

1Use of this material on farm land may exceed the scope of permissible use of a specialty fertilizer because a specialty fertilizer is to be distributed primarily for nonfarm use. See § 3.1-75.1(o)(3).

VIRGINIA FREEDOM OF INFORMATION ACT. COMMITTEE APPOINTED PURSUANT TO § 15.1-1132 TO PERFECT CONSOLIDATION AGREEMENT BETWEEN CITY AND COUNTY SUBJECT TO ACT; COMMITTEE MEETINGS MUST BE OPEN.

January 10, 1985

The Honorable William T. Wilson
Member, House of Delegates

This is in reply to your request for my opinion whether the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), applies to a committee of citizens appointed by the circuit court pursuant to § 15.1-1132 to perfect a consolidation agreement between the City of Covington and Alleghany County, and if it does, whether the committee is permitted to discuss matters within its cognizance in executive or closed meetings.

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 a governing body fails 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." (Emphasis added.)

Section 15.1-1132.

By an order entered November 7, 1984, the Circuit Court of Alleghany County appointed five citizens as a committee "to act for and in lieu of the governing body for the City of Covington in perfecting a consolidation agreement and in petitioning for a referendum." The court order denies a motion seeking compensation for the appointed committee. The order goes on to state, however, that "the duties, powers and authority of the committee shall be as provided by law and set forth in the attachment hereto titled 'Charge to the Citizens Committee on Consolidation,'" and by reference makes that document a part of the court's order. The "Charge," among other things, authorizes the committee to expend reasonable sums of money for clerical assistance and supplies,
the costs of which are to be assessed against the City of Covington, and further contemplates the incurring of additional costs for expert, consultant, legal and other services as may be necessary, with the court's approval.¹

The Act applies to any public body as defined in the Act, unless the Act itself² or some other provision of law³ exempts the body. Pursuant to § 2.1-341(a) and (c), the term "public body," for purposes of the Act, includes the following:

"Any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of state institutions of higher education; and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds." (Emphasis added.)

Prior Opinions of this Office hold a variety of organizations which are not governmental agencies in the traditional sense, but which receive primary support for their activities from public funds, to fall within the definition of "public body," quoted above. See, e.g., Opinion to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated November 5, 1984 (Old Dominion University Student Senate); Reports of the Attorney General: 1983-1984 at 447 (Governor's Advisory Board of Economists and Governor's Advisory Board on Revenue Estimates); 1982-1983 at 719 (hospital association), 726 (volunteer fire department); 1977-1978 at 482 (university honor committee); 1975-1976 at 406 and 1974-1975 at 584 (General Professional Advisory Committee, composed of university presidents, established by State Council of Higher Education to serve Council in an advisory capacity).⁴

The committee under consideration here is appointed by circuit court pursuant to a statutory mandate for the purpose of acting "for and in lieu of" a local governing body in perfecting a consolidation agreement as contemplated in Ch. 26 of Title 15.1. Its necessary expenses incurred in performing its statutory function are to be paid out of public funds, pursuant to the court's order. In my opinion, the committee falls within the definition of "public body" contained in § 2.1-341, and it therefore is subject to the Act.

With regard to the second part of your inquiry, § 2.1-343 states that, except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings of public bodies shall be public. There is no provision of law of which I am aware which specifically exempts a committee appointed under § 15.1-1132 from the public meeting requirement,⁵ nor does any exemption in § 2.1-345 apply.⁶ I have examined the list of allowed purposes for executive or closed meetings specified in § 2.1-344, and in my opinion none is sufficiently broad to encompass the committee's discussions as a whole, although individual matters with which it must deal procedurally may well be a proper purpose for a closed meeting.⁷ This conclusion is consistent with the rule that exceptions to the open meeting requirement are to be narrowly construed. See § 2.1-340.1; 1982-1983 Report of the Attorney General at 717.

¹A court has the implied power under the statute to authorize the incurrence and order the payment of such costs. City Council v. Newsome, 226 Va. 518, 311 S.E.2d 761 (1984).
²See § 2.1-345 (the Act's provisions are not applicable to parole boards, petit juries, grand juries or the Virginia State Crime Commission).
³See, e.g., § 15.1-945.7(D) (except for any hearing or meeting specifically required by law, the Act does not apply to the Commission on Local Government).
These advisory boards are no longer subject to the open meeting requirement by virtue of § 2.1-344(a)(12), which was added to the statute by Ch. 473, Acts of Assembly of 1984.

5Note, by way of contrast, Reports of the Attorney General: 1978-1979 at 316 (city mayor's advisory committee not subject to the Act; it "is not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding"); 1974-1975, supra (voluntary association of college presidents, with no official status as creature of State Council of Higher Education and receiving no public funds, is excluded from the Act).

6 Compare § 15.1-945.7(D), recited in supra note 3.

7See supra note 2.

8 Thus, for example, consideration of terms of proposed contractual arrangements with court-authorized consultants, attorneys or other experts, may be a proper purpose for an executive session, under the exemption for "legal matters" provided in § 2.1-344(a)(6). See, e.g., 1982-1983 Report of the Attorney General at 716. The "legal matters" exemption may not be relied upon as a catch-all exemption from the open meeting requirement, however, and must be confined instead to discussions dealing with specific potential legal disputes and specific legal questions confronting the committee. See Reports of the Attorney General: 1982-1983 at 716, 717; 1981-1982 at 432; 1980-1981 at 389.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. SCHOOL BOARDS. EMPLOYMENT CONTRACT OF SUPERINTENDENT INEFFECTIVE UNLESS SCHOOL BOARD RECONVENES IN OPEN SESSION AND REASONABLY IDENTIFIES SUBSTANCE OF CONTRACT.

March 12, 1985

The Honorable Floyd C. Bagley
Member, House of Delegates

You have asked four questions concerning 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 action taken by the Prince William County School Board (the "School Board"), both before and after entering into a contract of employment with the Division Superintendent of Schools (the "Superintendent"). In your letter, you present the facts as follows:

"In multiple executive or closed meetings, the School Board negotiated a written employment contract with the Superintendent employing the latter for a four-year term commencing July 1, 1985. The contract has been signed by the Superintendent, and by the Chairman of the School Board, who purported to be acting on behalf of the School Board.

The employment contract provides that the Superintendent be paid a stated annual salary for the contemplated four-year term. There is a separate provision in the contract—a so-called 'buy-out' clause—whereby the School Board would be obligated to pay the Superintendent a stated sum of money in the event the Superintendent were forced to resign short of serving a full four-year term. The amount stated in the buy-out clause is substantially in excess of one hundred thousand dollars. On January 2, 1985, the School Board duly adopted a resolution to employ, at a stated salary, the Superintendent for a four-year term commencing July 1, 1985. The resolution makes no reference to a written contract between the School Board and the Superintendent; and it does not authorize the School Board Chairman to execute such a contract. No other resolutions of the School Board are relevant to this inquiry."
The School Board has denied a request from the press for access to the written employment contract between the School Board and the Superintendent. It has done so on the theory that the contract is a 'personnel record' within the meaning of § 2.1-342(b)(3) and therefore exempt from disclosure."

I will consider your first two questions together. Those questions are as follows:

"(1) Are the provisions of the employment contract between the Superintendent and the School Board enforceable?

(2) Can the School Board Chairman obligate the School Board by signing a written contract, if the School Board has never adopted a resolution or taken other formal action explicitly authorizing him or her to do so?"

My opinion necessarily is limited to the questions asked and the facts represented.

Section 2.1-343 provides, in part: "Except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings. Minutes shall be recorded at all public meetings." Section 2.1-344 provides, in pertinent part:

"(a) Executive or closed meetings may be held only for the following purposes:

(1) Discussion or consideration of employment...salaries...of public officers, appointees or employees of any public body...."

Clearly, discussion and consideration of the employment of the Superintendent and the terms of his contract were proper subjects for a closed session under the foregoing provision if the required procedure were followed. See 1982-1983 Report of the Attorney General at 713. This section should not be construed, however, to permit the Board, acting in executive session, to actually employ the Superintendent without further action. See 1980-1981 Report of the Attorney General at 386. Whatever action is decided upon in the closed session, the School Board must reconvene in open session and take the formal action required by § 2.1-344(c). That section reads, in part, as follows:

"No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion which shall have its substance reasonably identified in the open meeting."

If the January 2, 1985 action, when the School Board adopted a resolution to employ the Superintendent, was taken in open session, then the action is valid under the Act. If, however, the January 2, 1985 action was taken only in executive session, then it is not effective under the Act. See 1974-1975 Report of the Attorney General at 578.

You state that the January 2, 1985 resolution makes no reference to a written contract between the School Board and the Superintendent, and it does not authorize the School Board Chairman to execute the contract. These facts are the source of your inquiry as to the authority of the School Board Chairman to obligate the School Board on the contract.

Each school board is a body corporate. See § 22.1-71. I presume the School Board has adopted bylaws and regulations for its own government and management of business, as provided in § 22.1-78. As with other corporate bodies, a school board can act only through its duly authorized officers and agents. See Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1974). In this instance, the Chairman signed the employment
contract in his official capacity and was thus the agent through which the School Board acted. It is unnecessary for a corporate board to formally authorize its chairman to sign each individual contract entered into on behalf of the board. General authority is sufficient and is usually found in the bylaws. See Yerby v. Grigsby, 36 Va. (9 Leigh) 387 (1838); Curper v. Cooke, 39 W.Va. 346, 19 S.E. 379 (1894). If the bylaws do contain such general authority, then, in my opinion, the contract executed by the Chairman on behalf of the School Board represents the action of that body, and, if otherwise valid, the School Board is bound by the contract. See Horner v. Holt, 187 Va. 715, 47 S.E.2d 365 (1948).

In sum, I cannot definitively answer your first two questions based on the limited facts presented. As discussed above, any question of the effectiveness of the appointment of the Superintendent, or of the enforceability of the signed contract, turns upon the type of meeting conducted on January 2, 1985, in which the resolution was adopted and, alternatively, upon the authority given the Chairman in the bylaws to act as agent for the School Board in entering contracts.

I now consider your third and fourth questions, which read as follows:

"(3) Is there anything in the Virginia Freedom of Information Act or other laws of the Commonwealth that prevents the School Board from permitting public access to the employment contract in question?

(4) Is the position taken by the School Board consistent with the policy of the Commonwealth 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?" § 2.1-340.1 (emphasis added.)"

The Freedom of Information Act establishes a policy of "ready access to records" and "free entry to meetings of public bodies...." In order to achieve the purposes of the Act, the General Assembly has directed that "it shall be liberally construed...." See § 2.1-340.1. The Act's exceptions are to be narrowly construed and exist to provide a legal basis for not complying with the otherwise applicable requirements of general public access, in certain limited and specified situations. A public body is not obligated to invoke an exception simply because a document falls within an exception to mandatory disclosure. Whether to exercise an exception normally is a decision which rests in the discretion of the governing body. Thus, there is nothing in the Act which "prevents" the School Board from disclosing the employment contract in question.

Turning to your last inquiry, as you indicate, § 2.1-340.1 clearly expresses the legislative policy and purpose of the Act. In addition to the provision quoted in your letter, the section also provides that the Act is to be liberally construed to achieve the purposes of the Act, and "[a]ny exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person." A contract of employment is an official record. The clear implication of that portion of § 2.1-344(c) quoted above, however, is that when the School Board, in open session, votes to ratify or affirm action taken in a lawfully convened executive session, the entire contract need not be made public. But it is equally clear that the substance of the contract must be reasonably identified. While each document must be considered on an individual case-by-case basis, I am also of the opinion that a provision containing a buy-out clause, such as you suggest, must be disclosed under the Act.

In closing, I call your attention to § 22.1-87, which provides a statutory procedure for judicial review of action of a school board, and to § 2.1-346, which provides the statutory procedure for enforcing provisions of the Freedom of Information Act.
Even though all the terms of the contract were not set forth in the resolution, I assume that the School Board approved the terms and has not repudiated the contract executed by the Chairman.

Despite the fact that the action of the School Board may be defective for failure to comply with the Act, and the Chairman may not have had sufficient authority to act on behalf of the School Board, this does not necessarily mean that the official acts of the Superintendent thereafter were void and of no legal effect. It is true that § 2.1-344(c) expressly provides that no resolution or contract, passed or agreed to in executive session, shall become effective unless the public body reconvenes in open meeting and takes a vote on the resolution or contract. Nevertheless, the law is equally clear that an official improperly elected or appointed, due to a failure to comply with the Act, continues as a de facto officer, and his official actions are valid until such time as the legal defect in his election or appointment becomes known. See Reports of the Attorney General: 1979-1980 at 380 (member of planning commission); 1975-1976 at 417 (member of school trustee electoral board); 1974-1975 at 418 (member of social services board); 1972-1973 at 515 (member of county welfare board).

Note also that my opinion is limited to effectiveness of the action due to procedural requirements. I do not have before me the question of the validity of a "pay-out" provision in an employment contract.


VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. WHEN PUBLIC BODY RECONVENES FOR EXECUTIVE MEETING IN DIFFERENT LOCATION, SUCH LOCATION MUST BE PROVIDED TO THOSE PROPERLY REQUESTING NOTIFICATION PURSUANT TO ACT.

October 17, 1984

The Honorable Madison E. Marye
Member, Senate of Virginia

This is in response to your request for my opinion regarding application of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), to two situations involving the Montgomery County School Board (the "Board").

You indicate that the Board is presently engaged in the process of interviewing applicants for the position of superintendent. The candidates have not been publicly identified. Your first inquiry involves a situation in which the Board convened a meeting and then went into executive session for a "personnel matter." You indicate that this executive session did not convene where the public meeting had been taking place but was held instead at an unannounced site. The Board members refused to divulge the location where they met to conduct an interview in executive session. Four hours later the members of the Board reconvened in the original location to adjourn the meeting. You have been informed that although notification of the location of the "continued meeting" was requested, the request was denied by the Board. You inquire whether the Board's refusal to identify the location of the executive session was in violation of the Act.

Section 2.1-343 of the Act states, in part: "Information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information." This mandate must be read in conjunction with § 2.1-340.1, which states that the Act shall be liberally construed to promote public awareness of governmental
activities and that exceptions shall be narrowly construed. See City of Danville v. Laird, 223 Va. 271, 288 S.E.2d 429 (1982). Based upon the clear wording and intent of the Act as adopted by the General Assembly, I must necessarily conclude that the notice provision of § 2.1-343 applies to executive sessions (closed meetings), as well as public meetings, despite the fact that the public may be excluded from the executive session. The phrase "each meeting" applies equally to closed and open meetings despite the fact that the public may be excluded from the executive session. It is my opinion, therefore, that when a public body chooses to adjourn the public meeting and reconvene in executive session, it must provide information as to the time and location of the executive session to those citizens of the State who request such information.

Your second inquiry involves a situation where the Board met, following the earlier meeting, over dinner, with a candidate for the position of superintendent. Board members indicated that the dinner was merely a social gathering and was not an executive or public meeting. The chairman indicated that no school business was being conducted and that only school issues in general were discussed. You inquire whether the Board may meet in such a "social" setting or whether the gathering was a meeting under the Act.

Section 2.1-341 of the Act provides, in part:

"Nothing in [the Act]...shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transacting of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity."

The facts as stated do not show whether the dinner gathering was prearranged or if those attending merely decided to eat together following the meeting. An evidentiary issue is thus presented.

Based upon the limited information contained in your letter, I am unable to formulate an opinion whether a court would view the dinner gathering as a meeting for purposes of the Act. I note, however, that even an informal assemblage of the board members would constitute a meeting under the terms of the Act if part of the purpose of the gathering is the discussion of any public business or if the gathering was prearranged with any purpose of discussing any business of the board. See § 2.1-341(a).

In light of the intent and purpose of the Act as set forth by the General Assembly, I believe it prudent for the Board and every public entity to avoid those situations which may create the appearance of, if not the opportunity for, the private transaction of public business in situations which do not comply with the terms of the Act.

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1The purpose for the executive session is authorized by § 2.1-344(a)(1). The identity of those being discussed in executive meeting need not be disclosed. See Nageotte v. King George County, 223 Va. 259, 288 S.E.2d 423 (1982).

2Even though such notice might tend to negate the purpose for conducting a closed session, I must leave resolution of that problem for possible legislative action.

VIRGINIA FREEDOM OF INFORMATION ACT. EXEMPTIONS. SECURITY INSPECTION SURVEYS AND OPERATION IDENTIFICATION CHECKS SUBMITTED IN CONFIDENCE
November 9, 1984

The Honorable Lindsay G. Dorrier, Jr.
Commonwealth's Attorney for Albemarle County

This is in response to your request for my opinion concerning disclosure of information from security inspection surveys and operation identification checks which is filed with local law enforcement agencies. You specifically inquire whether the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), is applicable to this type of information.

You indicate that the "information" in question takes the form of surveys and reports which are conducted and compiled by community volunteers throughout the Commonwealth. This information is then filed with local police and sheriffs' departments. You state that these documents are filed "in confidence" with the local law enforcement agency.

Section 2.1-342(b)(1) excludes from mandatory disclosure all "reports submitted to the state and local police...in confidence...." Thus, even assuming that the documents constitute official records, as defined in § 2.1-341(b), if the documents in question are submitted in confidence, they are excluded, pursuant to § 2.1-342(b)(1), from the disclosure requirements of the Act.

July 24, 1984

The Honorable Scott Eubanks
Director, Division of Industrial Development

This is in response to your request for my opinion whether Internal Revenue Service Form 8038, required to be filed with the Division of Industrial Development by § 15.1-1377 of the Code of Virginia, is subject to mandatory disclosure under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act"). This Opinion is limited to consideration of the applicability of the Act.

Section 15.1-1377 requires that a copy of Internal Revenue Service Form 8038 be furnished to the governing body of the municipality, and that another copy be sent to the Department of Economic Development (presently the Division of Industrial Development). The language of § 15.1-1377 is mandatory regarding providing a copy of the form. Form 8038 is entitled an "Information Return for Private Activity Bond Issues," as provided in § 103(1) of the Internal Revenue Code.

The Act requires that, except as otherwise specifically provided by law, all official records are to be open to inspection and copying by citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. See § 2.1-342(a). The Act excludes only certain records from this mandate. The exclusions in the Act are enumerated in § 2.1-342(b).
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...in the possession of a public body...in the transaction of public business." See § 2.1-341(b). Clearly, the form contemplated in § 15.1-1377 falls within the definition of an official record. It is material in the possession of a public body in the transaction of public business, subject to mandatory disclosure pursuant to the Act, unless otherwise provided by law or unless it falls within one of the exceptions provided by § 2.1-342(b).

Section 2.1-342(b)(17) states that financial statements which are not publicly available, filed with applications for industrial development financing are excluded from mandatory disclosure. The Act does not define "financial statements," and therefore, the term must be given its meaning consistent with common usage. A financial statement would include a corporation's or individual's assets and liabilities. See In re Dye, 330 F.Supp. 895 (W.D. La. 1971). Such a statement would be any type of report summarizing financial condition or financial results over a period of time or on a certain date. See Black's Law Dictionary 568 (5th ed. 1979). See also State of Oregon v. Wiemals, 62 Or.App. 266, 660 P.2d 702 (1983).

A review of Internal Revenue Service Form 8038 shows that it will not contain the detailed information which would cause it to be classified as a financial statement as described above. Rather, it is an "information return" relating to bond matters. In fact, most of the information is available through other documents which would be contained in the bond transcripts, and those documents would be available to the public. Consequently, the form does not qualify for exemption in § 2.1-342(b)(17).

It is my opinion that none of the exceptions to the Act is applicable to the form about which you inquire. Further, I am not aware of any other law which would protect the form from required disclosure pursuant to the Act. I am, therefore, of the opinion that Internal Revenue Service Form 8038, when filed as part of the industrial approval process, is an official record required to be disclosed in accordance with the terms of the Act.

1The Department of Economic Development, referred to in § 15.1-1377, is established effective September 1, 1984, by Ch. 950, Acts of Assembly of 1984. Prior to September 1, 1984, the Division of Industrial Development will perform the functions of the Department of Economic Development, pursuant to § 15.1-1377.

VIRGINIA FREEDOM OF INFORMATION ACT. "MEETING." TRIAL PREPARATION CONFERENCE ATTENDED BY THREE MEMBERS OF CITY COUNCIL NOT MEETING UNDER § 2.1-341(a).

March 8, 1985

The Honorable William T. Wilson
Member, House of Delegates

You ask whether a violation of the Virginia Freedom of Information Act, §§ 2.1-340.1 through 2.1-346.1 of the Code of Virginia (the "Act"), occurred under the following circumstances: On January 9, 1985, a conference was held in the office of the city manager of the City of Covington, attended by some members of the Covington City Council. The conference had been called by the attorney representing the city in litigation. The attorney's purpose was to prepare two members as witnesses for their
testimony and court appearance the next day. A third member learned of the conference and attended. No notice was given, except to those persons invited to attend.

Your question requires the interpretation of § 2.1-341(a), which reads, in pertinent part:

"(a) 'Meeting' or 'meetings' means the meetings, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members...of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any legislative body...including cities, towns and counties; municipal councils....Nothing in this chapter shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transacting of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity." (Emphasis added.)

Prior Opinions of this Office have concluded that informal gatherings for the purpose of discussing public business are within the ambit of § 2.1-341(a). In each instance, however, there was a physical gathering of the members of the public body, as an entity, for the purpose of deliberating policy or preparing to take action.

It is my opinion that, in the situation which you describe, there was no "meeting" within the ambit of § 2.1-341(a). At the conference in question, only three members of the Covington City Council were present. The purpose of the conference was to prepare two of them as individual witnesses for their impending court appearance. The conference had been called by the attorney representing the city, who suggested which city officials should attend the conference. Inasmuch as the city was a party to the litigation, it is evident that public business was involved. Nevertheless, because the members were not gathered as an entity or even informal assemblage, and because of the absence of the deliberation of policy and the absence of preparation for the taking of action by the city council, I must conclude that there was no meeting under § 2.1-341(a).

This interpretation of § 2.1-341(a), in the situation posited by you, is supported by the decision of the Supreme Court of Virginia in the case, Nageotte v. King George County, 223 Va. 259, 288 S.E.2d 423 (1982).

I have been unable to find any provision of the Charter of the City of Covington which prohibits the gathering of city council members for this type of conference.

Based on the facts you have provided, it is my opinion that the Act was not violated by the conference of January 9, 1985.

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1Reports of the Attorney General: 1977-1978 at 485 (city council and planning commission; discussions of the city's comprehensive plan and growth); 1975-1976 at 411 (city council meeting to discuss allegations that city police were maintaining files on local businessmen); 1974-1975 at 579 (city council meeting to discuss the election of the mayor and vice-mayor), 574 (city council budget discussions with city manager).

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VIRGINIA FREEDOM OF INFORMATION ACT. MINUTES. PLANNING COMMISSION PUBLIC BODY FOR PURPOSES OF ACT AND MUST RECORD MINUTES AT ALL PUBLIC MEETINGS.
October 31, 1984

The Honorable Mitchell Van Yahres
Member, House of Delegates

This is in response to your request for my opinion whether the Albemarle County Planning Commission ("ACPC") is required by Virginia law to record minutes of its meetings.

You specifically cite for my consideration § 15.1-444(d) of the Code of Virginia. This section requires a planning commission to "[k]eep a complete record of its proceedings; and be responsible for the custody and preservation of its papers and documents." The facts which you present indicate that the ACPC has tape recordings and rough notes of its proceedings; however, no formal, written minutes are available at present for the time period of October 1982 through August 1984. The president of Citizens for Albemarle, Inc. has suggested that you propose an amendment to § 15.1-444(d), requiring planning commissions to keep "minutes" of all proceedings.

All public bodies are required by law to record minutes at all public meetings. See § 2.1-343, a part of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act"). The ACPC is a "public body" for purposes of the Act and is, therefore, subject to the requirements of the Act. See § 2.1-341(a), (e). The General Assembly has determined that the provisions of the Act are to be liberally construed so that citizens are afforded the opportunity to witness the operations of government. See § 2.1-340.1; see also 1979-1980 Report of the Attorney General at 236. It is my opinion, therefore, that in addition to the record-keeping requirements of § 15.1-444(d), the ACPC must keep minutes of all public meetings in order to meet its obligation under the Act. See 1978-1979 Report of the Attorney General at 313.

The Act does not specify the form "minutes" must take. In the absence of statutory direction to the contrary, tape recorded minutes would comply with the requirements of the Act, inasmuch as recording is an acceptable method of memorializing a meeting. See 1983-1984 Report of the Attorney General at 441. Section 2.1-341(b) defines "official records" as being inclusive of tapes and sound recordings; hence, applies to recorded minutes of a meeting. It should be noted, however, that § 2.1-342(a) requires a public body to make official records available for copying, as well as inspection. Such a requirement should be considered by a public body when determining the form for preparing minutes of its proceeding.

VIRGINIA FREEDOM OF INFORMATION ACT. PUBLIC AGENCY NOT REQUIRED TO PROVIDE OFFICIAL RECORDS IN SPECIFIC MANNER REQUESTED.

September 25, 1984

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

You have asked whether a clerk of court is required to collect and store data in a particular manner in order to comply with a citizen's exact request pursuant to the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). Specifically, you inquire whether you must store judgment data on magnetic tapes and make available copies of such tapes at the request of a citizen when the information is available in another form for public review during business hours.
You indicate that the judgment data requested is available during business hours. You do not indicate what form this available data takes; however, for purposes of this Opinion, I will assume that the data is available in an understandable form (i.e., typed record, computer printout). I will also assume that the data available in conventional form may be copied at the expense of the requestor.

Section 2.1-342(a) requires that public records subject to mandatory disclosure be made available to any citizen requesting them, unless otherwise specifically provided by law. These official records are open for "inspection and copying...during the regular office hours of the custodian...." See § 2.1-342(a). A reasonable charge for copying and search time may be requested by the public body.

The Act does not require a public body to create a particular record if such does not already exist. See 1982-1983 Report of the Attorney General at 727. See also 1983-1984 Report of the Attorney General at 436. Similarly, the Act does not require a public body to convert an official record available in one form into another form at the request of a citizen. It is my opinion that so long as a public body makes the record available to the requesting citizen to review or copy, the public body is in compliance with the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS HELD BY COMMISSIONER OF REVENUE PERTAINING TO TAX EXEMPTIONS FOR REHABILITATED BUILDINGS NOT GENERALLY SUBJECT TO MANDATORY DISCLOSURE DUE TO CONFIDENTIALITY PROVISIONS OF § 58.1-3.

May 31, 1985

The Honorable Alma Leitch
Commissioner of the Revenue for the City of Fredericksburg

You have asked whether records held by you as Commissioner of the Revenue for the City of Fredericksburg pertaining to rehabilitated residential, commercial and industrial property that has qualified for a partial exemption from city real estate taxes are subject to mandatory disclosure under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You state that the partial exemptions are granted to qualifying properties under §§ 58.1-3220 and 58.1-3221.

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 records in question are clearly within the statutory definition of official records. See § 2.1-341(b).

Records held by commissioners of the revenue are subject to the general confidentiality provision of § 58.1-3, which reads, in pertinent part:

"A. Except in accordance with proper judicial order or as otherwise provided by law, the Tax Commissioner or agent, clerk, commissioner of the revenue, treasurer, or any other state or local tax or revenue officer or employee, or any former officer or employee of any of the aforementioned offices shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation....Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor. The provisions of this subsection shall not be applicable, however, to:
1. Matters required by law to be entered on any public assessment roll or book.

   * * *

4. The sales price, date of construction, physical dimensions or characteristics of real property, or to any information required for building permits. (Emphasis added.)

Thus, a broad proscription against a commissioner of the revenue disclosing information obtained in the course of his public duties is created by § 58.1-3. Absent an exception, a commissioner may not disclose any information about transactions, property, income, or the business affairs of a person or entity. See 1981-1982 Report of the Attorney General at 377. Certain tax exemption information is a public record pursuant to § 58.1-3604 and, therefore, falls within the exception to the nondisclosure provision of § 58.1-3 for matters required by law to be entered on a public book. Section 58.1-3604 reads:

"The appropriate county, city or town assessing officer shall make and maintain an inventory and assessment of all tax-exempt real property and all such property immune from real estate taxation within his county, city or town, excluding streets, highways and other roadways. Such official shall identify such property by a general site description indicating the owner thereof and report such information on the land book along with an assessment of the fair market value of such property, the total assessed valuation for each type of exemption and a computation of total tax which would be due if such property were not exempt. A total of such assessed valuations and a computation of the percentage such exempt and immune property represents in relation to all property assessed within the county, city or town shall be published annually by such local assessing officer and a copy thereof shall be filed with the Department of Taxation on forms prescribed by the Department. All costs incurred pursuant to this section shall be borne by the county, city or town." (Emphasis added.)

Prior Opinions of this Office have concluded that § 58-46 (the statutory predecessor to § 58.1-3) protected information held by the commissioner of the revenue not subject to public use or scrutiny under other statutes. Information concerning the income and net worth of elderly persons contained in applications for an exemption from local real estate taxes has been determined to be confidential under § 58-46. 1976-1977 Report of the Attorney General at 277. Finally, information contained in applications for a revision of real property assessments (fair market value, cost of construction, amount of fire insurance carried) has been found to be confidential. 1970-1971 Report of the Attorney General at 353.

In order to qualify for the exemption under §§ 58.1-3220 and 58.1-3221, the property must meet detailed standards concerning location, age of buildings and value before and after rehabilitation. The application for the exemption must contain this type of detailed information. Information contained in your records concerning those rehabilitated properties which have qualified for the exemption must be disclosed only if the information is a matter of public record. Information that is a matter of public record includes that information set out in § 58.1-3604, information found on property appraisal cards, information required for building permits, and matters required by law to be entered on any public assessment roll or book. Information contained in your records concerning rehabilitated properties that is not a matter of public record is confidential under § 58.1-3 and should not be disclosed.

Section 58.1-3331.

Section 58.1-3(A)(4).

Sections 58.1-3(A)(1), 58.1-3220(C), and 58.1-3221(C).

VIRGINIA FREEDOM OF INFORMATION ACT. STUDENT SENATE OF STATE UNIVERSITY SUBJECT TO ACT.

November 5, 1984

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

This is in response to your request for my opinion whether the Student Senate of Old Dominion University ("ODU") is subject to the requirements of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

You indicate that the Student Senate controls a budget of approximately $139,000, and that such funds are generated from fees charged to the students. The Student Senate allocates funds to the various student organizations and is responsible for the general management of the student government. The role and responsibilities of the Student Senate are outlined in a Constitution and Bylaws.

The Act requires public officials and public bodies to comply with certain disclosure and public access requirements. See § 2.1-340.1 et seq. For purposes of the Act, a public body is defined, among others, as any organization in the Commonwealth which is "supported wholly or principally by public funds." See § 2.1-341(a), (e). On several prior occasions, this Office has considered the applicability of this section to organizations which are not State agencies in the strictest sense. For example, the University of Virginia Honor Committee was held to be subject to the Act. See 1977-1978 Report of the Attorney General at 482. Similarly, a hospital association and volunteer fire department, supported principally by public funds, were held to be subject to the Act. See 1982-1983 Report of the Attorney General at 719 and 726. Conversely, a voluntary association of college presidents, receiving no public funds, was held to be excluded from the Act. See 1974-1975 Report of the Attorney General at 584.

The Act does not provide a definition of "public funds." Applying the common usage to the term, it would include any moneys owned by government in the hands of government agencies or officials. Although generated from student fees, I assume that, as collected, the fees are paid into the State treasury as required by § 2.1-180, and are included in the budget of the Vice-President for Student Affairs. I am of the opinion that when the money enters the system in this manner, it becomes "public funds." See § 2.1-180; Alvey v. Brigham, 286 Ky. 610, 150 S.W.2d 935 (1940).

Section 2.1-340.1 indicates the General Assembly's clear intent that the Act be liberally construed in favor of public awareness and access to the operations of government. Exceptions are to be narrowly construed in order that nothing which should be public is kept in secret. Although a State university's student senate is not a governmental agency in the traditional sense, it does fall within the definition established by the General Assembly in the Act. See 1977-1978 Report of the Attorney General at 483. I can find no exception in the Act for such a student-run organization.
It is, therefore, my opinion that the Student Senate of ODU is subject to the requirements of the Act.

VIRGINIA PUBLIC PROCUREMENT ACT. PROFESSIONAL SERVICES. COMPETITIVE NEGOTIATION. VOIDABILITY OF IMPROPERLY PROCURED CONTRACTS.

August 29, 1984

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

This is in reply to your request for my opinion pertaining to procurement of professional services under the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act").

Your first inquiry is whether the method for procurement of professional services described in § 11-37, paragraph (3a), under the definition of "competitive negotiation," is mandatory for local governing bodies where the cost of such services is expected to exceed $20,000, or whether local governing bodies may adopt alternative methods for procurement of such services.

Section 11-35(D) provides that, subject to certain limitations and except as stated in § 11-35(E), localities may adopt alternative procurement policies based upon competitive principles. Section 11-35(E) is a limitation on the general authority conferred by § 11-35(D), and mandates compliance with certain specified sections of the Act. Section 11-35(E) was amended in 1984 to further qualify this authority to adopt alternative procedures by requiring that:

"The method for procurement of professional services set forth in paragraph 3(a) of § 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed $20,000." (Emphasis added.)

The word "also" in this sentence means that it applies in addition to those other sections made mandatory in the first sentence of § 11-35(E). Therefore, like those sections, it is also mandatory.

In view of the now clear mandate in subsection (E) of § 11-35, I am of the opinion that counties, cities, school divisions and towns with populations exceeding 3,500 must procure professional services expected to cost more than $20,000 by the competitive negotiation method for professional services set forth in § 11-37, and that they may not adopt alternative methods for procurement of such services expected to exceed that amount.

Your second inquiry is whether, when using the foregoing method for procurement of professional services, local governing bodies are allowed to ask for written proposals or nonbinding estimates of costs for professional services at any time prior to individual discussions with offerors.

Before answering this question, it will be helpful to outline briefly the steps mandated in § 11-37 for the competitive negotiation procedure for procurement of professional services:
First, the locality issues a written Request for Proposal which must contain certain specified information concerning the project.

Second, public notice of the Request for Proposal must be given for at least ten days.

Third, the potential offerors make initial written responses.

Fourth, the locality reviews the initial responses with emphasis on professional competence to determine who is "fully qualified, responsible and suitable."

Fifth, the locality engages in individual discussions with two or more offerors whom it has determined are fully qualified.

Sixth, the locality evaluates all information developed in the selection process on the basis of the evaluation factors set forth in the Request for Proposal, and rank in order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Seventh, negotiations shall then be conducted beginning with the offeror ranked first and, if a contract satisfactory and advantageous to the locality can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror.

"At the discussion stage [step five above], the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services." (Emphasis added.)

Section 11-37(3a).

The foregoing provisions clearly direct public bodies to first evaluate offerors of professional services on the basis of their professional competence and proposed services, rather than the cost of those services. Nonbinding estimates of cost may be solicited prior to actual negotiations, but not before the discussion stage, as an aid in subsequently ranking the offerors. After the offerors are ranked and negotiations are begun with the offeror ranked first, a binding fee proposal may be discussed. Inasmuch as this procedure is mandatory in the situations indicated above, I am of the opinion that your inquiry must be answered in the negative.

Your third inquiry is whether State agencies may ask for written fee proposals or nonbinding estimates of cost for professional services prior to individual discussions with offerors.

The Act, in § 11-41, provides that "[a]ll 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." It further provides that "[p]rofessional services may be procured by competitive negotiation." (Emphasis added). State agencies must comply with either the procedure for competitive sealed bidding or that for competitive negotiation in any procurement transaction. The Act does not prohibit the award of a contract for professional services by a State agency through competitive sealed bidding. Nevertheless, if a State agency elects to contract for professional services through competitive negotiation, it would follow the procedure prescribed in § 11-37 under the definition of competitive negotiation, and it would be bound by the same limitations applicable to local governing bodies. Therefore, based upon my response to your second inquiry, I am of the opinion that State agencies and institutions may not ask for written fee proposals or nonbinding estimates of cost prior to
individual discussions with offerors when procuring professional services by competitive negotiation.

Your final inquiry is whether a contract entered into in violation of the provisions of §§ 11-35 and 11-37 is void or voidable, and you ask who would have standing to contest the award of such a contract.

The General Assembly has clearly provided the method for such contests, and they obviously must be in accordance with the statutorily prescribed procedure. Article 3 of the Act, §§ 11-63 through 11-71, establishes the limited remedies which are available to aggrieved bidders and offerors. Specifically, § 11-66 permits "[a]ny bidder or offeror" to protest the award or decision to award a contract by submitting a written protest to the public body. If the public body determines that "the decision to award is arbitrary or capricious" and the contract has already been awarded, but performance has not begun, "the performance of the contract may be enjoined." Id. If performance has begun, "the public body may declare the contract void upon a finding that this action is in the best interest of the public." Id.

A bidder or offeror who is dissatisfied with the public body's decision on a protest under § 11-66 may seek judicial review of the same pursuant to § 11-70(C), which provides:

"A bidder, offeror or contractor may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the Invitation to Bid or Request for Proposal."

Finally, § 11-67 provides that "[p]ending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by the fact that a protest or appeal has been filed." In view of the foregoing provisions which preserve the integrity of a contract which has been awarded, unless and until its performance is enjoined, I am of the opinion that a contract awarded in violation of §§ 11-35 or 11-37 is voidable, not void ab initio. Even in the absence of § 11-67, if a public body has the authority to enter into a particular type of contract, but fails to do so in a procedurally correct manner, the contract would not be void ab initio, but would, at most, be voidable. Lack of authority to enter into a contract or particular contract clause, on the other hand, will make it ultra vires and, therefore, void ab initio. Deal v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983).

I am of the further opinion that the remedial provisions of Art. 3 confer standing to protest or appeal an award or decision to award only upon an actual participant to the procurement proceedings, which is limited to a bidder, offeror or contractor. Public bodies, of course, also have standing to appeal to the courts from adverse decisions of an administrative appeals panel made pursuant to § 11-71.

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1Section 11-37(3a) provides: "The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of
price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this paragraph above, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.  

For procurement of professional services not expected to exceed $10,000, § 11-41(F) permits both State agencies and local governing bodies to establish "small purchase" procedures which need not include either competitive sealed bidding or the "professional services" form of competitive negotiation.

The Commonwealth's Capital Outlay Manual prescribes use of competitive negotiation for the procurement of architectural and engineering services on capital outlay projects.

VIRGINIA PUBLIC PROCUREMENT ACT. PUBLIC CONTRACTS. SCHOOLS.

March 21, 1985

The Honorable Frederick H. Creekmore
Member, House of Delegates

You have requested my opinion on the applicability of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"), to contracts between public schools and private businesses which sell goods, such as class rings and graduation announcements, or services for purchase by students or their parents.

Whether a contract must be procured in accordance with the Act depends upon whether it is one of those contracts described in § 11-41(A). Section 11-41(A) provides that "all public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services...shall be awarded after competitive sealed bidding or competitive negotiation...unless otherwise authorized by law." Although the term "public contract" is not specifically defined in the Act, the Act is structured upon the premise that the "public contracts" referred to in § 11-41(A) are contracts entered into by "public bodies." A school division, and therefore any school within the division, falls within the definition of "[p]ublic body" found in § 11-37. The private business firms with which the school divisions deal are, of course, "nongovernmental contractors." Therefore, if a public body, such as a school, enters into a contract with a private business for the purchase of goods or services, § 11-41(A) requires that the contract be awarded only after competitive sealed bidding or competitive negotiation, unless there is another applicable exception authorized by law.

From your letter, it appears that the schools enter into contracts with private businesses and the terms of the contract specify what goods and services will be made available to the school's students, as well as the prices to be paid by the students, and when the rings, photographs or announcements will be delivered. The school makes all
the arrangements with the vendor. As with the contracting for college bookstore
operators, this is tantamount to the purchase of goods and services by the school, even
though the students and their parents may actually make payments directly to the
vendor. See 1983-1984 Report of the Attorney General at 290. Accordingly, it is my
opinion that such contracts are public contracts for the purchase of goods and services
and are subject to the Act. 1

Although these contracts are of the type to which the Act does apply, there may be
applicable exceptions to the requirement for competitive sealed bidding or competitive
negotiation. There are undoubtedly numerous instances in which the total purchases
would be under $10,000, thereby permitting the use of small purchase procedures
pursuant to § 11-41(F), if the school division has previously adopted small purchase
procedures in writing.

Because these contracts are subject to the Act, you ask also whether the low bid
price for the product or service must be the sole criterion in awarding a contract, or
whether quality, service to the buyer, reputation, reliability, and delivery schedule are
also relevant factors to be considered.

Although § 11-41(A) establishes competitive sealed bidding as the basic method by
which goods and services are to be procured by public bodies, § 11-41(C) provides that
goods and services may be procured by competitive negotiation, if "competitive sealed
bidding is either not practicable or not advantageous to the public...."

In competitive sealed bidding, factors such as the characteristics of the goods, level
of quality, the required delivery dates, etc., are set forth in specifications drawn by
the public body, and a responsive bid must comply with the specifications.

With competitive negotiation, the public body obtains greater flexibility in
evaluating the prospective contractor and the goods and services offered. Price may be
a factor to be considered in evaluating the various offers, but, unlike competitive sealed
bidding, the contract need not be awarded to the offeror with the lowest price, even if
its product and other qualifications would meet the public body's minimum
requirements. Rather, it is awarded to the offeror making the best overall proposal,
considering all factors, including price. I am, therefore, of the opinion that factors other
than price may be considered in awarding contracts, whether in the specifications or in
negotiations.

You should also note that for antitrust law purposes the school may be deemed to be
acting as an intermediary for the students with an obligation to act in the students' best

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM. BOARD OF SUPERVISORS NOT
ELIGIBLE TO PARTICIPATE.

July 13, 1984

The Honorable John H. Tate, Jr.
County Attorney for Smyth County

You have asked whether an elected member of the Board of Supervisors of Smyth
County can qualify for participation in the Virginia Supplemental Retirement System
Section 51-111.31(a) of the Code of Virginia, relating to the participation of localities in VSRS, provides, in pertinent part:

"The governing body of any county, city or town...may, by resolution legally adopted and approved by the [VSRS] Board, elect to have those of its officers and employees who are regularly employed full time on a salary basis...become eligible to participate in the retirement system...."

Section 51-111.10:01(21) defines "[l]ocal officer" as "the treasurer, commissioner of the revenue, Commonwealth's attorney, clerk of a circuit court, sheriff, or constable, of any county or city, or his deputy or employee...." Sections 14.1-46.01 and 14.1-46.01:1 authorize boards of supervisors to grant to their members "any or all of the fringe benefits in the manner and form as such benefits are provided for county employees or any of them." See § 14.1-46.01:1(4).

The ability of officers and employees of a local governing body to participate in VSRS is dependent on both the decision of the governing body to authorize participation through resolution and approval by the VSRS Board. Although §§ 14.1-46.01:1 and 14.1-46.01 allow the governing body to grant to its members any of the fringe benefits which it in its own discretion has authority to convey upon its officers and employees, participation in VSRS by members of the board of supervisors still must be approved by the VSRS Board. Neither Title 51 nor Title 14.1 contains provisions which would override the necessity of approval by the VSRS Board and require automatic inclusion of members of the boards of supervisors in VSRS upon a resolution properly adopted by the board of supervisors.

It is an elementary rule of statutory interpretation that the construction given to a statute by public officials charged with its enforcement is entitled to great weight and, in doubtful cases, will be regarded as decisive. Bed Company v. Corporation Commission, 205 Va. 272, 136 S.E.2d 900 (1964), citing Commonwealth v. Appalachian Electric Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951). VSRS has consistently held that members of a board of supervisors do not meet the requirements of full-time employment within the meaning of § 51-111.31(a). Consequently, VSRS has construed this statute to exclude members of a board of supervisors from participation in VSRS.

The Supreme Court of Virginia has also held that the legislature is presumed to be cognizant of the agency's construction, and when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced therein. Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965), citing Smith v. Bryan, 100 Va. 199, 40 S.E. 652 (1902). The legislative authorization to boards of supervisors allowing them to grant their members any or all of the fringe benefits received by county employees was added to § 14.1-46.01 in 1978. Chapter 572, Acts of Assembly of 1978. That authorization has not been changed by the legislature, even though the VSRS Board has maintained its interpretation of the full-time employment requirement as applied to boards of supervisors since 1952.

Section 14.1-46.01:1 was added by the 1984 General Assembly and carried forward virtually the same language regarding fringe benefits for members of the boards of supervisors as already contained for a number of years in § 14.1-46.01. In light of the fact that the General Assembly has not made any attempt to alter the interpretation of VSRS regarding inclusion of members of the board of supervisors in the State Retirement System, it is my opinion that members of the board of supervisors are not eligible to participate in the Virginia Supplemental Retirement System. As indicated above, the provisions of §§ 14.1-46.01 and 14.1-46.01:1 must be regarded as permitting the board members to enjoy those fringe benefits which they, in their sole discretion, have the authority to convey upon officers and employees.
The Honorable Jay W. DeBoer  
Member, House of Delegates

This is in reply to your inquiry concerning the group life insurance program provided to State employees and participating localities. You first asked whether the Virginia Public Procurement Act, § 11-35 et seq. of the Code of Virginia ("Procurement Act") is applicable to the procurement of group insurance for this program. You also ask whether localities, which have previously elected to participate in the group insurance program, may discontinue participation and procure separate coverage for their employees and officers.

With regard to your first question, § 51-111.67:1 provides that the Virginia Supplemental Retirement System ("VSRS") Board of Trustees is specifically authorized to purchase a contract or contracts of life, accidental death and dismemberment insurance, including reinsurance, for those eligible employees and officers enumerated in § 51-111.67:2. Section 51-111.67:1 also includes various requirements for these insurance contracts, including the mandate that insurance shall be carried with a life insurance company "which shall have been determined by the Board to maintain in the Commonwealth sufficient staff and facilities to efficiently administer and service such insurance." The remaining provisions of Art. 9 of Title 51 also contain numerous other requirements for any group life and accident insurance contract. For example, Art. 9 establishes who shall be eligible for coverage, the amounts of life and accident insurance, and the contribution rates. See §§ 51-111.67:1 through 51-111.67:12.1.

Section 11-41(A), a portion of the Procurement Act, provides that all public contracts with nongovernmental contractors for the purchase of insurance "shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law." Section 11-41(B) through (F) provides alternative methods of procurement under certain circumstances. Section 11-35(F) further provides that the provisions of the Procurement Act shall apply to contracts entered into on or after January 1, 1983.

The foregoing provisions of Titles 51 and 11 are in pari materia, that is, related to the same subject. Accordingly, they must be construed together. 1983-1984 Report of the Attorney General at 289.

In this light, insurance contracts, including contracts for group life and accidental death and dismemberment, entered into on or after January 1, 1983, by covered public bodies, are subject to the Procurement Act, including the purchasing methods enumerated in § 11-41(A) through (F). There is no exemption for VSRS. These procurements by VSRS, however, must also conform with the statutory specifications for group life, accident and dismemberment insurance contained in Art. 9 of Title 51.

With regard to your second question, the General Assembly provided for political subdivisions of the State to participate in the group life, accidental death and dismemberment insurance program which became effective on July 1, 1960.
Section 51-111.67:3 provides that political subdivisions that have separate group life insurance may discontinue separate coverage and participate in the State program. Participation, however, is specifically conditioned upon Board approval and discontinuance of the separate coverage. Based on the foregoing, political subdivisions which participate in the VSRS retirement program as provided in § 51-111.31 et seq. are eligible to participate in the group insurance program.\(^1\) Political subdivisions with a separate insurance program, however, must forego that coverage in order to participate in the State program.

Once a political subdivision has elected to participate, Art. 9 provides a specific method for termination of coverage by individual employees and officers. See § 51-111.67:4(d) and (e).\(^2\)

With a single exception, there are no provisions to allow an employer group to withdraw once it has elected to participate. Section 51-111.67:2(4) provides, in part:

"After June 30, 1982, educational corporations may elect, upon such terms and conditions as the Board may determine, to discontinue all insurance under this article with respect to all of its employees in service."

No other employer group enumerated in § 51-111.67 is granted authority to discontinue participation in the State program.

In light of the foregoing, while a political subdivision may initially decline to participate, it is my opinion that once a political subdivision has entered into the State program, it is not authorized thereafter to discontinue its participation. The aforementioned § 51-111.67:4, however, does provide for termination of individual employee coverage under certain circumstances.

\(^1\)Section 51-111.67:2(3)(b) further provides that regular full-time employees of a political subdivision who participate in the retirement program after June 30, 1962, may, subject to Board approval, participate in the group insurance program provided that seventy-five percent of the eligible employees participate in the program. This section also limits the eligible group to employees under the age of seventy.

\(^2\)Section 51-111.67:8 also provides that an employee of a political subdivision may decline participation by notifying his employer prior to the initial date of coverage. That individual may thereafter become insured "only upon presentation at his own expense of evidence of insurability satisfactory to the insuring company."

VIRGINIA WORKERS' COMPENSATION ACT. LAW ENFORCEMENT OFFICERS EMPLOYED BY VIRGINIA WESTERN COMMUNITY COLLEGE NOT ENTITLED TO PRESUMPTION PROVIDED BY § 65.1-47.1.

October 15, 1984

The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked whether a person employed by Virginia Western Community College as Chief of Police is entitled to the presumption afforded by § 65.1-47.1 of the Code of Virginia.
Section 65.1-47.1, a part of the Workers' 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.)

Section 51-145 provides that membership in the State Police Officers Retirement System ("SPORS") shall consist of all persons who were State police officers on July 1, 1950, and all persons who became State police officers after July 1, 1950. Consequently, the person in your example would not be eligible for the presumption as a member of SPORS. The person in your example is an employee of Virginia Western Community College and is not a member of the State Police Officers Retirement System or of a county, city or town law enforcement department. The fact that the individual has been appointed as a special policeman does not change this conclusion.

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 officer in the present case is not a member of SPORS or of any county, city or town law enforcement department enumerated in § 65.1-47.1, I must necessarily conclude that he is not entitled to the hypertension presumption provided by the statute. For a similar conclusion involving persons employed as law enforcement officers by the Chesapeake Bay and Bridge Commission, see 1983-1984 Report of the Attorney General at 462.1

1The Virginia Industrial Commission has reached a similar conclusion involving corrections officers for the Department of Corrections. See Nicholson v. Commonwealth, Claim No. 108-18-09.

VIRGINIA WORKERS' COMPENSATION ACT. SALARIED AND VOLUNTEER FIRE FIGHTERS ENTITLED TO REBUTTABLE PRESUMPTION IN § 65.1-47.1.

September 26, 1984

The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked whether the presumption relating to death or disability from respiratory disease, hypertension or heart disease contained in the Workers' Compensation Act, §§ 65.1-1 through 65.1-163 of the Code of Virginia, applies to fire fighters. Section 65.1-47.1 provides, in pertinent part:

"The death of, or any condition or impairment of health of, salaried or volunteer fire fighters caused by respiratory diseases, and the death of, or any condition or impairment of health of, salaried or volunteer fire fighters...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 [Workers' Compensation] Act unless the contrary be shown by a preponderance of competent
In view of the clear applicability of the foregoing, I am of the opinion that salaried and volunteer fire fighters are entitled to the rebuttable presumption, subject to the qualifications enumerated in § 65.1-47.1. For decisions applying the statute, see County of Amherst v. Brockman, 224 Va. 391, 297 S.E.2d 805 (1982); Fairfax Fire Ser. v. Newman, 222 Va. 535, 281 S.E.2d 897 (1981).

WASTE DISPOSAL. TOWNS. COUNTIES. COUNTY MAY NOT CHARGE TOWN PROPORTIONATE OPERATING COSTS OF COUNTY LANDFILL WHEN TOWN DOES NOT USE COUNTY LANDFILL.

February 14, 1985

The Honorable Claude W. Anderson
Member, House of Delegates

This is in reply to your request for my opinion whether a town which operates a sanitary landfill on property it owns in the surrounding county is obligated to pay to the county a proportionate share of the cost of a separate landfill owned and operated by the county. You relate that the county insists the town must pay a proportionate share of the yearly cost of the county landfill operation, pursuant to § 32.1-183 of the Code of Virginia, even though the town does not use that landfill.

The relevant portion of § 32.1-183 reads as follows:

"Until such date as a county, city or town becomes subject to a regional solid waste management plan, such county, city or town shall be responsible for implementation of a local solid waste management plan which meets such standards as may be prescribed by the Board by regulation.

If a county levies a consumer utility tax and the ordinance provides that revenues derived from such source, to the extent necessary, be used for solid waste disposal, the county may charge a town or its residents, establishments and institutions an amount not to exceed their pro rata cost, based upon population for such solid waste management if the town levies a consumer utility tax." (Emphasis added.)

A number of prior Opinions of this Office have construed this section and its predecessor, and have established the following: The statute specifically requires that each county, city and town implement a local solid waste management plan in the absence of a regional plan. The requirement is for a separate plan, not necessarily separate facilities, and a town may establish and operate its own solid waste facility or use the county's. The county may charge a town for disposal of solid wastes in its landfill only if three conditions are met: (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: 1983-1984 at 89; 1980-1981 at 397; 1978-1979 at 65; 1974-1975 at 383; 1973-1974 at 91; 1972-1973 at 124, 459.

I am not advised whether the three conditions listed above have been met. Even if they have been met, however, it is clear from examination of the above Opinions that the obligation placed upon a town is either to establish and operate its own separate landfill, establish and operate a landfill jointly with the county, or make use of the county's
separate landfill. In my opinion, the statute cannot reasonably be construed to require a town, which operates its own landfill, to, at the same time, financially support the county's separate landfill which the town does not use. Compare 1980-1981 Report of the Attorney General at 123 (no statute authorizes a county to impose mandatory garbage pickup and disposal service). Accordingly, your inquiry is answered in the negative.

1See former § 32-9.1.
2This conclusion is consistent with the legislative history of the statute. Section 32-9.1, prior to its amendment in 1974, provided that "[e]ach county, city and town shall be responsible for the proper disposal of its solid wastes...." It was amended in 1974 to remove this mandatory requirement from the towns, giving each town the option of either using the county's landfill or of providing its own method of disposal independent of the county. At the same time, the present last paragraph of § 32.1-183, quoted above, was added, establishing the three conditions which must be met before the county may charge a town for "such solid waste management" as it provided the town, that is, for the town's use of its facility. (The actual words used at that time were "such solid waste disposal.") See Ch. 628, Acts of Assembly of 1974. In the recodification of 1979, the language relating to county charges was carried forward intact, but at the same time, the language was added making it again mandatory for each town to implement its own disposal plan, in the absence of a regional plan. See Ch. 711, Acts of Assembly of 1979.

WATER. SCENIC RIVERS ACT. DESIGNATION OF PORTION OF RIVER DOES NOT DIRECTLY AFFECT RIGHTS TO USE WATER IN DOWNSTREAM UNDESIgnATED PORTIONS, BUT ADVERSE IMPACTS ON LATTER FROM OUTSIDE COULD FRUSTRATE LEGISLATIVE PURPOSE.

November 7, 1984

The Honorable Robert W. Ackerman
Member, House of Delegates

You have advised that the City of Fredericksburg uses a reservoir on the Rappahannock River in Spotsylvania County as its water source. You also advised that a section of that river above the city's reservoir is under consideration for designation as a scenic river under the Scenic Rivers Act, § 10-167 et seq. of the Code of Virginia. You have asked whether such designation would affect the existing rights of the city as well as the potential rights of Spotsylvania County to impound or draw water from the river at a later date.

While each legislative designation of a scenic river varies slightly from the others, all are subject to § 10-174, which provides:

"After designation of any river or section of river as a scenic river by the General Assembly, no dam or other structure impeding the natural flow thereof shall be constructed, operated, or maintained in such river or section of river unless specifically authorized by an act of the General Assembly." (Emphasis added.)

If the existing or proposed impoundment in question is not located on the section of the Rappahannock currently under consideration for scenic designation, it is my opinion that the emphasized language of § 10-174 would preclude the need for legislative approval of the water uses you described. Nothing in this statute would specifically
prohibit otherwise lawful impoundments downstream from the designated section or lawful drawing of water from the river in the manner you outlined.

Conversely, if the reservoir or proposed dam is located within the designated section of the river, the statute clearly requires subsequent authorization by act of the General Assembly. Moreover, it is possible that an impoundment or other water use located outside the designated section could have an impact so substantial as to frustrate the legislative purpose of scenic designation and effectively destroy the river as a scenic resource. If that should happen, the agency having responsibility for management of the river may seek to initiate appropriate action to minimize such impact. The outcome of such a case would necessarily depend on its particular facts.

WATER AND SEWER AUTHORITIES. EXEMPTIONS TO MANDATORY CONNECTION MUST BE GRANTED TO BOTH COMMERCIAL AND RESIDENTIAL USERS WHO QUALIFY FOR SAME UNDER § 15.1-1261.

May 2, 1985

The Honorable R. Beasley Jones
Member, House of Delegates

You have asked whether the Dinwiddie County Water Authority should grant exemptions from mandatory connection to its water lines to commercial users, as well as residential users, in certain circumstances. You state that residential users having a preexisting potable source of water are exempt from mandatory connection. The water authority is extending one of its lines, and the question has arisen as to whether a commercial user is entitled to the same exemption as a residential user.

Your inquiry requires a review of the statutory scheme of § 15.1-1261 of the Code of Virginia, a part of the Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270. The first paragraph of § 15.1-1261 provides that any owner or occupant of property abutting a street or public way containing a water main shall, if required by the rules and regulations of the water and sewer authority, connect any residential, commercial or industrial building on such property to the public water main and shall cease to use any other source of water supply for domestic use.

The second paragraph of § 15.1-1261 provides, in pertinent part:

"[T]hose persons having a domestic supply or source of potable water shall not be required to discontinue the use of same. However, persons not served by a water supply system as defined in § 15.1-341 producing potable water meeting the standards established by the Virginia Department of Health may be required to pay a connection fee...."

Prior to amendment in 1982, the second paragraph of § 15.1-1261 read: "[T]hose persons having a domestic supply or source of potable water shall not be required to discontinue the use of same, but may be required to pay a connection fee...." In my opinion, the amendment of 1982 indicates a legislative intent that certain users be exempt from mandatory connection to water authority lines. The users so exempted are persons served by the water supply system, as defined by § 15.1-341, "producing potable water meeting the standards established by the Virginia Department of Health...."

Section 15.1-341 reads, in pertinent part:
"Any person, firm, corporation, including municipal corporations, or association who or which proposes to establish a water supply consisting of a well, springs, or other source and the necessary pipes, conduits, mains, pumping stations, and other facilities in connection therewith, to serve or to be capable of serving three or more connections shall notify the State Board of Health and shall notify in writing the governing body of the county in which such water system is to be located and shall appear at a regular meeting thereof and notify such governing body in person."

Section 15.1-1261 incorporates by reference the definition of water supply system in § 15.1-341. Accordingly, the definition of water supply system, for the purposes of § 15.1-1261, is "a water supply consisting of a well, springs, or other source and the necessary pipes, conduits, mains, pumping stations, and other facilities in connection therewith, to serve or to be capable of serving three or more connections...." (Emphasis added.) Section 15.1-341 specifically includes firms and corporations in the class of persons who may establish a water supply system, capable of serving three or more connections.

Section 15.1-1261 uses the word "persons" to define the class exempted from mandatory connection to water authority systems. Section 1-13.19 provides that the word "person" extends to political and corporate bodies, as well as individuals. Accordingly, it is my opinion that commercial water users are entitled to the same exemption as are residential users, provided such users qualify for the exemption under § 15.1-1261. The use of the word "domestic" in the first sentence of the second paragraph does not, in my opinion, limit the class of persons entitled to the exemption from mandatory connection.

1 The Supreme Court of Virginia has held that such connection may be required, when not plainly unreasonable or arbitrary, even when the owner already has an adequate and safe supply of water. McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E.2d 130 (1980), cert. denied, 449 U.S. 954 (1980); Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955).

WATER AND SEWER AUTHORITIES. MANDATORY SEWER CONNECTIONS. POWER TO ENTER UPON PRIVATE PROPERTY TO CONSTRUCT AND MAINTAIN SEWER LATERALS AND SEPTIC TANKS.

December 11, 1984

The Honorable Peter H. Luke
Commonwealth's Attorney for Rappahannock County

This is in reply to your request for my opinion concerning the application of § 15.1-1261 of the Code of Virginia to a sewage system proposed to be installed in Sperryville by the Rappahannock County Water and Sewer Authority.

It appears from the materials provided with your letter that the system will include installation of a main collection line and, on each serviced lot, a lateral line from the main connection line to a septic tank and another lateral line from the septic tank to the dwelling house or other serviced structure. All of the above facilities are to be installed by the authority, at its expense, and will be retained in authority ownership. The authority will thereafter maintain the facilities, which will necessitate its periodic entry onto private property to inspect and repair the laterals and septic tanks, as may be necessary, and to pump the tanks. Such periodic maintenance is necessary for the system
to function properly within its design parameters. Pursuant to § 15.1-1261, the authority has adopted a mandatory connection resolution which has been concurred in by the county board of supervisors.  

Under the facts related, the question presented is whether the authority's power in § 15.1-1261 to require and regulate connections to the system includes the continuing right of entry onto the property for the purpose of maintaining the sewer laterals and septic tank located thereon in each case.

It is well-settled that adoption and enforcement of reasonable regulations of a public body compelling private property owners to connect their properties to local sewer and water systems are valid exercises of the police power of the State. At the same time, however, the public body has no power to construct and maintain its sewers through private property without the property owner's consent, unless the right to do so has been established through condemnation or like proceedings. In this instance, the facts presented make it clear that the sewer laterals and septic tanks are necessary components of the overall sewer system to be constructed, owned and maintained entirely by the authority. The authority's entry upon private property to construct and maintain essential parts of its sewer system without the consent of the owner would amount to an appropriation of private property rights for a public use. In my opinion, any right of the authority to proceed with such action would be outside the police power and squarely within its delegated power of eminent domain. I note that it is conceded in the materials enclosed with your letter that "the authority...is clearly required to procure easements for the main collection line of this sewer system." I see no material difference between the main collection line and the other components of the system in this regard, under the circumstances described. I am, therefore, of the opinion that the power of the authority to require hookup of the system does not include the power to enter private property to maintain the laterals and septic tank, absent an agreement or an easement to do so.

Section 15.1-1261, a part of the Virginia Water and Sewer Authorities Act, under which the authority was created, provides, in pertinent part, as follows: "Upon the acquisition or construction of any water system or sewer system under the provisions of this chapter, the owner, tenant, or occupant of each lot or parcel of land which abuts upon a street or other public way containing a water main or a water system, a sanitary sewer which is a part of or which is served or may be served by such sewer system and upon which lot or parcel a building shall have been constructed for residential, commercial or industrial use, shall, if so required by the rules and regulations or a resolution of the authority, with concurrence of such local government, municipality, or county that may be involved, connect such building with such water main or sanitary sewer, and shall cease to use any other source of water supply for domestic use or any other method for the disposal of sewage, sewage waste or other polluting matter. All such connections shall be made in accordance with rules and regulations which shall be adopted from time to time by the authority, which rules and regulations may provide for a charge for making any such connection in such reasonable amount as the authority may fix and establish." See Shrader v. Horton, 471 F.Supp. 1236 (W.D. Va. 1979), aff'd, 626 F.2d 1163 (4th Cir. 1980); McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E.2d 130, cert. denied, 449 U.S. 954 (1980); Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955); Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577 (1954); see generally 64 C.J.S. Municipal Corporations § 1805(b) (1950); 11 E. McQuillin, Municipal Corporations § 31.30 (3d rev. ed. 1983).
WATER AND SEWERAGE. STATE WATER CONTROL BOARD. AUTHORITY TO REQUIRE PUBLICLY OWNED TREATMENT WORKS TO EXPAND OR UPGRADE. AUTHORITY TO ENFORCE TREATMENT REQUIREMENTS NOT APPROVED BY ENVIRONMENTAL PROTECTION AGENCY.

July 9, 1984

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

This is in response to your inquiries concerning the effect of § 62.1-44.15:1 of the Code of Virginia upon the ability of the State Water Control Board (the "Board") to impose requirements on publicly owned sewage treatment works.

Your first question is whether the Board may compel a publicly owned treatment works to comply with the requirements of its discharge permit. Pursuant to § 62.1-44.15(5), the Board is authorized to issue permits "for the discharge of sewage, industrial wastes and other wastes" into State waters. Section 62.1-44.1f provides further requirements for Board approval of sewage treatment works design to serve more than 400 persons. The Board and the Health Department have adopted the Commonwealth of Virginia Sewerage Regulations (1977) governing such discharges; the Board has adopted its Regulation No. 6, which is the National Pollutant Discharge Elimination System Permit program regulation and which governs the issuance of the discharge permits.

In general, these regulations require a publicly owned sewage treatment works to obtain a permit for the discharge of its wastes and then require secondary treatment or such other treatment as is necessary to assure compliance with certain more stringent requirements, particularly water quality standards. Sections 62.1-44.15(8), 62.1-44.23 and 62.1-44.32(a) give the Board specific authority to require compliance with the terms and conditions of the permits.

Section 62.1-44.15:1 restricts the application of this authority as follows:

"Nothing contained in [the State Water Control Law]...shall be construed to empower the [State Water Control] Board to require the State, or any political subdivision thereof, or any authority created under the provisions of § 15.1-1241, to construct any sewerage system, sewage treatment works...necessary to (1) upgrade the present level of treatment in existing systems or works to abate existing pollution of state waters, or (2) expand a system or works to accommodate additional growth, unless the Board shall have previously committed itself to provide financial assistance from federal and state funds equal to the maximum amount provided for under...applicable sections of the Federal Water Pollution Control Act...or unless the State or political subdivision or authority voluntarily agrees, or is directed by the Board with the concurrence of the Governor, to proceed with such construction, subject to reimbursement under...applicable sections of such federal act."
The foregoing restriction shall not apply to "those cases where existing sewerage systems or sewage...treatment works cease to perform in accordance with their approved certificate requirements."

This statute does not restrict the Board's authority to compel a political subdivision to comply with the requirements of its discharge permit in cases where an existing sewage treatment works ceases to perform in accordance with the requirements of the permit. See 1972-1973 Report of the Attorney General at 357. If the Board, however, otherwise seeks to enforce a permit requiring one of the entities specified in this statute to upgrade the level of treatment in an existing works or to expand an existing works to accommodate additional growth, the Board must have the concurrence of the Governor or must commit itself in advance to provide the maximum federal financial assistance available. See 1972-1973 Report of the Attorney General, supra. Absent such concurrence of the Governor or commitment from the Board, the Board may not compel upgrading or expansion of an existing facility. Of course, if no federal funding is available, then there is no commitment which may be made in advance, and the Board may order expansion or upgrading of an existing plant without violating §62.1-44.15:1.

Your second inquiry is whether, in the light of the last paragraph of §62.1-44.15:1, the Board may impose requirements upon a local government for the removal of nutrients such as nitrogen and phosphorus if those requirements are more stringent than are determined necessary by the Environmental Protection Agency (the "EPA").

The authority of the Board, set out above, is restricted by the Federal Water Pollution Control Act (the "Act"), 33 U.S.C. §1370. The Act prohibits the states from adopting certain requirements on the discharge of pollutants that are less stringent than the requirements in effect under the federal Act itself. The Act, however, does preserve the rights of the states to impose requirements that are more stringent than the requirements under the federal law.

The last paragraph of §62.1-44.15:1 provides, however:

"Nothing contained in [the State Water Control Law]. . .shall be construed to empower the [State Water Control] Board to require the State, or any political subdivision thereof, to upgrade the level of treatment in any works to a level more stringent than that required by applicable provisions of the Federal Water Pollution Control Act, as amended." (Emphasis added.)

Thus, your inquiry becomes a question whether nutrient removal is "required by applicable provisions of the Federal Water Pollution Control Act."

The provisions of the Act applicable to political subdivisions could include treatment requirements for nutrients arising from (1) certain federally promulgated limitations, (2) any more stringent limitations necessary to implement applicable water quality standards established pursuant to the Act, and (3) any more stringent limitation established by a state pursuant to the authority preserved by §1370 of the Act. 33 U.S.C. §1311(b).

The federal requirements in category (1) are among the minimum applicable provisions of the Act; these requirements are necessarily requirements of the Act and are thus not prohibited by the last paragraph of §62.1-44.15:1.

Regarding category (2) above, under the Act, the states establish and, at least once every three years, review water quality standards. If the administrator of EPA determines that a state's standards satisfy the requirements of the Act, those standards become the water quality standards for the applicable waters of the state. 33 U.S.C. §1313. I am of the opinion that water quality standards approved in this manner are
required by the applicable provisions of the Act, and are enforceable by the Board.

Regarding category (3) above, where the administrator of EPA does not approve a state's water quality standards, he is required to promulgate his own standards. 33 U.S.C. § 1313. If his standards are more stringent than the state's, his standards become the federal water quality standards under category (2). If the administrator's standards thus promulgated are less stringent than the state standards adopted by the Board, the situation posed in the example in your inquiry, the last paragraph of §62.1-44.15:1 would prohibit the Board from requiring a local government to meet the more stringent state standards. Similarly, any other more stringent Virginia requirement established by the Board could not be imposed upon a political subdivision because of the last paragraph of §62.1-44.15:1.

Finally, your inquiry raises the question of the effect of the refusal of EPA to provide grant funds for removal of nutrients such as nitrogen and phosphorous. In reviewing proposed construction grants for sewage treatment plants, EPA applies an Advanced Treatment Policy. 49 Fed. Reg. 21462 (May 21, 1984). Under this policy, grant funds under the Act are not available for advanced waste treatment, including removal of nitrogen and phosphorous, unless EPA determines that the advanced treatment is required and will result in significant water quality and public health improvements. Accordingly, there may be circumstances where a discharge permit issued by the Board requires an upgrade to improve nutrient removal, but EPA will not provide construction grant funds for the upgrade. In those circumstances, no federal financial assistance is "provided for" under the Act for the upgrade. Thus, there is no requirement under § 62.1-44.15:1 for approval by the Governor or prior commitment of funds before the Board may require that an existing works be upgraded or enlarged. Moreover, the conclusion whether the Board may require nutrient removal more stringent than is required under the Act is guided by the answers provided above in regard to categories (1), (2) and (3), not by the availability of grant funds. Thus, the ability of the Board to require nutrient removal is not affected by any EPA refusal under the advanced treatment policy to provide grant funds.

WETLANDS. LOCAL WETLANDS BOARD MAY CONSIDER EFFECTS ON WETLANDS OF PORTIONS OF PROJECT BEYOND JURISDICTION.

October 31, 1984

The Honorable William A. Pruitt
Commissioner, Marine Resources Commission

You have requested my opinion regarding the authority of a local wetlands board to regulate the length of structures known as groins (structures built out from a shore to prevent erosion) and other similar structures constructed as part of a single project extending beyond the wetlands in both the intertidal zone and below mean low water.

The Wetlands Act, §62.1-13.1 et seq. of the Code of Virginia, provides for local wetlands boards and gives them authority to regulate wetlands which are contiguous to and above mean low water, including the intertidal zone.

The lands below mean low water, unless previously conveyed away, are owned by the Commonwealth. See §62.1-1. Section 62.1-3 allows certain uses of these lands and gives the Marine Resources Commission (the "Commission") authority to permit other uses. See 1981-1982 Report of the Attorney General at 242.

In granting or denying any permit for the use of State-owned bottom lands, the Commission must consider the effect of the project "upon the wetlands of the Commonwealth, except when its effect upon said wetlands has been or will be determined under the provisions of Chapter 2.1 (§ 62.1-13.1 et seq.) [The Wetlands Act]...." Section 62.1-3, ¶ 6.

By reading a wetlands board's authority to carry out the Commonwealth's strong policy favoring wetlands preservation, together with the deference to Wetlands Act decisions contained in § 62.1-3, I conclude that a local wetlands board should consider the impact on wetlands from the total project, including that portion of the project resting on subaqueous lands beyond the wetland. Although not expressly authorized to do so by statute, regulation of the length of a structure is vital to exercising the authority to regulate the use of wetlands. Whether such consideration will require imposition of a limitation on the length of structures located below mean low water is a factual determination which must be made on a case-by-case basis. That decision is subject to review by the Commission. If the wetlands board does not consider the wetlands impact of the total project, the Commission must consider, pursuant to § 62.1-3, the effect of such a subaqueous project on wetlands, when it determines whether or not to grant a permit to use subaqueous lands.

I am, therefore, of the opinion that a local wetlands board is authorized to regulate the length of a structure which is constructed through both the intertidal zone and channelward of mean low water, subject to superior jurisdiction of the Commission to modify or reverse the decision.

WETLANDS. REPAIR OR REPLACEMENT OF BULKHEADS EXEMPT FROM PERMIT REQUIREMENTS AS LONG AS NO ADDITIONAL WETLANDS COVERED.

December 19, 1984

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

This letter is in response to your request for an interpretation of the Wetlands Act, § 62.1-13.1 et seq. of the Code of Virginia, as it pertains to bulkheads and their repair. Your inquiries are motivated by a proposal to completely remove an existing wooden bulkhead and replace it with new metal materials. Such operation will disturb nonvegetated wetlands. You did not indicate if additional wetlands will be covered by the construction.

Section 62.1-13.5 authorizes counties, cities and towns to adopt a wetlands zoning ordinance. The provisions are specified in the statute. Section 3 of the ordinance exempts certain uses of wetlands from the necessity of obtaining a wetlands permit. It reads, in pertinent part, as follows:

"The following uses of and activities on wetlands are permitted, if otherwise permitted by law:
(h) The normal maintenance, repair or addition to presently existing roads, highways, railroad beds, or the facilities of any person, firm, corporation, utility, federal, State, county, city or town abutting on or crossing wetlands, provided that no waterway is altered and no additional wetlands are covered...." (Emphasis added.)

Your first inquiry is whether bulkheads are "facilities," as described in § 3(h) of an ordinance authorized in § 62.1-13.5. When reading a statute, the general rule is that its words should be given their usual, commonly understood meaning. See The Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944); 1980-1981 Report of the Attorney General at 58. The commonly understood meaning of "facility" is "something...that is built...installed, or established to perform some particular function...." Webster's Third New International Dictionary 812 (1968). The same publication defines "bulkhead" as a device designed to resist pressure or shut off water, especially "the retaining wall along a waterfront." A bulkhead is commonly used to perform a particular function: to prevent the erosion of the bank of a waterway or to contain fill material; accordingly, a bulkhead comes within the broad definition of "facility." I am, therefore, of the opinion that bulkheads are included within the word "facilities" in §3(h), and that the normal maintenance, repair or additions to a bulkhead would be permitted under that section if no further wetlands were covered.

Your second question is whether the phrase "normal maintenance, repair or addition to" in § 3(h) would include the complete replacement or reconstruction of a bulkhead in the same location. It is my understanding that such replacement may disturb existing nonvegetated wetlands, but you did not state whether it will result in the covering of any additional wetlands. The answer to your inquiry hinges upon that fact.

The exemption contained in § 3(h) applies not only to maintenance and repair but also to an "addition to" a facility, the key condition being that "no additional wetlands are covered." I am advised that when a bulkhead begins to suffer serious deterioration, a common practice is to completely replace it. The replacement may occupy the exact location or it may be constructed seaward of the exising bulkhead. If not built on the same location, it would necessarily mean that additional wetlands will be covered by the facility.

I am, therefore, of the opinion that replacement of a bulkhead is within the contemplation of "normal maintenance, repair or addition to presently existing...facilities...." If, however, any additional wetlands will be covered, such replacement will require a wetlands permit inasmuch as it would not then be exempted as provided in § 3(h) of the wetlands ordinance.

WILLS AND ADMINISTRATION. ANTI-LAPSE STATUTE. USE OF TERM "PER CAPITA" DOES NOT DEFEAT OPERATION OF § 64.1-64.

September 24, 1984

The Honorable G. Steven Agee
Member, House of Delegates

You have requested my interpretation of § 64.1-64 of the Code of Virginia, popularly referred to as the "anti-lapse" statute, based on a hypothetical situation which you relate. That section provides, in pertinent part:
"If a devisee or legatee die before the testator, leaving children or their
descendants who survive the testator, such children or their descendants shall take
the estate devised or bequeathed, as the devisee or legatee would have done if he
had survived the testator, unless a different disposition thereof be made or required
by the will." (Emphasis added.)

You have described a situation in which a testator leaves property to three
brothers, A, B and C, in equal shares per capita. Only C survives the testator. Although
A and B predecease the testator, each leaves children who survive the testator. You
inquire whether the use of the words per capita constitutes a "different disposition
thereof...be made or required by the will." More specifically, in the situation described,
you ask whether C would take the entire estate or whether the children of A and B take
their respective father's share.

At common law, the death of a legatee or devisee prior to that of the testator
would require the "falling back" of a legacy or devise into the testator's estate. The
harshness of that common law doctrine has been modified with the enactment of "anti-
lapse" statutes, such as § 64.1-64. These statutes provide that the children or
descendants of a predeceased devisee or legatee who survive the testator should take the
testamentary gift intended for their dead ancestor. See generally 80 Am.Jur.2d Wills
§ 1661 (1979).

I am unaware of any decision of the Supreme Court of Virginia in which this precise
question has been addressed. It has been held that the enactment of the statute is in
furtherance of what fairly may be presumed to have been the intention of the testator
and, in order to effect that intent, the statute should be liberally construed. Hester v.
Sammons, 171 Va. 142, 198 S.E. 466 (1938). The statute, therefore, operates to preserve
the devise for those who presumably would have enjoyed its benefits had the deceased
devisee survived the testator and died immediately thereafter. See Nicholson v. Fritz,
252 Iowa 892, 109 N.W.2d 226 (1961). This ordinarily will be more in accord with the
testator's intent than permitting the legacy to fall into the residue or pass as intestate
property. Id.

Section 64.1-64 creates a rebuttable presumption as to the testator's intent,
although the statute does not apply where a contrary intent is manifest. Such intent
must be clearly shown, and doubts are resolved in favor of the operation of the statute.
See 80 Am.Jur.2d Wills § 1984; Annot. 63 A.L.R.2d 1172. A contrary intent may be
discerned, inter alia, by considering the will as a whole, by conditioning a bequest on the
legatee or devisee surviving the testator, or by specifically providing for disposition of
the gift if the beneficiary predeceases the testator. See 80 Am.Jur.2d Wills § 1686.
Finally, it has been held that the testator is presumed to have known of the anti-lapse

The term per capita denotes the method of dividing an estate by which an equal
share is given to each of a number of persons, all of whom stand in equal degree to the
decedent. Black's Law Dictionary 1022 (5th ed. 1979). This is to be distinguished from
the term per stirpes which denotes a division within a class or group of distributees who
have taken the share to which their deceased relative would have been entitled. Id. at
1030.

A gift to a class of persons or on their death to their heirs or children will be
distributed among such heirs or children per stirpes, unless the will discloses a contrary

Based on the above considerations, I am of the opinion that when the devise is to a
class in equal shares, or specifically named persons in equal shares, the inclusion of the
words per capita, by themselves, does not rebut the presumption created by § 64.1-64
that the testator intended his estate to pass testate, rather than lapse or fall back into
the residue. It cannot be argued logically that the testator intended to have his estate
pass as intestate in the event A, B and C predeceased him, in the situation which you
describe. I am of the opinion that the words "per capita" do not evince a "different
disposition" than to devise the property to A, B and C equally. Accordingly, § 64.1-64
would be applied to distribute one-third of the estate to C, with the children of A and B
taking their respective father's share.

WILLS AND ADMINISTRATION. TESTATOR MAY NOT WAIVE PERSONAL
REPRESENTATIVE'S OBLIGATION TO FILE INVENTORY AND SETTLEMENT WITH
COMMISSIONER OF ACCOUNTS PURSUANT TO §§ 26-12 AND 26-17.

May 15, 1985

The Honorable Willis A. Woods
Judge, Twenty-Seventh Judicial Circuit

You have asked whether a testator may relieve his personal representative from the
requirement for filing an inventory as required by § 26-12 of the Code of Virginia and/or
the personal representative's obligation to make a settlement as required by § 26-17. You
advised that the relevant language in the will under review states: "I relieve (him)
from the necessity of making any settlement before the Commissioner of Accounts."

Under the 1981 Virginia Small Estate Act, § 64.1-132.1 et seq. (the "Act"), the
procedures for filing an inventory and settlement with the commissioner of accounts are
not required. This view was addressed briefly in an Opinion found in 1982-1983 Report of
the Attorney General at 86. In that Opinion, I stated that "the effect of the Act was to
eliminate court involvement and reduce expense in the administration of estates that
comply with the requirements." Id. at 87. It is not the testator's consent (as given in the
will under review) that triggers the waiver of some of the traditional duties of a personal
representative, but rather the express statutory conditions set out in § 64.1-132.2.

For estates not falling under the Act, this Office has had one occasion to comment
on the mandatory character of filing an inventory with the commissioner of accounts. That
Opinion responded to a letter raising an apparent conflict between § 26-12, which
requires an inventory of all property of the estate, and § 26-12.1, which provides an
inventory form that fails to make provision for certain types of estate property. The
Opinion resolved the apparent conflict by determining that the requirement to file an
inventory was mandatory, while the use of the statutorily provided form was
discretionary. Any perceived lapse in the form was not a basis to diminish the personal
representative's duty under § 26-12 to report all of the estate property of which he has
knowledge. The basis for the Opinion was that § 26-12 uses the command "shall,"
whereas § 26-12.1 uses the precatory "may." The same rationale would apply to the
mandatory "shall" language of § 26-17.

The inventory and settlement serve a specific and practical purpose. They are filed
with the commissioner of accounts and forwarded to the office of the clerk of court.
The clerk of court relies on the inventory and final settlement to determine and verify
the amount of probate tax owed by the estate. Absent an inventory and settlement, the
clerk would be without an administrative procedure to verify the amount of probate tax
due.

The statutory scheme provides several instances where the requirements of
personal representatives are waived. For example, under §§ 64.1-116 and 64.1-119, a
personal representative is required to give bond before the grant of administration.
Section 64.1-121 allows the bond requirement to be dropped at the testator's request, subject to objection by interested persons. Likewise, the requirement to file an inventory found in § 26-12 is subject to an exception in § 26-12.2 where the sole purpose of qualifying as a personal representative is to bring a wrongful death action.

In view of the mandatory language of the statutory sections under scrutiny, the need of the statutory scheme for probate tax collection, and the use of specific exceptions to other mandatory language in related areas of the statutory scheme, it is my opinion that the requirements to file an inventory and settlement with the commissioner of accounts, found in §§ 26-12 and 26-17, are mandatory, except as statutorily waived by the Act, and cannot be waived by a release from the testator.

Section 26-12 provides, in part: "Every personal representative, guardian, curator or committee, shall, within four months after the date of the order conferring his authority, return to the commissioner or commissioners of accounts, under his oath and in proper form, an inventory of all the personal and real estate which is under his supervision and control, and all other property of the estate of which he has knowledge...."

Section 26-17 provides, in part: "A statement of all money and other property which any personal representative...has received, or become chargeable with, or has disbursed...shall, within four months after the end of every such year, be exhibited by him before the commissioner of accounts of the court wherein the order conferring his authority was made, or of the court wherein the instrument creating the trust was first recorded; and the commissioner shall state, settle and report to the court an account of the transactions of such fiduciary, as provided by law."

ZONING. AGRICULTURAL DISTRICTS. INTERPRETATION OF "MORE INTENSIVE USE" IN § 15.1-1511(D).

February 19, 1985

The Honorable Daniel R. Bouton
Commonwealth's Attorney for Greene County

You ask several questions concerning the interpretation and application of the Agricultural and Forestal Districts Act (the "Act"), §§ 15.1-1506 through 15.1-1513 of the Code of Virginia.

You state that on March 6, 1982, the Midway Agricultural District was created by ordinance by the Board of Supervisors of Greene County. As stated in your letter, the ordinance provides, in relevant part, as follows:

"(4) The zoning and subdivision ordinances of Greene County, Virginia, are hereby amended within this Agricultural or Forestal District to read as follows:

(a) No parcel within the Agricultural or Forestal District shall be developed to more intensive use (for which purpose 'more intensive' shall mean a use which is placed in a more intense zoning classification under the Greene County Zoning Ordinance with special use permits being considered more intensive than uses by right) during the period that such parcel is within the Agricultural or Forestal District.
This restriction shall not prevent the subdivision of one lot of two acres from an existing parcel and deeded for the purpose of housing to a parent or child of the owner or one of the owners of such parcel.

Any collection of contiguous parcels in one ownership shall be considered to be a 'parcel' for the purpose of this ordinance, except that where any one subparcel independently acquired is conveyed subject to the provisions of this ordinance, such conveyance will not be considered a violation of this ordinance.

You state that subsequent to the passage of this ordinance, several conveyances have been made to persons not a parent or child of the owner of the parcel. These conveyances, however, have all entailed uses permitted by the existing zoning classifications.

Section 15.1-1511(D) of the Act reads, in pertinent part:

"The governing body may require, as a condition for approval of the proposal, that any parcel in the proposed district shall not be developed to a more intensive use during the period which said parcel remains within the proposed district without the prior approval of the governing body."

Section 15.1-1512(B) provides, in pertinent part:

"[P]rovided, however, that zoning and subdivision ordinances shall be applicable within said districts, to the extent that such ordinances are not in conflict with the purposes of this chapter."

Interpretation of the phrase "more intensive use" in § 15.1-1511(D) must be consistent with the policy of the Act and the intent of the legislature in enacting it. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). The policy behind the Act is "to conserve and protect and to encourage the development and improvement of...[the State's] agricultural and forestal lands for the production of food and other agricultural and forestal products." See § 15.1-1507.

In the ordinance creating the Midway Agricultural District, the board of supervisors has defined "more intensive" as a use which is placed in a more intense zoning classification under the Greene County Zoning Ordinance, with special use permits being considered more intensive than uses by right. I assume that most, if not all, the land in the Midway Agricultural District is zoned for agricultural use, and that the local ordinance lists the uses permitted in an agricultural zone. I also assume that those uses permitted in an agricultural zone are consistent with the purposes of the Act. By definition, any use disallowed by an agricultural zoning classification would be a more intensive use than those uses allowed. Based upon the assumptions stated above, I conclude that the definition adopted by the Greene County Board of Supervisors is consistent with the Act, because it allows only those uses which are listed under an agricultural zoning classification.

I next consider whether a governing body may restrict the subdivision of land within an agricultural district to conveyances to the parent or child of the owner of a parcel for the purpose of housing. It is my opinion that such a restrictive provision goes beyond the
powers granted to a local governing body by the General Assembly and lacks a reasonable relationship to the policy of the Act.

The Supreme Court of Virginia has made a significant distinction between local regulations governing subdivisions (Art. 7, Ch. 11 of Title 15.1) and those regulations governing zoning (Art. 8). See Board of Supervisors v. Horne, 216 Va. 113, 119, 215 S.E.2d 453, 455 (1975). The Court also made it clear in Horne that a county does not have general authority to impose a moratorium on subdivisions.

In this particular case, I believe that the provisions of § 15.1-1512(B) are controlling. There, the General Assembly provided that subdivision ordinances shall be applicable in agricultural and forestal districts to the extent that such ordinances are not in conflict with the purpose of the Act. Greene County's ordinance, according to the reading you suggest, effectively imposes a prohibition on all subdivisions of land in agricultural and forestal districts with the narrow exception of conveyances to parents or children for housing purposes. I find nothing in the subdivision provisions of Title 15.1 which inherently conflicts with the provisions of the Act, thereby necessitating such a prohibition. While it may be permissible to limit or prohibit certain types of subdivisions, a question which I do not consider here, the county's ordinance is, in my opinion, overly broad and is not tailored to meet the specified purposes of the Act.

As stated by the Supreme Court of Virginia: "[N]o matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal." Alford v. Newport News, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979).

I next consider whether the governing body must provide the opportunity for a hearing under § 15.1-1511(D) when a landowner desires a more intensive use of his land within an agricultural district.

Section 15.1-1512(B) provides that subdivision and zoning ordinances shall be applicable within an agricultural district to the extent that such ordinances are not in conflict with the purposes of that chapter. The hearing provisions relating to zoning decisions are found in §§ 15.1-495 through 15.1-498. If an owner desires a more intensive use for his land, then, if permitted by the zoning ordinance (§ 15.1-495(f)), he may apply for a special exception under § 15.1-496. Before granting any exceptions, however, the board would have to consider the prohibition against conflict with the purposes of the Act.

Your final question is whether the conveyances referenced in your letter to persons not a parent or child of the grantor are in conflict with the purposes of the Act, even though such conveyances consist of uses that are permitted by the zoning classifications of the respective parcels. As indicated in my answer above, the board may not restrict the subdivision of land within an agricultural district to conveyances to parents or children of the owners. It is my opinion that if the property is zoned for agricultural use and the conveyance does not take the property out of those uses permitted under such a classification, then there is no conflict with the purposes of the Act.

ZONING. BOARD OF ZONING APPEALS. HEARINGS. TIME OF DECISION. BOARD MUST DECIDE APPEAL WITHIN SIXTY DAYS AFTER HEARING.

March 21, 1985

The Honorable Peter H. Luke
Commonwealth's Attorney for Rappahannock County
This is in reply to your request for my opinion concerning the time requirement for a decision of the board of zoning appeals specified in § 15.1-496.2 of the Code of Virginia.

Section 15.1-496.1 requires that an appeal to the board of zoning appeals must be taken within thirty days after the decision appealed from by filing a notice of appeal with the zoning administrator and the board, and further requires the zoning administrator to "forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken."

The first sentence of § 15.1-496.2 continues to provide for the procedure in such appeals and reads as follows: "The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and decide the same within sixty days." (Emphasis added.) You specifically ask when the sixty-day period, prescribed by the emphasized language quoted above, begins to run.

A review of the legislative evolution of the sixty-day provision is helpful in answering your inquiry. The original predecessor statute to § 15.1-496.2 was § 3091(12) of the Code of 1919, which was enacted in Ch. 197, Acts of Assembly of 1926. As first enacted, the first sentence of that section read as follows:

"The board of zoning appeals shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time."

The above-quoted words are virtually identical to, and apparently were taken from, a provision in § 7 of the Standard State Zoning Enabling Act (U.S. Department of Commerce, 1926). See Ross v. County Board, 197 Va. 91, 93, 87 S.E.2d 794 (1955). The words remained intact through successive revisions of the Code until reenactment as part of § 15-968.10 of the Code of 1950 in 1962, when they took their present form and, most particularly, the phrase "within a reasonable time" was changed to "within sixty days." See Ch. 407, Acts of Assembly of 1962. The sentence has not been changed since that time.

You will note that the original provision, following the wording of the Standard State Zoning Enabling Act, contemplated three separate and distinctive time periods: (1) the period within which an appeal must be filed, then (2) the board must fix a "reasonable time for the hearing of the appeal," and finally, (3) the board must "decide the same within a reasonable time." The decision of the board must be based on information obtained at the hearing, and therefore the second, separate "reasonable time" period, within which a decision is to be made, must necessarily refer to the time period which occurs after the hearing. See 5 P. Rohan, Zoning and Land Use Controls § 3504[2], pp. 35-30 to 35-32 (discussing § 7 of the Standard Act).

As noted above, the only material change in the wording of the sentence under consideration from its original enactment that is relevant here is that this third period of time has been changed from "within a reasonable time" to "within sixty days." It still must occur after the hearing. Thus, I conclude that the sixty-day period within which action must be taken begins on the day after the date of the board's hearing on the appeal.1

---

1 You note in your letter the following five possible alternatives: (1) the date the appeal is filed; (2) the date the board receives the appeal; (3) the date on which the board first meets after receiving the appeal; (4) the date the board meets to set the hearing on
the appeal; and (5) the date of hearing on the appeal.
2 The Act uses the term "board of adjustment," but the wording otherwise is the same. See 8 P. Rohan, Zoning and Land Use Controls § 53.01(1) (1984) for the full text of the document containing the Act and explanatory notes.
3 Section 15-968.10 subsequently became § 15.1-496 which, in turn, was later divided into what is now §§ 15.1-496, 15.1-496.1, 15.1-496.2 and 15.1-496.3. See Ch. 521, Acts of Assembly of 1975.
4 See § 1-13.3. Had the General Assembly intended the sixty-day period to begin to run from any of the other dates suggested in n.1, supra, it could easily have amended the sentence to clearly state as much. Compare, e.g., § 15.1-493(B) (failure of the planning commission to report its recommendations on a proposed amendment to the zoning ordinance "ninety days after the first meeting of the commission after the proposed amendment...has been referred to the commission" will be deemed the commission's approval of the proposal).

ZONING. NONCONFORMING USES. CHANGE IN VOLUME AND AREA OF OPERATION OF NONCONFORMING USE ILLEGAL IF CONSTITUTES CHANGE IN CHARACTER OF USE; DETERMINATION MUST BE MADE BY ZONING OFFICIALS ON CIRCUMSTANCES OF EACH CASE.

November 23, 1984

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County

This is in reply to your request for my opinion concerning the limits which may be placed upon the nonconforming use of a piece of property under a county zoning ordinance adopted and administered pursuant to Art. 8 of Ch. 11, Title 15.1 of the Code of Virginia.

Specifically, you ask if the nonconforming use may be limited to the portion of the property utilized for such use on the effective date of a zoning ordinance, at which time the use becomes nonconforming. You relate that an individual purchased a 19-acre parcel of land in King George County in 1981, and on a portion of the property he commenced operating an automobile junkyard and automobile salvageyard. At the time the property was not regulated by a zoning ordinance. In 1982 the county board of supervisors enacted a countywide zoning ordinance which placed the property in an agricultural use zone. The landowner thereafter applied to have the property rezoned from agricultural to industrial use. The rezoning application was denied, and the auto salvage business has continued at the site as a nonconforming use. As the business has grown, more and more acreage of the parcel has been utilized to store increasing numbers of junk cars.

It is a general rule that an increase in the volume of a business conducted as a nonconforming use does not, of itself, constitute an illegal expansion or extension, so long as the basic nature and character of the use is unchanged from that which existed at the time the use became nonconforming. It is also generally held, however, that a nonconforming use may not be extended to areas of land which were not in use at the time of enactment of a new or amended zoning ordinance. See 1 R. Anderson, American Law of Zoning §§ 6.42, 6.47, 6.48 (2d ed. 1976); 8A E. McQuillen, Municipal Corporations §§ 25.206, 25.207, 25.208 (Rev. 3d ed. 1976); 4 A. Rathkopf, The Law of Zoning and Planning § 51.07 (4th ed. 1984); 6 P. Rohan, Zoning and Land Use Controls § 41.03 (1984).
The Supreme Court of Virginia has stated as follows with regard to analysis of changes in a nonconforming use:

"Recognizing that a nonconforming use need not remain static, we consider whether the character of the nonconforming use in existence when the zoning restriction was imposed has been continued or changed.

* * *

Under the...statute, whether a nonconforming use has been increased in size or scope is merely one circumstance relevant to the key determination of whether the character of the use has been changed.

The degree of relevance of any such increase depends in each case upon the quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote...." (Emphasis by the Court.)


As the Court has indicated, determination of whether the extension of a nonconforming use has resulted in a change of character of the use in violation of the zoning ordinance can only be made upon examination of the circumstances of each particular case, taking into consideration the magnitude of change in the size and scope of the use and its effect upon zoning objectives. I am not prepared to make such a determination in this instance on the information presented. In any event, the question more appropriately should be decided locally by officials familiar with local circumstances, in the first instance by the official charged with the responsibility of administering the county zoning ordinance, who may take administrative action or institute legal proceedings to insure compliance with the zoning ordinance. See § 15.1-491(d). Such administrative determination and action may be appealed to the board of zoning appeals, with ultimate determination of the question being made by a court, if that becomes necessary. See § 15.1-496.1 et seq.

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1 Article 8 consists of §§ 15.1-486 through 15.1-498. Section 15.1-492, relating to vested rights and nonconforming uses under a zoning ordinance, reads as follows:

"Nothing in this article shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered and may further provide that no 'nonconforming' building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such 'nonconforming' use."

Article 1, § 11 of the King George County Zoning Ordinance provides for nonconforming uses in language consistent with the above.

2 Note that an owner of a nonconforming use may be found to have a vested right to use an entire parcel, even though only a portion of the property was in such use when the ordinance became effective, depending upon the circumstances of the case. Cf. Delta Oil Sales Co. v. Holmes, 186 Va. 301, 42 S.E.2d 262 (1947); see generally 6 P. Rohan, Zoning and Land Use Controls § 41.03[3][c] (1984).

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